LawTalk
ISSUE 935 · DECEMBER 2019

Culturally, Ethnically and Linguistically Diverse parties in the courts

Page 54

NEW ZEALAND LAW SOCIETY
NZLS EST 1869

Rapua te ara tika mōu ake
Page 26

NZ Relationship Property Survey 2019
Page 42

The new Trusts Act 2019: Key changes
Page 48

Are legal disrupters steering people off the road
Page 60

LexisNexis®

Get a SWEET DEAL on Lexis® *Draft*

Save 25% off the RRP for Lexis *Draft* and Lexis *Draft* Pro*

Make your next drafting task the sweetest part of your day! For a limited time, we're offering 25% OFF the RRP (excluding GST) for Lexis *Draft* and Lexis *Draft* Pro licenses. Sink your teeth into intuitive editing and proofreading features that reduce review time from hours to minutes by choosing the **Lexis *Draft*** that's right for you:

	Lexis *Draft*	Lexis *Draft* Pro
Microsoft® Word and Outlook Integration	✓	✓
Analytical & Legal Research through Lexis Advance®	✓	✓
PDF Converter	✓	✓
Collaborative Work Folders	✓	✓
PermaLink to Cases and Legislation	✓	✓
Language Editing with WordRake	✓	✓
Proofreading & Risk Assessment		✓

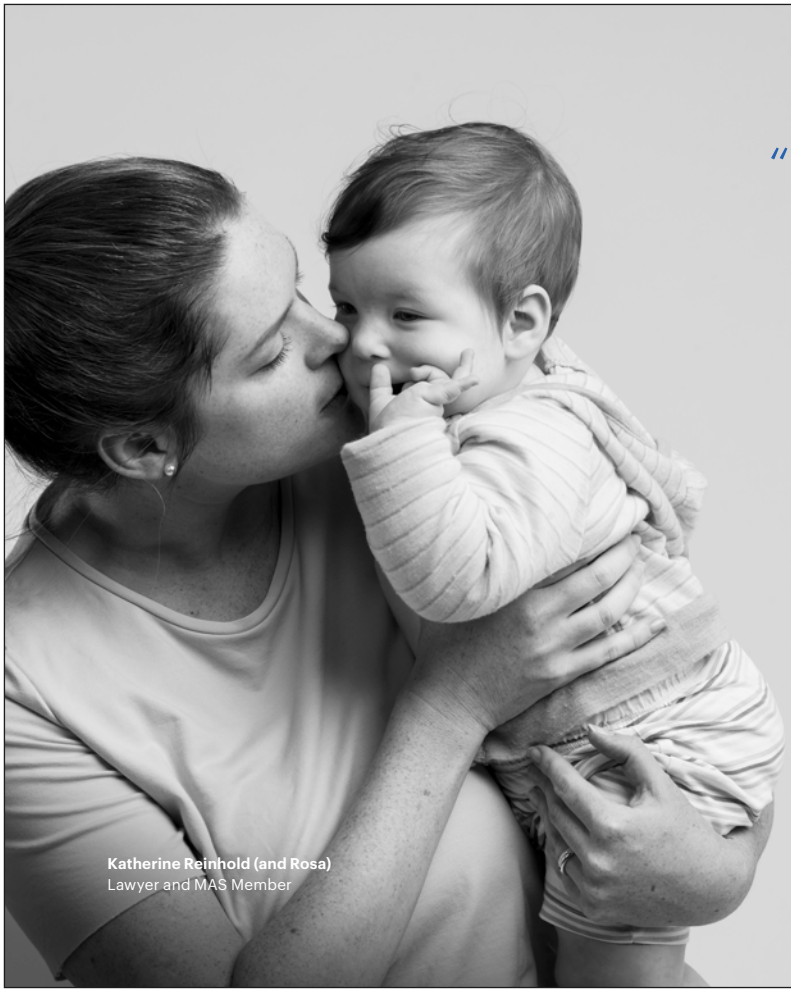
Take advantage of this special offer TODAY!
Visit info.lexisnexis.co.nz/LexisDraftSWEETDEAL or call 0800 800 986.

LexisNexis.co.nz | Lexis *Draft* Sweet Deal

***Lexis Draft and Lexis Draft Pro SWEET DEAL Discount Offer Terms & Conditions:**
Offer is valid 21st October 2019 through 20th December 2019, 5:00pm NZT. Discount is limited to new LexisNexis® subscribers of Lexis *Draft* or Lexis *Draft* Pro for the entire term of the license including renewal terms. Subject to the terms of the Lexis *Draft* and Lexis *Draft* Pro End User License Agreement set forth at http://www.lexisnexis.com.au/drafting/lexisdraft/termsandconditions, product trials in relation to this offer will be conducted from 21st October 2019 until 13th December 2019, 5:00pm NZT with no trial extensions. Contact a LexisNexis Representative to discuss multiple-license pricing options for the Lexis *Draft* and Lexis *Draft* Pro Discount Offer. Offer is only valid in New Zealand and cannot be combined with any other discounts.

LexisNexis, Lexis Draft Pro, Lexis Draft, and the Knowledge Burst logo are registered trademarks of RELX Inc. © 2019 LexisNexis NZ Limited. All rights reserved.

MP1020191CC



Katherine Reinhold (and Rosa)
Lawyer and MAS Member

"They've been insuring New Zealand families like mine for nearly 100 years."

MAS is 100% New Zealand owned and we've been serving our Members, like Katherine, for nearly 100 years now. Not only have we established a foundation to fund health initiatives, we have been awarded *Consumer NZ People's Choice* across four categories* for three years running.

Keep good company with MAS
mas.co.nz
0800 800 627

* House, contents, car and life insurance

mas

University of Otago
Te Whare Wānanga o Otāgo
NEW ZEALAND

University of Otago Legal Issues Centre
Te Pokapū Take Ture

Thank you from the University of Otago Legal Issues Centre

The University of Otago Legal Issues Centre, with support from the New Zealand Law Foundation, has been conducting a two-year, multidisciplinary study to investigate the trend towards delivering justice in a lawyerless online space.

We are extremely grateful to all those who participated in the project and were so generous with their time.

We especially wish to thank: Duncan Cotterill, Chapman Tripp, Meredith Connell, Bankside Chambers, Crown Law, Government Legal Network, CODR.

Results of the project will be available in 2020: otago.ac.nz/legal-issues

We wish the profession a safe and happy holiday and look forward to working with you next year to continue to improve access to justice for all New Zealanders.

The Law Foundation NEW ZEALAND
SUPPORTING INDEPENDENT LEGAL THINKING

6 · **From the Law Society**

7 · **New Zealand Law Society**

13 · **Letters to the Editor**

People in the Law

16 · On the move

21 · The Innovators – Tila Hoffman ▷ BY ANDREW KING

22 · Oprah-inspired, Egyptian-born lawyer striving to make a contribution – Diana Youssif ▷ BY JAMIE DOBSON

24 · The long road from Black Stick gold medal-winner to lawyer ▷ BY NICK BUTCHER

Practising Well

26 · Rapua te ara tika mōu ake – seek the pathway that is right for you ▷ BY ALICE ANDERSON

Update

30 · ACC and the Woodhouse Principles: administrative efficiency ▷ BY DON RENNIE

37 · Charities law needs shakeup, Fellowship winner says ▷ BY LYNDA HAGEN

38 · Payment of a fine takes priority over payments to shareholders and directors ▷ BY LUCY MOFFITT

39 · Temporary work visa changes announced ▷ BY HASEEB ASHRAF

42 · The New Zealand Relationship Property Survey 2019 ▷ BY JAMIE DOBSON

48 · The new Trusts Act 2019: Key changes to consider ▷ BY RHONDA POWELL

51 · The Trusts Act 2019: Moving on from the 1950s ▷ BY HENRY STOKES

ABOUT LAWTALK

LawTalk is published monthly by the New Zealand Law Society for the legal profession. It has been published since 1974 and is available to every New Zealand-based lawyer who holds a current practising certificate.

DISCLAIMER

Unless it is clearly indicated, the views expressed in *LawTalk* are not to be taken as those of, or endorsed by the New Zealand Law Society. No responsibility whatsoever is accepted by the New Zealand Law Society for any opinion, information, or advertisement contained in *LawTalk*.

ABOUT THE LAW SOCIETY

The New Zealand Law Society was established on 3 September 1869. It regulates the practice of law in New Zealand and represents lawyers who choose to be members. The powers and functions of the Law Society are set out in the Lawyers and Conveyancers Act 2006. As well as upholding the fundamental obligations imposed on lawyers who provide regulated services, the Law Society is required to assist and promote the reform of the law, for the purpose of upholding the rule of law and facilitating the administration of justice in New Zealand.

SUBMISSION OF MATERIAL

All contributions, letters and inquiries about submission of articles should be directed to the Managing Editor, *editor@lawsociety.org.nz*.

ADVERTISING

Advertising inquiries should be directed to *advertising@lawsociety.org.nz*. Information on rates, deadlines and conditions is available on the Law Society website under News and Communications/*LawTalk*. The Law Society has a strict policy of not publishing articles in exchange for advertising.

LAWTALK ONLINE

An online version of *LawTalk* is available on the New Zealand Law Society's website at *www.lawsociety.org.nz*. A link to the latest online *LawTalk* is emailed to all practising lawyers each month after publication. Receipt of the hardcopy *LawTalk* may be cancelled by emailing *subscriptions@lawsociety.org.nz* and stating "please cancel *LawTalk* hardcopy" and advising name, lawyer ID (lawyer login), workplace and address.

SUBSCRIPTIONS

Non-lawyers and lawyers based outside New Zealand may subscribe to *LawTalk* by emailing *subscriptions@lawsociety.org.nz*. Annual subscriptions in New Zealand are NZ$145 for 11 issues (GST and postage included). Overseas rates are available on request.

ENVIRONMENTAL STATEMENT

LawTalk is printed on Sumo Matte. This is an environmentally responsible paper. Forestry Stewardship Council (FSC) certified, it is produced using Elemental Chlorine Free (ECF) Mixed Source pulp from Responsible Sources and manufactured under the strict ISO14001 Environmental Management System. The FSC is an international non-profit, multi-stakeholder organisation

Contents

Access to Justice

54 · Lawyers need to do more to ensure CALD clients get equal access to justice in courts ▹ BY MAI CHEN

60 · Are legal disrupters steering people off the road? ▹ BY ALLIE CUNNINGHAME

64 · New name, new place: Porirua Kapiti Community Law Centre ▹ BY TRACEY CORMACK

66 · Update on legal aid ▹ BY GEOFF ADLAM

Legal History

69 · The (then) Supreme Court judges ▹ BY SIR IAN BARKER QC

Alternative Dispute Resolution

76 · Principles of influence: likeability ▹ BY PAUL SILLS

78 · Family feuds — litigate, arbitrate or mediate? ▹ BY KERI MORRIS AND CHRIS LAHATTE

Practice

80 · Succession planning: a strategic approach ▹ BY EMILY MORROW

82 · Are you approaching eDiscovery in the most effective way? ▹ BY ANDREW KING

84 · **Lawyers Complaints Service**

Legal Information

89 · Recent legal books

Courts

90 · Court opening hours over the 2019/20 holidays

Classifieds

92 · Will notices

93 · Legal Jobs

94 · CPD Calendar

Lifestyle

97 · A New Zealand Legal Crossword ▹ SET BY MĀYĀ

98 · Fever pitch ▹ BY CRAIG STEPHEN

99 · Complicated sport's appeal to lawyers ▹ BY CRAIG STEPHEN

100 · Lake Charles, Louisiana ▹ BY JOHN BISHOP

102 · **Tail end**

which promotes responsible management of the world's forests. FSC certification is internationally recognised as the most rigorous environmental and social standard for responsible forest management. The paper used to produce LawTalk meets FSC requirements at all stages along the production cycle. The shrink wrap used for delivery of *LawTalk* is 27 micron biodegradable film manufactured in New Zealand. This degrades naturally. If you wish to discard LawTalk, please recycle it. The wrapping may be composted.

CONTACT DETAILS

PO Box 5041, Wellington 6140, New Zealand
DX SP 20202

PLEASE RECYCLE

***** FPO *****
Placeholder for
FSC Certificate
***** FPO *****

PEOPLE

PRESIDENT Tiana Epati

VICE PRESIDENTS
Nerissa Barber (Wellington)
Herman Visagie (Central North Island)
Tim Jones (Auckland)
Andrew Logan (South Island)

EXECUTIVE DIRECTOR
Helen Morgan-Banda

LAWTALK EDITOR AND COMMUNICATIONS MANAGER
Geoff Adlam · 04 463 2980
editor@lawsociety.org.nz

SENIOR COMMUNICATIONS ADVISOR
Nick Butcher · 04 463 2910
nick.butcher@lawsociety.org.nz

DIGITAL CONTENT EDITOR
Craig Stephen
craig.stephen@lawsociety.org.nz

LEGAL WRITER
Tracey Cormack
tracey.cormack@lawsociety.org.nz

COMMUNICATIONS ADVISOR (SOCIAL MEDIA)
Jamie Dobson
jamie.dobson@lawsociety.org.nz

WEBMASTER
Miranda Kaye
miranda.kaye@lawsociety.org.nz

DIGITAL CONTENT SPECIALIST
Angela Ludlow
angela.ludlow@lawsociety.org.nz

SENIOR DESIGNER
Andrew Jacombs
andrew.jacombs@lawsociety.org.nz

DESIGNER
Sophie Melligan
sophie.melligan@lawsociety.org.nz

JUNIOR DESIGNER
Nina Gillanders
nina.gillanders@lawsociety.org.nz

ADVERTISING
Maria Pirela · 04 463 2905
advertising@lawsociety.org.nz

PRINTING AND DISTRIBUTION
Blue Star, Petone, Wellington
ISSN 0114-989X (Print)
ISSN 2382-0330 (Digital)

FROM THE LAW SOCIETY

From the Law Society

It's been more than a decade since the Lawyers and Conveyancers Act 2006 (the Act) came into force and during that time many issues have arisen in relation to how the legislation works in practice and the need to keep pace with modern society.

By the time this issue of *LawTalk* is published, it will be about six weeks since the Law Society's Board decided to commission an independent review of our structure and function. This decision, endorsed by our Council, will result in a comprehensive review.

One issue is that the Act sets out a 'dual' model for the Law Society, meaning we regulate lawyers as well as acting as a membership organisation for them. There is tension in this model, particularly in the complaints area, which has been brought into stark relief over the past two years. It is time we looked at this and decide whether it is still an appropriate framework for the Law Society.

After the recent effect on public confidence which centred on complaints about the conduct of lawyers against other lawyers, it became clear to me a few months into my presidency that incremental change was not going to achieve the outcomes we need. Particularly where you have an Act which contains a complaints process primarily focused on the protection of consumers.

Dame Silvia Cartwright, who chaired the Law Society Working Group which published its report last year, proposing regulatory change to address sexual violence and harassment, bullying and discrimination in the legal profession got to the heart of the issue when she stated in her foreword:

"Disciplinary procedures designed to protect consumers of legal services simply could not accommodate such sensitive complaints."

As you would expect, since the report was released there has been a strong focus by the Law Society on strengthening our policies and processes when dealing with sensitive complaints. However, we are very constrained by our existing legislation.

On a strict reading of the Act, behaviour by a lawyer that is unconnected to the provision of legal services may only be subject to the current disciplinary regime if it is at the highest level of misconduct, justifying a finding that the lawyer is no longer fit to continue to practise. This leaves out of reach a wide range of unacceptable behaviour which is damaging to the reputation of the whole profession.

The process to develop the draft Terms of Reference has begun. There will be plenty of opportunities to have your say as we will consult widely on the framing and extent of the review

This is not a position we can tolerate as a profession, or that the public will tolerate of us. There is an expectation within the profession and wider society that we will protect those who are vulnerable and hold to account those who are responsible for perpetrating unacceptable behaviour.

This is also an opportunity for the profession to make some fundamental decisions about who we are and, more importantly, who we want to be. The Act sets the framework and purpose of the Law Society. Therefore, in turn, it is necessary to ask ourselves what the purpose of the profession is, and whether we are meeting that purpose.

I have been greatly moved by

the level of support for this view from the Law Society Board and the Council, two bodies of elected members who are the primary governance groups for our profession. Many others from the profession have also written to me offering their full support.

There is a whakataukī which says: waiho i te toipoto, kaua i te toiroa; let us keep close together, not far apart.

The verbal and emotional support from the Board and Council to take this courageous step echoes this sentiment. I have never felt us so united as a profession over the need to be strong and look forward.

The process to develop the draft Terms of Reference has begun. There will be plenty of opportunities to have your say as we will consult widely on the framing and extent of the review.

Other jurisdictions, including Ireland, Scotland and England and Wales have all examined their regulatory and membership frameworks, and related legislation, in recent years and each jurisdiction has made varying reforms. We need to look at the changes made internationally and consider what might work best for us in a New Zealand context.

This process of review, and any subsequent reforms, will outlast my presidency. Which is why having support from leaders in the profession is pivotal to any future reform.

To quote Barack Obama: "Change will not come if we wait for some other person or some other time. We are the ones we've been waiting for. We are the change that we seek." ■

Tiana Epati
President, New Zealand Law Society.

NEW ZEALAND LAW SOCIETY

Regulatory solutions preferred for AML/CFT compliance

As much as possible, AML/CFT compliance matters should be addressed by regulatory means, rather than non-regulatory means (such as guidance) or semi-regulatory means (such as codes of practice), the Law Society says.

"This is because the AML/CFT is already (understandably) complex, and it is important to ensure that it is as simple as possible for reporting entities to navigate," it has told the Ministry of Justice in consultation on a ministry paper, *Expiring AML/CFT Regulations*.

The paper proposes changes to expiring regulations issued under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 and sets out proposals for new regulations to address urgent issues.

The Law Society says while the diversity of money laundering and terrorism financing risk to New Zealand's financial system (ML/TF) means some unavoidable complexity in the AML/CFT compliance regime, that should be minimised as far as possible.

It strongly supports the amalgamation of the existing six AML/CFT regulations into one, and says it is concerned that a "surrounding proliferation" of non-regulatory or semi-regulatory measures would undermine positive steps in facilitating reporting entities' understanding of, and compliance with, their AML/CFT obligations.

"As much as possible within the scheme of the AML/CFT Act, compliance matters should provide certainty to reporting entities. The Law Society recognises that this is not practicable in relation to some aspects of AML/CFT compliance – for example, only a reporting entity is capable of properly assessing its own ML/TF risk, and therefore creating an appropriate and unique risk assessment and compliance programme suiting its own needs.

"However, it is important that as much clarity as possible is provided in relation to more mechanical or technical aspects of compliance. For this reason, the Law Society considers that regulations should favour the provision of clear thresholds for the activities, products and instruments that are excluded from the regime rather than, for example, providing broad statements of principle that leave room for time-consuming and potentially risky interpretation."

The Law Society says it is concerned that the combination of the inherent complexity of the regime, the fact that much of the substance of the regime is, almost uniquely, contained in regulations rather the AML/CFT Act itself and that many persons needing to understand the Act are either not legal professionals or, if they are, are not subject matter experts which creates a unique challenge. ■

Advertising in *LawTalk* and LawPoints

Advertising inquiries can be directed to *advertising@lawsociety.org.nz*. Information on conditions, rates and deadlines is available on the Law Society website under News and Communications/LawTalk.

NZ Law Society to commission comprehensive review

The New Zealand Law Society is to commission an independent review of its structure and function, the Society's President Tiana Epati announced on 23 October.

Ms Epati said the decision to commission the review had been made by its Board, and endorsed by its Council, at meetings in October and it will consider all aspects of the structure and function of the Law Society.

The decision to conduct an independent review reflected the constraints the current Lawyers and Conveyancers Act 2006 placed on the Law Society's ability to be transparent about its complaints process, and to deal with a broad range of unacceptable behaviour, including complaints of sexual harassment and bullying within the profession.

"The current Act's primary purpose is to maintain public confidence in the provision of legal and conveyancing services, and to protect the consumers of these services," said Ms Epati.

As identified by the Dame Silvia Cartwright independent review of the regulatory framework, behaviour by a lawyer that is unconnected to the provision of legal services can only be subject to the current disciplinary regime if it is at the highest level of misconduct, justifying a finding that the lawyer is no longer fit to continue to practise.

Ms Epati said the Act also continues a 'dual' model for the Law Society, regulating lawyers and providing membership services for them, and it was time to reflect on whether this was the optimal model.

"After more than a decade since the current Act took effect in 2008, and the recent effect on public confidence which centred on complaints about the conduct of lawyers against other lawyers, it is time to have a wide-ranging review of the current model. Any recommendation for legislative change would need to go through the normal process involving the Ministry of Justice and seeking approval from the minister."

She said the review is expected to draw on local and international experiences to consider possible future models for the provision and regulation of legal services in Aotearoa New Zealand, as well as the best model to provide membership services to practising lawyers.

The terms of reference for the independent review will be agreed after extensive consultation with the legal profession and other stakeholders. ■

Gender Equality Charter has 142 signatories

The New Zealand Law Society's Gender Equality Charter has 142 signatories ranging from law firms to in-house legal teams, sole practitioners and barristers chambers.

That covers about 25% of lawyers holding practising certificates.

The charter is a set of commitments aimed at improving the retention and advancement of women lawyers. Charter signatories are required to meet these commitments over a two-year period and reporting on progress to the Law Society.

These include tackling unconscious bias, encouraging flexible working arrangements for everyone, closing the gender pay gap and promoting equitable instructions.

Gabrielle O'Brien, the Acting General Manager of Law Reform and Sections, says one of the advantages of being a signatory is that it brings a disciplined focus in work on equality.

"We've had good feedback from charter signatories in the six-month check-ups. Whether it is ensuring progress is included as a standing item on management meeting agendas or looking at a practical review to identify any barriers for women, momentum is gained by having an action plan," she says.

The two-year report survey is coming up in April 2020 and will cover all current signatories.

"It'll give the Law Society an overview of progress made and will also be a useful exercise for the signatories to map improvements they have made," she says.

More information on how your organisation can sign up to the Gender Equality Charter can be found on the Law Society website. ■

Standing Orders would benefit from more definite purpose statement

It is appropriate for the House of Representatives Standing Orders to include a more specific statement of purpose than the current provision, the Law Society has submitted to the Speaker in a submission on the Review of Standing Orders 2020.

It is now common practice for legislation to contain a purpose statement outlining its objectives or intent, which assists in interpretation and application, the Law Society says. It notes that the current provision states only that the Standing Orders "contain rules for the conduct of proceedings in the House of Representatives and for the exercise of powers possessed by the House".

"The existing provision could be improved by including reference to the function and purposes of the House's proceedings. For instance, the principle of parliamentary accountability has recently been recognised as being a fundamental constitutional principle."

The Law Society's submission also addresses the Government's announcement that Cabinet has approved, in principle, an amendment to the New Zealand Bill of Rights Act 1990 to provide a statutory power for senior courts to make declarations of inconsistency under the Bill of Rights and require Parliament to respond. The proposal is that a declaration of inconsistency will trigger a reconsideration of the issue by Parliament.

"The Law Society notes that if this amendment proceeds, there will need to be a process for how Parliament will 'reconsider' the issue as Parliament does not usually initiate actions on its own motion. This may be addressed in the amending legislation, but amendments to the Standing Orders may also be required. Given this, the Law Society notes this as an issue that the [Standing Orders] Committee will need to consider in the near future." ■

IRD caution urged over habitual buying and selling of land proposals

The Law Society has recommended that Inland Revenue considers whether there will be further monitoring or reporting obligations on lawyers and conveyancers through implementation of proposed amendments to exclusions from land sales rules relating to habitual buying and selling of land.

In a submission on the tax policy consultation document, *Habitual buying and selling of land*, the Law Society says the rapid increase in regulatory compliance responsibilities of lawyers and conveyancers in recent years is making even low-risk "standard" land transactions such as the sale and purchase of the family home increasingly difficult and expensive for consumers.

It says the IRD proposals are intended to address concerns that taxpayers are structuring land transactions in order to access the exclusions from the land sales rules set out in the Act, and so bypassing the restrictions on the availability of those exclusions.

"It is unclear from the paper whether any information is available as to the scale of any potential problem in this regard," the Law Society says. "In particular, in relation to the concern that taxpayers are acquiring successive properties through separate but associated persons or arrangements, the Law Society understands from practitioners that this is rarely encountered in practice." ■

Culture change focus shows in CPD audit

BY **HELEN COMRIE-THOMSON**

As the Law Society's Continuing Professional Development Manager, I carry out audits of compliance with the annual CPD requirements. While CPD audits serve to verify that practitioners are complying with the CPD Rules, they also provide an opportunity for lawyers to receive individualised feedback on their plan and record, and for the Law Society to see what the profession has been learning about over the last year.

In December 2018, the Law Society released its Working Group Report which discussed a proposal for mandatory training related to safe workplace culture, diversity and equality. We know that the legal profession has a culture of lifelong learning, so one of the focus areas in this year's audit was to see whether practitioners were already placing an emphasis on culture change by making workplace culture, diversity and equality part of their 2018-19 CPDPR learning needs.

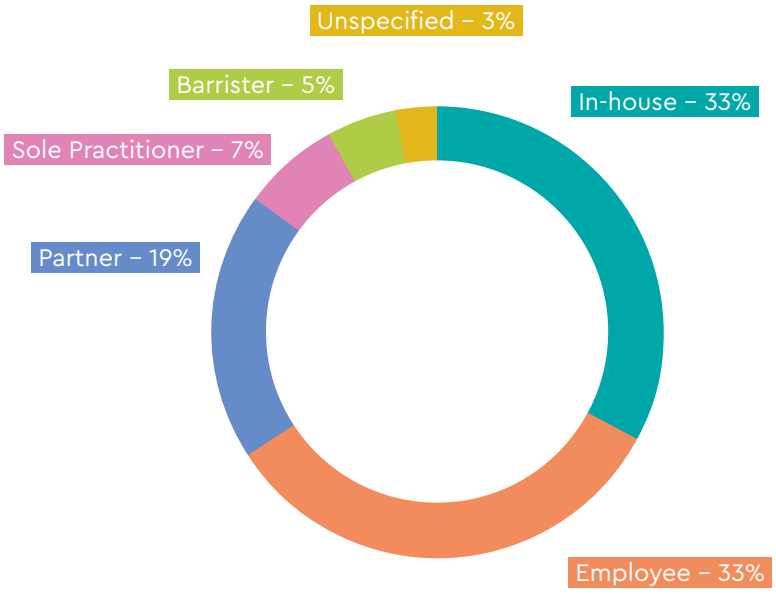
It turns out they are. The audits undertaken so far have shown that a third of practitioners are engaging with education linked to the prevention of bullying and harassment in the workplace and the areas covered in the Working Group Report. And it's a diverse range of practitioners choosing to focus on this learning need: in house lawyers and employees, as well as partners, barristers and sole practitioners.

There was further evidence of lawyers choosing to focus on specific educational areas in response to recent changes in the profession, shown through the prevalence of AML/CFT CPD that was being undertaken. A third of the practitioners audited had chosen to make learning about AML/CFT requirements and compliance a continued focus.

Our aim with feedback for those audited this year was to provide individualised educational support and guidance. Often, this was around the writing of learning needs or how to add a little more depth to reflections.

As we're auditing, something that we see a lot of are plans and records where a practitioner has chosen the activity first and then developed their learning need to fit the activity. If you really want to attend the activity, then it's likely that you did have a need in the first place. However, attending for the sake of attending, while ticking off your required CPD hours, doesn't necessarily help you to develop or gain the maximum benefit from the event – which is what CPD is all about. Our advice is to always start with your learning needs – then find the activity.

PARTICIPATION IN CPD ACTIVITIES RELATED TO SAFE WORKPLACE CULTURE, DIVERSITY AND EQUALITY



When you're writing your learning needs, remember that your plan and record (CPDPR) is about your professional development. Think of it as an investment in yourself and your career. Learning needs don't necessarily need to be about developing skills and knowledge in black letter law, and it was pleasing to see over half of the practitioners audited chose to include practice and professional skills as part of their CPD, for example, learning te reo Māori, how to prepare electronic bundles, public speaking skills, or writing skills.

Reflecting on CPD activities can be tricky as we often get tied up in whether or not the experience was a good one. Try to focus on the learning, rather than the experience. What did you learn? How might you use what you learnt in your day-to-day practice? And what might be your next learning steps? Thinking about your next steps might just help you to develop your learning needs for the subsequent year.

The legal profession is being asked to change, and to paraphrase Nelson Mandela, education is the most powerful weapon which you can use to change. Use your CPD to your advantage. Make those 10 hours work for you. Invest in yourself. ■

Submission points to problems in Arms Legislation Bill

Parliament's Finance and Expenditure Committee has been advised to give further consideration to aspects of the Arms Legislation Bill. The omnibus bill amends the Arms Act 1983 with the policy of improving public safety by adjusting legislative frameworks to impose tighter controls on the use and possession of arms.

In a submission to the committee, the Law Society said there were several key points which required further consideration:

- Further clarity is required in respect of aspects of the dealer's licensing regime.
- The list of offences that will automatically disqualify a licence holder should be narrowed so that they only relate to those offences which involve violence or a threat to safety.
- Various aspects of the involvement of health practitioners in firearms licensing require revision.
- A number of the new or amended offences contained in the Bill place the onus on the defendant to establish a defence. These offence provisions need to be reviewed in light of the right to be presumed innocent until proven guilty affirmed in section 25(c) of the New Zealand Bill of Rights Act 1990.
- Inconsistencies in sentencing for offending involving prohibited versus non-prohibited firearms should be addressed. ■

Significant issues with education pastoral care legislation

A bill addressing gaps in the pastoral care of domestic tertiary students is being rushed through the legislative process without adequate analysis, the New Zealand Law Society has told Parliament's Education and Workforce select committee.

The Law Society has presented its submission on the Education (Pastoral Care) Amendment Bill. The bill proposes a new mandatory code for domestic tertiary students requiring providers to take all reasonable steps to protect students and it creates a new offence for providers responsible for serious harm to or the death of students.

"Swift action to remedy regulatory gaps that may have been a contributing factor to the recent deaths of students in New Zealand is understandable. However, the Law Society is concerned with the haste in which the bill has been drafted," Law Reform Committee Convenor Tim Stephens said.

The Law Society says the new criminal offence, as currently drafted, is very unclear. Although the departmental disclosure statement for the bill says the offence is one of strict liability, the wording of the provision does not suggest that.

"If strict liability is intended, then the section should specify that the defendant will only avoid liability by proving a lack of fault.

"In our view, the committee needs to reflect on whether strict liability is appropriate in these circumstances. The Supreme Court has recently observed that the reverse onus in strict liability offences may need to be revisited in light of the New Zealand Bill of Rights Act," Mr Stephens said.

The Law Society says it was not clear what constitutes 'serious harm' where a breach of the code has occurred, as the wording of the definition of serious harm also appears to cover cases where the breach results in a student being endangered but not physically or psychologically harmed.

In relation to the new civil penalty, the Law Society says the current provision does not expressly state the burden of proof required to establish the alleged contravention.

"The Law Society recommends the committee carefully reconsiders the new offence provisions in the bill, and considers alternative ways of addressing the regulatory gaps," Mr Stephens said. ■

Practice Briefing series

The New Zealand Law Society now has 39 titles in its Practice Briefing series. These are practical guides on a range of matters encountered in legal practice. They are located at *https://www.lawsociety.org.nz/practice-resources/practice-briefings*

▲ Dunedin Court sitting

▲ Auckland High Court sitting
NZLS Auckland photographer Claudia Chilcott

▲ Hamilton High Court sitting

150 year anniversary special sitting in Dunedin

A special court sitting in Dunedin on 24 October commemorated the 150th anniversary of the New Zealand Law Society. The sitting was followed by a gala dinner. Earlier in the afternoon, the annual Ethel Benjamin Address was given by the Solicitor-General Una Jagose QC.

Chief Justice Helen Winkelmann presided over the special sitting. Joining her were Judges of the Supreme Court, Court of Appeal, High Court, District Court, Employment Court and Coronial Court, and among them the President of the Court of Appeal, the Chief District Court Judge, and the Principal Judges of the Family Court and Youth Court.

In her address, the Chief Justice spoke of the Law Society being no ordinary institution:

"Through the work it does in supporting and regulating an independent legal profession, it has a critical role in our society. A role so critical that it is no overstatement to say that the Law Society is necessary to our constitutional order."

Chief Justice Winkelmann acknowledged that the anniversary was an opportunity to reflect on who we are as a society and the role we should play. ■

.... and in Auckland

A special sitting commemorating 150 years of the New Zealand Law Society was held on 25 October at the Auckland High Court. The sitting was presided over by Chief Justice Helen Winkelmann, and the Chief High Court Judge Geoffrey Venning.

David Campbell, Law Society Auckland branch President, Cameron Jacob-Sauer, Tāmaki Makaurau regional co-representative of Te Hunga Rōia Māori Aotearoa, Jacque Lethbridge, Auckland Community Law Centre Board Chairperson, and Kate Davenport QC, NZBA President, all spoke at the event. ■

... and in Hamilton

A special sitting of the High Court in Hamilton to commemorate the 150th anniversary of the Law Society was presided over by Sir Mark O'Regan of the Supreme Court. ■

Disagreement over IRD view on holding costs for privately used land

In a submission on an IRD tax policy consultation document, *Holding costs for privately used land that is taxable on sale*, the Law Society says it disagrees with the view that denying deductions for all holding costs for periods of private use is the best of three options.

The IRD recognises that an apportionment approach would "arguably" be the most accurate option, but says it would not be consistent with other areas of tax law, difficult to calculate, and a simplified apportionment would be arbitrary.

However, the Law Society says apportionment is consistent with current legislation and well-established case law and does not need to be difficult to calculate or administer. ■

Writing for *LawTalk*

Submission of articles for publication in *LawTalk* is welcomed. Articles must relate to matters which are of interest to members of the New Zealand legal profession and should be less than 2,000 words. All articles must not have appeared elsewhere and will be edited. Articles should be submitted to *editor@lawsociety.org.nz* as a MS Word document (no PDFs are accepted). *LawTalk* does not publish advertorial or articles in exchange for advertising or payment.

LETTERS TO THE EDITOR

Letters to the Editor

Mentoring of younger lawyers

I was most interested to read the article on Trevor Booth ("Retiring from practising law at 90", *LawTalk* 934, November 2019, pages 20-21).

I had a few dealings with him when I was in private practice in Whakatane and always found him unfailingly professional and pleasant to deal with.

As a 'product' of those earlier times in the law – albeit 15 or so years younger than Trevor – I recall the earlier times of 'handshake, word is my bond' well. I also recall that in the provincial areas in general practice, it was not uncommon – indeed expected – that you would do just about whatever work came in the door, whether it be court appearances, conveyancing and so forth.

I also agree what he is saying about the mentoring of younger lawyers. When I was in my first legal partnership at McVeagh Fleming in Auckland, I was very lucky to have as two mentors Maurice Hunt and Colin Holdaway and soon learned 'the things I did not get taught in law school'. One discussion I will always recall with Colin was when he asked me one day "which is the most important – the duty to your client, yourself or your fellow practitioners?" I of course answered that is was the duty to the client, whereupon he chuckled and said, "all you young chaps say that, but it is actually your duty to yourself". He explained it to me thus: "You must always get the legal advice to your client correct, and never 'wing it' as if you get it wrong then the client will come after you, so in looking after yourself you are also looking after the client."

When I left Auckland in the early 1970s and came down to Whakatane to join what was then Buddle Harvey, I had been told that court work would not be required. However, when I arrived I was asked by the senior partner Joe Buddle whether I wanted "the good news or the bad news first". I opted for the bad first and he said that the lawyer who had been doing the court had left but the "good" was that he was sure I could handle it. So I was thrown in the deep end, not having done court work before, but amazingly soon discovered I really enjoyed it and so developed a mixed practice of court and general conveyancing – even some Māori

Land Court appearances.

I suspect that is increasingly rare in these specialist days, but probably still exists in smaller towns.

However, in community law I have rediscovered the delights of dealing with pretty well everything that comes in the door.

The modern LLB is of course very different from that I did in the 60s where there were no elective options.

David Sparks
Senior Solicitor, Baywide Community Law Service, Whakatane.

Extending ACC appeal jurisdiction to the Supreme Court

The judgment of the Supreme Court on 11 October, in the Shark Experience Ltd appeal case (*Shark Experience Ltd v Pauamac5 Inc* [2019] NZSC 111), highlights once again the anomaly in the ACC legislation that prevents an appeal on a question of ACC law being heard by the Supreme Court, the highest authority in the land.

The *Shark Experience* case involved one appellant and three respondents and six legal counsel were involved. The case was heard on 26 March 2019 before a full bench of five Supreme Court Judges who almost seven months later, delivered a 121-page judgment setting aside a decision of the Court of Appeal that "shark cage diving is an offence under s 63A Wildlife Act 1953". A huge amount of legal and judicial resources were applied to arriving at that decision which affected one commercial enterprise.

Surely decisions by ACC on cover and entitlements under the ACC legislation affecting the rights of every victim of accidental injury in New Zealand, are more important and require an urgent review of the law.

The Supreme Court Act 2004 created the Supreme Court which was intended to replace the Privy Council in England, as the ultimate appeal authority under New Zealand law. However, for some reason, appeals on questions of law against ACC decisions, have been limited by legislation to appeals to the Court of Appeal.

Attempts by the New Zealand Law Society to remedy the situation by extending the jurisdiction of the Supreme Court, have fallen on deaf ears. No minister has moved to amend the law and there has been no "white knight" in any Parliament, who has led a move to improve the lot of accident victims who have not had the benefit of ultimate authority on questions of ACC law and policy. The ACC Board is obviously not anxious for its decisions to be tested before the highest legal authority to establish the true meaning of the complex legislation the Board administers.

A review of ACC law was not on the work programme of the previous government nor does it have priority with the present government so the anomaly remains. Yet another frustration for accident victims.

Don Rennie
Former Convenor NZLS ACC Committee, Wellington.

Legal nomenclature and JAWS

I read with interest and amusement Sir Ian Barker's recent article on legal nomenclature ("Legal nomenclature – from prolix to trendy", *LawTalk* 933, October 2019, pages 69-70). I wish to assure Sir Ian that there is no link between the name under which lawyers practise and their traditions of service to the community. For almost four decades we have been known to many people by the abbreviation JAWS – yet sharks do not abound.

Ian Finch
Partner, James and Wells, Auckland.

AML and compliance success

It was truly satisfying to read in the *Dominion Post* recently that the Police have apprehended a sophisticated drug dealing and money laundering operation with arrests made in Shannon and Palmerston North.

Clearly the Anti-Money Laundering and Financing of Terrorism Act compliance which we as a profession have had forced on us is really working and gaining some real traction in apprehending those responsible for money laundering. I was wondering if it was possible for the Police to identify which law firms' AML documentation was instrumental in this apprehension of the money launderers so those responsible may in a small way be recognised for their excellent compliance efforts and so the rest of us can take heart that the cost to us as a profession is not all in vain.

Eugene Collins
Partner, Collins & May Law, Lower Hutt.

Guidance to lawyers on testamentary capacity

I have regularly provided medical opinions about capacity, including testamentary capacity, in situations where this capacity is in doubt. The loss of capacity for decision-making is a tragic component of many neurodegenerative illnesses, but can also occur at younger ages in some of those with learning difficulties, head injury or treatment-resistant mental health problems. I have also participated in providing expert opinions regarding the likely capacity for such as making a new

will, after that person's death.

Studies have shown high levels of incapacity for those who are general hospital inpatients or residing in Aged Residential Care. With the aging of the population, this is far from being an academic concern only.

I have also provided teaching to legal groups about how to assess capacity, with particular reference to testamentary decision-making, with my colleague Professor Kate Diesfeld (AUT). The premise of our teaching programme was that all professional groups, especially lawyers, should be able to undertake a capacity assessment of clients. This is a perfectly achievable skill for most professional groups. Lawyers should be able to identify "red flags" where capacity might be in question, and then undertake the interview which would establish whether the person had capacity to proceed with giving instructions for a new will.

I admit that there remain cases where capacity is equivocal following assessment, or the dynamics in the situation are complex, or where influence is considered possible. In these situations it is always advisable to obtain a second opinion about capacity, for example from a medical or health practitioner. But there is nothing to prevent lawyers from assessing capacity and being confident of its presence or absence in most cases. In our view, this should be part of lawyers' everyday practice.

I was therefore alarmed to read the article by Sally Morris and Freya McKechnie, summarising the judgment in *Sandman v MacKay* [2019] NZSC 41 ("Supreme Court provides guidance to lawyers on testamentary capacity", *LawTalk* 933, October 2019, pages 29-31). The majority decision appears to state that the lawyer should proceed with preparing and executing a new will, despite any concerns about the person being incapacitated. Any concerns about capacity should be resolved after the person's death. I note that Elias CJ dissented from this part of the judgment, saying that she doubted that "a solicitor who knows a client to lack testamentary capacity is nevertheless obliged to carry out the client's instructions, leaving capacity to be assessed after death…"

As someone who provides post-mortem capacity opinions for historical decisions, I would like to say that certainty about the person's capacity is often not achieved based upon the (often flimsy) medical or legal records available from the time of the decision, and therefore, from a practical point of view, this is hardly a satisfactory way of bringing closure to the issue. Furthermore, it is costly, time-consuming and emotionally draining for many of the parties in the dispute.

I also believe that a lawyer, as a member of a professional group, should be acting both for the client and in their best interests, and where these are in conflict, for example, where someone lacking capacity is giving unwise instructions about their new will, the lawyer should have the confidence to pause proceedings and get an assessment done. What is the point of preparing and executing, and charging for, a new will, when that instrument is going to be invalid? Furthermore, international studies show that the degree of financial abuse that is inflicted on older people is shocking, with estimated figures from the US running to the billions of dollars each year. It is my contention that lawyers should be willing to protect their clients, in the same way that the banks have now signed up to. I hope that this obligation to one's clients might be present in the Code of Conduct for the legal profession.

When appointing a new Enduring Power of Attorney, the lawyer, legal executive or trustee officer witnessing the signing by the attorney is required to assert that the person understands what they are doing, understands the risks and there is no reason to believe that the person has incapacity. This implies to me that those involved witnessing this document are expected to know how to assess capacity for this decision.

The medical profession has had to be dragged into confronting the issues around incapacity, whether for surgical procedures or accepting admission into aged residential care. Slowly, confidence and competence in this area has increased amongst doctors and other health professionals, due to training and open-discussion. I hope that the legal profession might commit to the same path, and I hope that the minority decision in this case will come to be seen as more practical, protective and just for clients.

Dr Mark Fisher
Mental Health Service Clinical Director, Auckland District Health Board, Auckland.

Senior Family Law Barrister

I specialise in New Zealand divorce cases where there are significant assets including family trusts, complex business structures, and multi property ownership.

Jeremy Sutton®

09 309 4647
js@bastionchambers.co.nz
jeremysutton.co.nz
Shortland Street, Auckland City

PEOPLE IN THE LAW
ON THE MOVE

Acting Judges appointed

A number of Acting members of the judiciary have been appointed.

Mark Eversfield Perkins, retired Employment Court Judge, has been appointed an Acting Judge of the Employment Court for a 12-month term from 28 December 2019.

Allan Christopher Roberts, retired District Court Judge, has been appointed an Acting District Court Judge with criminal jurisdiction for a one-year term from 30 January 2020. **David Christopher Ruth**, retiring District Court Judge, has been appointed an Acting District Court Judge with criminal jurisdiction for a two year-year from 27 March 2020. **David Graham Smith**, retiring District Court Judge, has been appointed an Acting District Court Judge with criminal and Family Court jurisdiction for a two-year term from 21 February 2020. **Timothy Hindmarsh Druce**, retiring District Court Judge, has been appointed an Acting District Court Judge with Family Court jurisdiction for a two-year term from 12 December 2019. **Lawrence Irwin Hinton**, retiring District Court Judge, has been appointed an Acting District Court Judge with criminal jurisdiction for a two-year term from 29 December 2019. **Anthony Peter Christansen**, retired District Court Judge, has been appointed an Acting District Court Judge for a two-year term from 17 April 2020. **Philip James Recordon**, retired District Court Judge, has been appointed an Acting District Court Judge for a two-year term from 4 April 2020. **David John Harvey**, retired District Court Judge, has been appointed an Acting District Court Judge with criminal jurisdiction for a term commencing on 5 March 2020 and expiring on 31 December 2021. **Brian Patrick Dwyer**, retiring District Court Judge, has been appointed an Acting District Court Judge with criminal jurisdiction and also as an alternate Judge of the Environment Court for a two-year term commencing on 6 December 2019.

Solicitor-General appoints Hamilton Crown Solicitor

Jacinda Nancy Foster has been appointed Crown Solicitor at Hamilton from 1 November 2019. An Almao Douch partner, she takes over the role from Ross Douch following his retirement in March. Jacinda graduated LLB from the University of Waikato in 1996 and was admitted as a barrister and solicitor of the High Court in Hamilton the same year. She has served as a Crown prosecutor for 16 years.

Susan Hughes QC reappointed to Medical Council

Susan Hughes QC has been reappointed to the Medical Council as a lay member for a two-year term. A New Plymouth-based barrister, Susan is currently deputy chair of the council. She left New Plymouth firm Govett Quilliam in 2006 to practise at the Bar. Her experience spans broad based litigation across the diverse jurisdictions of the courts.

Maree Hayes awarded Public Service Medal

Invercargill Court Services Manager **Maree Hayes** has received the New Zealand Public Service Medal, recognising her commitment to public service. Maree has worked for the Invercargill High and District Courts for 43 years. In that time, she was part of the foundation committee for 'The Right Track' – an educational initiative targeting young people and repeat offenders, which she also introduced to Southland.

The Public Service Medal is awarded to public servants who have given meritorious service and was established by Royal Warrant in 2018.

McCaw Lewis announces two promotions

Kylee Katipo has been promoted to associate. Kylee joined McCaw Lewis in 2018 and is a member of the Māori legal team. She has a background in Māori Land Court and Waitangi Tribunal matters, previously worked as Research Counsel in the Māori Land Court for the court's judiciary and recently became Secretary for Te Hunga Rōia Māori o Aotearoa.

Connie Bollen has been promoted to senior solicitor. She joined the Māori legal team and the relationship property team in 2018. Connie has experience working with clients on treaty negotiations, as well as various district and kaupapa inquiries before the Waitangi Tribunal.

McCaw Lewis marks centenary with book

To mark its 100th year in existence, Hamilton firm McCaw Lewis has released a book covering the story of the firm. Waikato writer Kingsley Field authored the book, including stories of the firm's people who have gone on to hold roles in the judiciary, Waitangi Tribunal and politics.

The firm was founded in 1919 by World War I Captain Wally King who began a sole practice on Hamilton's Victoria Street. He was joined by Ronald "Punch" McCaw, whose services to the Hamilton community was recognised with an MBE in 1958.

Director Brendan Cullen says the book (100 - Kotahi Rau - The McCaw Lewis Story 1919-2019) is "littered with history of the region."

Lane Neave launches alumni network

National firm Lane Neave has established a new alumni network. The network is extended to former staff, lawyers and retired partners with the objective of developing a lifelong relationship.

Two consultants join McMillan&Co

Neville Martin joined the firm as consultant in the private client team from 2 September. Neville has spent 30 years at the helm of Otago firm McKinnon Aitken Martin. He advises on all aspects of personal property, trusts, wills, and powers of attorney.

Kyla Mullen has joined as consultant. Kyla graduated in 2013 and has since worked as a Research Assistant and Teaching Fellow at the University of Otago Law Faculty. Kyla will be working across all of the firm's practice areas, focusing on immigration, employment and relationship property matters.

New CEO for Gibson Sheat

Cameron Madgwick joined Gibson Sheat as Chief Executive Officer on 29 October. Cameron has a background as a lawyer and a governance professional, having practised in large national firm and in-house scenarios including Contact Energy, Vector and New Zealand Rugby.

He was chair of Community Law Centres o Aotearoa for nine years and is currently chairperson of the Laura Fergusson Trust, a charitable body that supports people with disabilities.

Emma Miles joins Riverbank Chambers

Emma Miles has joined the newly established Riverbank Chambers in Hamilton. She was admitted as a barrister and solicitor in June 2012. Emma specialises in dispute resolution and mediation in the areas of family and employment law, and will continue to practise in both Auckland and Hamilton.

Hudson Gavin Martin welcomes two

Sonya Hill has joined HGM as a special counsel and will be advising on all commercial aspects of the firm's IP, tech and media practice.

Sonya is an experienced commercial lawyer and most recently worked for Christchurch City Council where she advised on a broad range of commercial and IP-related matters, and worked closely with the council's IT department on technology-related matters. Sonya has worked for Bell Gully and Simpson Grierson in New Zealand and in the UK for Pinsent Masons.

Lisa Paz has joined HGM as a senior solicitor and recently returned from London.

Lisa started her career at Buddle Findlay and is experienced in telecommunications, marketing, data protection and technology, gained from her time as legal counsel for UK telecommunications company O2.

Madeleine Lister promoted at Edwards Law

Madeleine Lister has been promoted to associate with employment law specialist firm Edwards Law. Madeleine joined Edwards Law's Auckland office in 2017. She is experienced in all areas of employment law and has appeared in the Employment Relations Authority and Employment Court.

FairWay Resolution announces 2019 scholarship winner

Nurit Zubery has won FairWay Resolution's 2019 Anne Scragg Scholarship for her article "Perceptions of Gender Power in Family Dispute".

Nurit studied law at Tel-Aviv University and practised in litigation, commercial and employment law in Israel before moving to New Zealand in 1999. Having studied at the Massey University Dispute Resolution Programme, she is now undertaking an LLM at the University of Auckland.

Fairway, a conflict management and dispute resolution provider, offers the Anne Scragg scholarship annually as

Contributing information to On the Move

Brief summaries of information about promotions, changes in law firms, recruitment and retirement are published without charge in On the Move (which is also available on the Law Society website). Please send information as an email or MS Word document (no PDFs please) to *editor@lawsociety.org.nz*. Submissions should be three or four sentences without superlatives. We may edit them to conform to the format used. A jpeg photo may be included but please ensure you have permission for us to use it.

part of its commitment to best practice dispute resolution. The winner receives a $10,000 contribution to their professional development, as well as the option to join FairWay on a 12-week placement.

Greenwood Roche announces new partner

Greenwood Roche has announced the appointment of resource management lawyer **Francelle Lupis** to partner from 1 October 2019.

Francelle advises on all aspects of resource management and environmental law, with a particular focus on urban development and large-scale infrastructure projects, together with district and regional planning and policy matters. She works out of Greenwood Roche's Auckland office.

Two lawyers appointed members of Commerce Commission

Two Wellington-based lawyers have been appointed members of the Commerce Commission's Board of Commissioners.

Derek Johnston has been appointed a member for five years from 1 November. Derek is a commercial barrister and arbitrator of Thorndon Chambers. He has broad experience in competition and commercial law, including advising in key sectors such as dairy, telecommunications, gas and electricity. Derek has previously been the independent Chair of NZX's Regulatory Governance Committee, Chair of the NZ Markets Disciplinary Tribunal and a corporate partner at Russell McVeagh.

Elisabeth Welson has been reappointed for a further two years after her current term concludes on 31 March 2020. Elisabeth is a sole practitioner and formerly a senior commercial partner at Simpson Grierson. She has significant expertise in competition, consumer and regulatory law, along with general commercial and governance experience. Elisabeth has been a full member of the Commission since 2013. She is also a member of the Institute of Directors.

Changing your details

Various rules and regulations require lawyers and/or firms to notify the Law Society about certain information or when there is a change to that information. This includes matters such as change of work address, employer, name, practising certificate type and trust accounting arrangements. Information on how to change or update your details is available on the Law Society's website at *http://www.lawsociety.org.nz/for-lawyers/change-your-details*

Stewart Germann receives Certified Franchise Executive award

Stewart Germann, Partner of Stewart Germann Law, has become the first person in New Zealand to receive the Certified Franchise Executive qualification from the Institute of Certified Franchise Executives (CFE) and the Franchise Council of Australia. He received the award during the Australian National Franchise Convention.

Stewart has over 35 years' experience in franchising law and acts for many franchisors and franchisees in New Zealand and overseas. He has accepted an invitation from AUT's law school to lecture on franchise law in 2020.

CFE is the only internationally-recognised professional accreditation programme for franchise executives. It was founded in the US more than 20 years ago and was licensed to the Franchise Council of Australia in 2014.

Juno Legal expands team with four new lawyers

On-demand legal services provider and NewLaw firm Juno Legal has welcomed four new lawyers.

Margot Lyons joins the firm in Wellington from MBIE where she advised on a wide range of commercial, regulatory and compliance matters. She was previously in the commercial property field in private practice at DLA Piper, DJ Freeman (London) and Minter Ellison (Sydney) and in-house with Halifax Bank (London).

Iain Thorpe joins the firm in Wellington from OMV New Zealand where he advised on significant capital projects including the acquisition of the upstream Shell Oil assets. He was previously at the bar and in private practice with Minter Ellison, Watson Farley Williams (London) and Bell Gully. He has more than 30 years' experience in commercial litigation, negotiating complex high value international contract procurements and insurance claims, and conducting investigations.

Jenine Briggs joins the firm in Auckland from AMP where she was advising on a significant divestment project. She previously led the corporate legal team at Suncorp Group which involved working on several strategic divestments, joint ventures and acquisitions. She began her career in private practice with Simpson Grierson before moving in-house with a focus on financial services.

Jen Hanton joins the firm in Auckland from Fonterra where she led the establishment of the global legal team's first in-house online portal designed to make legal services more accessible to the business. She was previously Senior Legal Counsel at Spark advising on a range of commercial and IP matters and was in-house with Vanco PLC (London) after starting her career in private practice with Buddle Findlay.

SBM Legal announces changes to partnership

Employment law and human resource specialist firm SBM Legal has announced

changes to its partnership from 30 October.

Don Mackinnon has stepped down as a partner to pursue a role as a barrister. Don has been with SBM since it was founded in 2008 and has over 30 years' experience in employment law and industrial relations. He was previously a partner at Simpson Grierson in its employment law team, as well as Head of Litigation. Don will provide legal services to SBM clients on an as-need basis, as he takes the opportunity to focus on areas of law including investigations and bargaining and commitments in sports governance.

Matthew McGoldrick has joined the partnership, having been with SBM Legal since 2013. He was formerly a senior associate. Matthew regularly represents employers and employees in mediation and before the Employment Relations Authority, Employment Court, District Court and in the High Court. He provides advice on varied matters such as restructuring and redundancy, disciplinary matters, termination of employment and health and safety.

Anthony Russell has also joined SBM Legal's partnership. He was formerly a principal. Anthony has over 25 years' legal experience, holding senior employment law positions at two leading law firms. He has worked with unions and has acted as a prosecutor for the Serious Fraud Office. He has also lectured in law at the University of Waikato and more recently, at AUT.

Malley & Co welcomes one and promotes two

Madeleine Buchanan has joined the firm as a lawyer in the commercial team. Madeleine graduated from the University of Canterbury with an LLB and BA in 2017. She was admitted at the High Court in Christchurch in December, 2018.

Chantal Morkel has been promoted to partner. Chantal joined the firm in 2018 and specialises in the areas of retirement villages, business, property, asset planning and trusts. Chantal practised in South Africa, gaining experience in the banking and finance sectors. Moving to New Zealand in 2007, she is experienced in rural property, banking and finance and commercial leases. Chantal is also a member of the Society of Trust and Estate Practitioners.

Rachel Haythornthwaite has been promoted to senior solicitor. Rachel joined Malley & Co in 2017 and specialises in family law. She regularly advises on family matters including care of children disputes, relationship property, protection and occupation orders and appears regularly in the Family Court.

ClearStone Legal welcomes Francine Cameron

Francine Cameron has joined ClearStone Legal and re-enrolled as a solicitor. She has seven years' experience and is returning to law after a break for parental responsibilities. Francine is a general practitioner and assists broadly with relationship property, trusts and estate planning and contracts. She is also the Chairperson of Grey Lynn School's Board of Trustees.

Two join Wynn Williams

Kate Bradley has joined Wynn Williams' dispute resolution team in Christchurch as associate. Kate has a broad commercial background and specialises in family law, with a particular focus on relationship property, trust and estate disputes.

Katherine Binsted joins the firm's corporate and commercial team in Auckland as associate. Katherine is broadly experienced in property and commercial law. She graduated with a LLB/BA from Victoria University of Wellington in 2011.

Andrew Morris joins Morris Legal as Senior Associate

Andrew Morris joins private client firm Morris Legal as its newest senior associate, coming from US firm White & Case in London. Andrew will specialise in trust, estate and relationship property disputes for New Zealand and international clients. Before moving to London, Andrew began his career at Russell McVeagh in Auckland, and has a background in complex financing transactions.

Receipt of LawPoints and NZLS Weekly

The Law Society's weekly enewsletter LawPoints is automatically sent on Thursday evenings to all lawyers who currently hold a practising certificate, unless they unsubscribe. Because of the anti-spam settings of some servers, LawPoints may be blocked in some organisations. The Law Society has also had some problems recently with changes implemented by our US-based LawPoints distributor MailChimp which have removed some previous recipients from the distribution list. If you do not receive LawPoints or have stopped receiving it without unsubscribing, contact *angela.ludlow@lawsociety.org.nz*.

A version of LawPoints for the wider community, NZLS Weekly, is also available free of charge each week to non-lawyers. To sign up, visit *www.lawsociety.org.nz/news-and-communications/email-updates/nzls-weekly*.

CONTINUED FROM PAGE 19

Parry Field Lawyers announces four promotions

Steven Moe has been promoted to partner. He joined the firm three years ago after having worked for an international law firm for 11 years. Steven focuses on social enterprises, start-ups, tech companies and other commercial matters.

Judith Bullin has been promoted to senior associate. She works in the property and commercial teams and specialises in subdivisions. She joined the firm in 2014.

Joseph Morris has been promoted to senior associate. He manages the Hokitika branch where he assists clients on a wide range of matters including property, commercial, estates, civil litigation, family and disputes.

Nicole Murphy has been promoted to senior associate. She has experience in a wide range of family matters, with particular experience in applications under the PPPRA and FPA.

Claro promotes Andrea Lane

Specialist health sector law firm Claro has promoted **Andrea Lane** to senior solicitor. After a previous career as a radiographer, Andrea completed an LLM (with distinction) in medical law and ethics at the University of Edinburgh and was also awarded the McLagen Prize for the best graduate in the LLM programme. She is based in Claro's Christchurch office and advises on a wide range of health sector issues.

Asking for help is a sign of strength

Law is a fulfilling profession, but it can be a stressful one. If you want ideas on improving your work-life balance, make a start by engaging with our Practising Well resources at lawsociety.org.nz/practising-well

practising well»

The Law Society is proud to partner with the following organisations in supporting you to keep practising well:

LIFELINE AOTEAROA

BUSINESS MENTORS INSPIRING SUCCESS

VITALITY WORKS Sanitarium Workplace Health

PEOPLE IN THE LAW

The Innovators

Tila Hoffman, Special Counsel and Business Transformation Manager at MinterEllisonRuddWatts

LawFest organiser Andrew King continues a series of interviews with key legal professionals with their innovation and technology stories.

What does legal innovation mean to you?

To me, legal innovation is changing legal practice so lawyers can deliver even better value to their clients. It is that simple. If it does not add value to your clients, then it is not innovative – or necessary.

What role does technology play in innovation?

Technology plays an important role but it should not be confused with legal innovation. Some innovation involves technology but you can be innovative and add value to your clients without using or developing new technology.

What pressures are organisations facing in the delivery of legal services?

Law firms and in-house teams are faced with the same issues as other businesses and professions. There is pressure to do more with less, to add value and to continually improve – it is no longer enough to do what you have always done.

What developments do you see in how legal services are delivered?

There are many opportunities to improve on business models that don't serve either lawyers or clients. Typical client demands mean lawyers sometimes work long hours, often late into the evening and on weekends, to meet deadlines and ultimately to prove their worth. If we add innovation and some legal tech to the equation, lawyers may be able to meet the deadlines without working longer hours. There will always be one-offs, but with a few changes they won't be the norm.

I would love to see lawyers working collaboratively with their clients to carefully identify issues, analyse options and offer solutions to fit a particular client's needs.

What I enjoy about my role is getting to work on ways to free lawyers up so they can focus on their clients, using tools that cater to specific client needs, and ensuring a consistent delivery model.

What opportunities has legal innovation brought to you?

I'm naturally curious and solutions focused. I like to visualise what can be and then actually turn the vision into reality. My current role allows me to draw on my experiences as a lawyer (in private practice and in-house roles here and overseas), to think about how a little (or big) change can positively impact our firm's legal team and clients. I get to identify pain points, consider and trial options, implement solutions and support our people and our clients to ensure solutions are embedded and actually have a positive impact.

Legal innovation has created that opportunity for me and I feel incredibly fortunate to be part of a firm that deeply values innovation.

What are some of your tips to start innovating or developing an innovative mindset?

Start somewhere – take a step and give something new a shot. A good place to start is thinking about a task you do more than once a day and think of ways to streamline that task. If something frustrates you, think of how to remove the frustration (for you and others). Get your content right and then add the legal technology tool on top.

Always keep the needs of the people you are innovating for top of mind – stand in their shoes and see your project or initiative from their perspective(s).

Be prepared for resistance but don't become inactive because of it.

Don't be so concerned about perfection that you never introduce your initiative – this is a common risk with law firms. If you keep trialling, your solution may be obsolete before it's implemented.

Why is it important for legal professionals to continue to learn about legal innovation and leveraging technology?

In my opinion, our value as lawyers is our ability to communicate, develop trusting relationships and be in "partnership" with our clients. To be a trusted advisor and partner, you need to focus attention on your client's business. If you streamline processes and embed some legal tech into your organisation, you will have the time to truly focus on your client. If you don't, another lawyer will. ■

Tila Hoffman will be speaking at LawFest, at the Cordis Auckland on 18 March 2020.

PEOPLE IN THE LAW
NEW IN THE LAW

Oprah-inspired, Egyptian-born lawyer striving to make a contribution

Diana Youssif, Solicitor, Parry Field Lawyers, Christchurch

BY **JAMIE DOBSON**

DIANA YOUSSIF WAS BORN AND GREW UP IN CAIRO, EGYPT until her family made Christchurch home when she was 17. She has one younger brother. Diana studied at the University of Canterbury towards a LLB(Hons) and a BA (majoring in Politics and minoring in French) and "did the typical exchange semester" at the Paris Institute of Political Studies.

"I was very lucky to receive the Bell Gully scholarship when I was a second-year university student," she says.

"This provided a normal pathway to my graduate job at the Wellington Bell Gully office. This is where I learnt the importance of attention to detail, systematic analysis and structured problem solving. As of this month I have begun a new stage in my career, as a solicitor in the litigation team at Parry Field Lawyers in Christchurch."

When did you realise that you wanted to be a lawyer?

"Growing up where I did, being a lawyer was not something that I thought of. I remember I wanted to do something that would help people or make their life easier – so I thought, what could make people feel better more than being a doctor? Unfortunately for me, I struggled with sciences and biology. On the other hand, I loved reading, writing, debating, thinking about different history narratives and I thought to myself being a lawyer was one way I could make a positive impact on those around me, while at the same time do things that I enjoy."

What do you enjoy most about being a lawyer/your current role?

"I really enjoy being able to contribute positively to something and seeing it through. I enjoyed the research and drafting side of the job at Bell Gully. Or when I find that one case that is directly on point – always a high. I am looking forward to interacting more with clients and doing more practical advocacy work in my next position.

"I still strive to be true to the reasons why I chose to be a lawyer: first, making sure I do my job as

I loved reading, writing, debating, thinking about different history narratives and I thought to myself being a lawyer was one way I could make a positive impact on those around me, while at the same time do things that I enjoy

properly as I can to make the life of those affected directly by my work slightly better and second, thinking about the bigger picture in terms of how I could, through my skills, contribute to making society a better place, beyond just me, my work and my clients."

Is there anything you wish you learnt in law school that wasn't covered during your studies?

"To aim high and not be restrained by pre-conceived ideas of where people of my gender, socio-economic background, ethnicity and sexuality end up and/or are perceived. Being free of those boxes that we sometimes make for ourselves is the most valuable thing I have learnt during my time at university. Go for that job, apply for that scholarship, get involved with that organisation and believe that you actually have a chance to achieve what you want."

Is there anyone who inspires you?

"I am inspired by my parents, who love, encourage and sacrifice endlessly. I am inspired by Oprah Winfrey, who has overcome lots of difficulties in her life and does her best to positively impact people around her. I am inspired by all the women who do their job to an excellent standard, yet have time and passion for their families or their life outside the workplace. There are a lot of you around and I respect you so much."

Are there any issues currently facing young lawyers?

"There are multiple issues currently facing young lawyers. I think a problem is the gap between the reasons why we start doing law and the reality of what the job actually entails, at least for certain people in certain workplaces. There is unfortunately, a systematic imbalance of power in the hierarchical structure of law firms, that naturally affects young lawyers adversely. Although some workplaces, and some teams within the same workplace, are better than others, it is not uncommon for young lawyers to face bullying, harassment, pressure to work long hours, having no autonomy over the type of work they do and losing the ability to speak up about their stress levels or that they need further guidance in relation to a certain task. With the current junior salaries, it

CONTINUED FROM PAGE 23

is also not uncommon for junior lawyers to work below minimum wage, some for a longer period of time than others.

"As you could tell by now, I enjoy advocating for things to become better and for standards to be raised. This is why I am privileged to be part of the Aotearoa Legal Workers' Union's elected executive. We are advocating for changing the status quo in legal workplaces, in the hope that legal workers would one day be more supported, valued and healthier (mentally and physically)."

How do you switch off after work?

"Exercise and catching up with good supportive friends usually does the trick. Early nights are also necessary. The right balance of outside-of-work commitments is also key. I am still in the process of trying to figure out how I can navigate that in my own life."

What advice would you have for someone going through the same process you did to enter the profession?

"Full-time work is quite different from university life – and no one prepares you for that. Your time is no longer yours, there are more people affected by your actions than just yourself and you need to identify who and what you prioritise because you can no longer commit to everything.

"It is important to remember that what will work for you is not necessarily what works for someone else. Do not put yourself in a box, extend lots of olive branches, do not hold grudges and make your own way. Do not be scared to be true to yourself and speak up when you need to. Look after your fellow colleagues starting out too – they are also going through similar things." ■

PEOPLE IN THE LAW
PROFILE

The long road from Black Stick gold medal-winner to lawyer

BY **NICK BUTCHER**

Pippa Hayward was studying law while juggling a professional sports career as a member of the Black Sticks hockey team.

It took almost 10 years to get her degree because of her commitment to the sport, but determination won in the end.

Pippa was a member of the New Zealand hockey squad which won gold at the 2018 Commonwealth Games on the Gold Coast. She also competed at the Rio 2016 Olympic Games but the Sticks agonisingly lost out on a medal to Germany in the medal play-off match.

Pippa, who was admitted in 2018 and is a solicitor at Meredith Connell in Auckland, comes from the deep south. Born in Dunedin, she grew up in Southland where her parents were farmers.

The family moved to Christchurch just before she entered her teenage years and Pippa attended the University of Canterbury. About halfway through her law degree, she transferred to the University of Auckland, a decision that was driven by her ongoing involvement with the Black Sticks.

"The team was unofficially based in Auckland, so it made sense for me to be there and train with the majority of the squad," she says.

"It was quite difficult at times to manage my sports career with studying law at university. Initially I was studying full-time and I was playing hockey. It became too difficult to do both full-time. After about a year and a half of that, I moved to studying part-time."

Taking exams while playing overseas

The biggest challenge, like all students, was around exam time. Often the team was overseas playing at an Olympic or World Cup qualifier.

"Our major tournament for the year would often be at the same time as mid-year exams, meaning I would have to do my exams in a hotel room. I remember this one tournament in Barcelona where I only ever saw the hockey turf and the inside of my hotel room."

Pippa, who played 158 times for the Black Sticks, says she has played just three games of hockey since she retired last year.

"While I don't play anymore, I do go to the gym regularly and I'm also competing in a six-hour adventure race soon. I've done a few of those events. I still like to keep fit but it's really nice to have weekends free again and be able to go away and see friends and family," she says.

Pippa Hayward doesn't come from a bloodline of lawyers. There are no other lawyers in her family circle and at the time the decision to study law wasn't something she had

▲ Pippa Hayward at the World League tournament in 2015 against Japan.

thought too deeply about. It was a practical decision. Her friends were going to study law and she thought that it would be a degree that could be useful for a range of careers.

"There were times when I questioned why I was doing it (law). I saw it as a degree that would lead to a lot of work opportunities. People would tell me that they had done a law degree, and while some of them were not practising law, they had gone into alternative careers, using that degree and were enjoying it," she says.

Variety of work

Pippa is a member of the New Zealand Law Society Auckland Young Lawyers Committee and was recently appointed to the New Zealand Sports Tribunal. It's likely she will be able to practise sports law while involved in the Tribunal.

There's not really a typical day at Meredith Connell and that's part of the attraction of working there.

"One day I might be in court, the next day I might be writing submissions and another day I might be meeting with a complainant. I have a pretty remarkable variety of work," she says.

The majority of her workload is criminal advisory and prosecution work: 20% charges prosecuted by the Crown and the remainder coming from regulatory prosecution, for example prosecutions under the Companies Act, New Zealand Customs Service and the Department of Conservation. She also does work for the Department of Corrections, specifically whether extra conditions need to be put in place when a person is released from prison.

Lawyer retention she says would be one of the biggest issues facing the legal profession.

"Keeping young people in the profession. There's a big focus on work/life balance and it can be quite difficult at times for lawyers. Mental health would be another big issue. I dealt with anxiety problems when I was playing hockey. It's really important to talk about it and put plans in place to manage issues so that you can move forward. Lawyers can be very self-critical and always expect even more than the best from themselves. We put a lot of unnecessary pressure on ourselves," she says.

Pippa Hayward hasn't thought about where she might be in her career in 10 years' time.

"I'm ambitious and do have goals when it comes to my legal career. Mostly I want to continue to live by the values that are important to me. That is doing the right thing and making sure that I am giving something back to society. I want to make sure that I enjoy my work but also push and challenge myself," she says. ■

Legal Accounting Bureau Ltd
We'll keep you balanced

Legal Accounting Bureau provides comprehensive, accurate, efficient and timely management of solicitors' trust accounts.

Outsource the management of your firm's trust account. Either come to us or we can come to you remotely.

- Save time and money
- Always know your trust account is balanced and your month end certificates are filed on time
- Our service is completely secure and confidential
- Trusted professionals with over 20 years' experience
- 72 law firms currently use our services

Contact us now:

Kathy Kell
kathy@accountingbureau.co.nz
Ph 09 444 1044
Fax 09 929 3203
www.accountingbureau.co.nz

Powered by juniorPartner.
Practice Management software you can trust.

PRACTISING WELL
TALKING ABOUT MENTAL HEALTH

Rapua te ara tika mōu ake - seek the pathway that is right for you

BY **ALICE ANDERSON**

I CONTACTED SARAH TAYLOR BECAUSE I AM an avid reader of the *Talking about mental health* series. I am a relatively fresh wahine Māori rōia, in my third year of practising. I have, however, seen quite a lot in my time. I have seen the devastation that the law can bring, both to those within it, and those seeking (or being forced) to rely on it. While many of these particular experiences are not my stories to tell, they have certainly coloured my view of the world and how I choose to practise.

I have also experienced many positive aspects of the law. I have a village of support that I have been able to share experiences with, celebrate with, and call on in times of need. I have been exposed to interesting and challenging legal work that has brought with it some losses but also great successes.

As Sarah and I discussed the possibility of me contributing to this series, I started to question myself – what value could I bring to this conversation? I had to think really hard about this. The impacts of poor mental health on Māori are controversial and there is a lot of kōrero, whakaaro and mahi being shared in this space.

Ultimately, I decided that the only thing I could truly and honestly bring to the table is my own perspective. So what follows is just from me. People may not like it or agree with it. Hei aha, kei te pai.

Balancing law and tikanga

Early into my studies at the University of Otago I realised that I would have a complex relationship with the law.

On one hand, I loved the adversarial nature of the law that created opportunity for change and could be used to help others. On the other hand, I realised the legal system was one that had oppressed our people and stripped them of their whenua and identity for generations.

Realising this made me consider the impacts of colonisation on our whānau, which led me to enrol in a Bachelor of Arts majoring in Indigenous Development. The university lecture theatres soon turned from a competitive learning environment among eager law students into whānau-based wānanga with friends who were sharing the journey through te ao Māori.

Through the guidance of my tuakana, I was able to explore who I was as Māori, and start to shed the hurt my whānau had carried for generations as we undertook the journey into our whakapapa. This journey is a lifelong one. However, balancing my learning of law with my learning of tikanga Māori gave me my foundational ethos that I have carried through into my practice.

Perhaps the pivotal moment came to me in my final year of study. I had the privilege to share a room and listen to Matua Moana Jackson speak. He asked us all: "are you going to be a lawyer who happens to be Māori, or a Māori who happens to be a lawyer?"

And it is that simple proposition that I return to in the darker days to remind myself of who I am.

A Māori employment lawyer

I have predominantly practised in employment law from the day I stepped foot into my first legal job in Invercargill. I had the arguably rare experience of learning from rangatira who trusted me, valued my opinion and genuinely wanted me to be the best lawyer possible. I attribute any successes I may have to those who guided me from the outset and allowed me to be unapologetically myself.

There appear to be only a small number of Māori lawyers

▲ Attendees of Te Hunga Rōia Māori o Aotearoa hui ā tau in August this year in Te Whanganui-ā-Tara. The theme of the hui was inspired by the whakataukī, Ānei tātou nā ko te pō; anā tatou he rā ki tua: Here we are in the night, a new day is yet to come.

practising in the employment space but those I have met are epic. I consider myself lucky to keep such talented company in this space. We have similar goals of implementing tikanga-based values into workplaces, employment relationships, and, importantly, dispute resolution.

Some of my most memorable moments arise from having the freedom to act in accordance with my tikanga and that of my clients when resolving a dispute. I hope to see the implementation of tikanga-based values and te reo Māori into more workplaces across Aotearoa, with studies now confirming it improves workplace wellness.

How can we truly pursue rangatiratanga in the current climate of the legal profession?

I don't purport to have all the answers. Truth be told, I don't even think I can fully articulate all the questions.

The concepts of employment law mirror the principles of Te Tiriti o Waitangi – at its highest level, partnership, participation, consultation, and active protection. Despite this, what I often see is Māori who are disempowered in their employment and ultimately their search for rangatiratanga.

The same can be said for Māori practising law. I don't need to reiterate the findings of the Dame Margaret Bazley Report or the 2018 Legal Workplace Survey, but they clearly indicated that many Māori are suffering in the profession and their workplaces. There are a multitude of reasons why this may be.

One of the reasons I think that Māori struggle in today's legal climate, and particularly in private practice, is due to the inherent disconnect between tikanga and the law and ultimately the flow-on effect that has into our workplaces. This disconnect can be detrimental to our holistic wellbeing as individuals and as a collective.

Mental health in the workplace is a pressing topic on the horizon in employment law. The judiciary are currently tasked with setting the standards and expectations of employers where their employee(s) are suffering from poor mental health.

It is said that the mental health of many Māori has suffered as a direct result of colonisation, and to reclaim mental wellbeing for Māori will require reconnection to land, culture, whakapapa and history. This leads me to the concept of Te Whare Tapa Whā, a Māori model of wellbeing developed by Professor Sir Mason Durie in the 1980s. It resonates with me and I have attempted to implement it to seek balance and stability in my practice and life.

In its simplest form, Te Whare Tapa Whā is a model for understanding Māori health. The symbol of the wharenui contains four strong foundations and sides, which illustrate the four dimensions of Māori wellbeing:

- Taha Whānau (social wellbeing),
- Taha Tinana (physical wellbeing),
- Taha Hinengaro (mental wellbeing),
- Taha Wairua (spiritual wellbeing).

Should one of the dimensions (or walls of the wharenui) be missing or in some way damaged, a person or collective may become unbalanced or unwell. When I am

> **I had the privilege to share a room and listen to Matua Moana Jackson speak. He asked us all: "are you going to be a lawyer who happens to be Māori, or a Māori who happens to be a lawyer?" And it is that simple proposition that I return to in the darker days to remind myself of who I am**

having a tough day at mahi, or feeling a "bit off" I look to the wharenui, assess my walls and ask myself what is missing.

Whakaaro Māori in the workplace

This somewhat simple, yet intrinsically complex, model of Te Whare Tapa Whā leads me to the importance of whakaaro Māori for the Māori lawyer and the incorporation of that into our workplaces to improve our holistic wellbeing. Due to the disconnect between tikanga and the law and the flow on effect this can have, we must identify what it means to us to be a Māori lawyer in order to find harmony in our mahi but, more importantly, in ourselves.

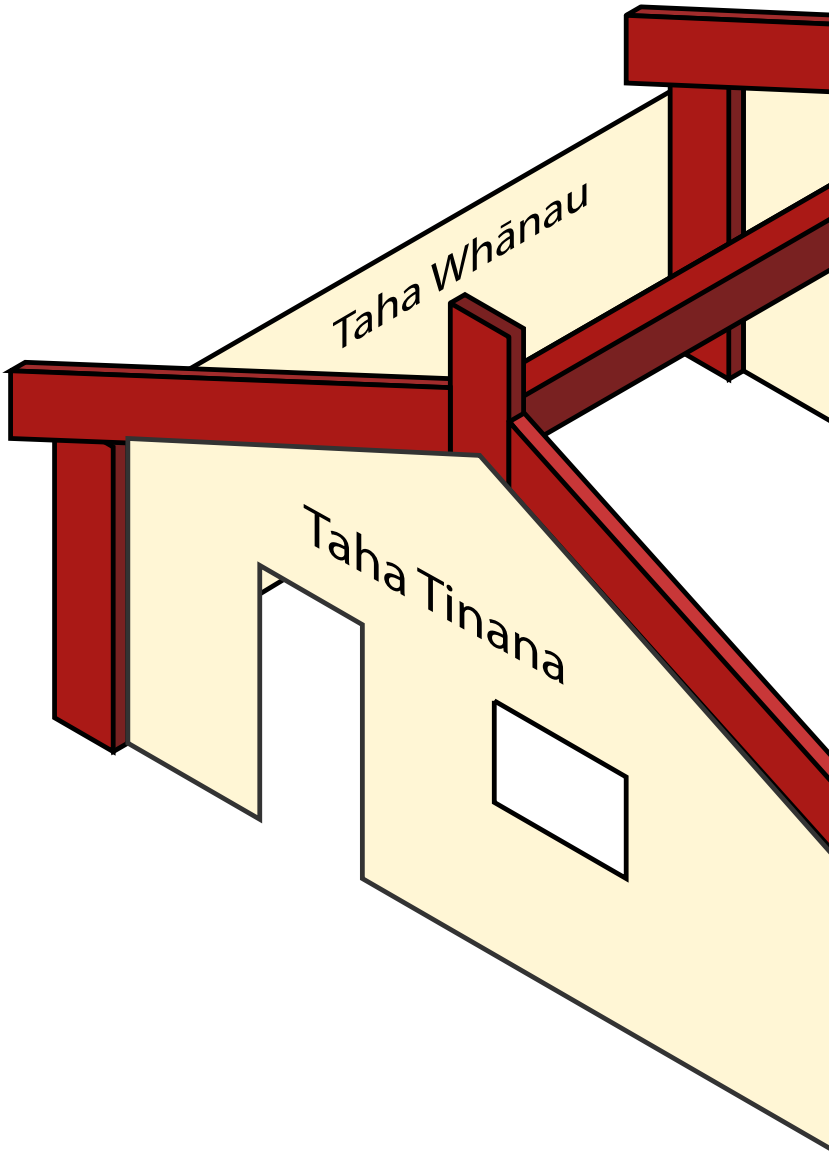
This overarching kaupapa of determining what kind of lawyer you want to be is relevant to any individual who is determining their bottom line in their workplaces. I believe having this clarity can help us look after our mental wellbeing and the overall health of our wharenui.

I find the following whakaaro useful to return to as it helps to keep me grounded.

Follow your passion

We can often be hard on ourselves if we are not working in areas that may impact on Māori in an "obvious" way (for example Waitangi Tribunal, criminal law, whenua Māori). We have amazing Māori rangatira (the list of my "idols" would be way too long to include) who are leading change and improvement for our people in these areas.

I draw my inspiration to practise employment law from Justice Joseph Williams, the first Māori Supreme Court Justice. In his Harkness Henry Memorial lecture "An Historical Attempt to Map the Māori Dimension in Modern New Zealand Law" Justice Williams looks at three stages of law in New Zealand. He considers that we are currently in the third law of Aotearoa which "proceeds on the basis that tikanga Māori is not foreign and separate but rather integrated and mainstream", but he acknowledges that we still have work to do. If you have not read this lecture – you should.



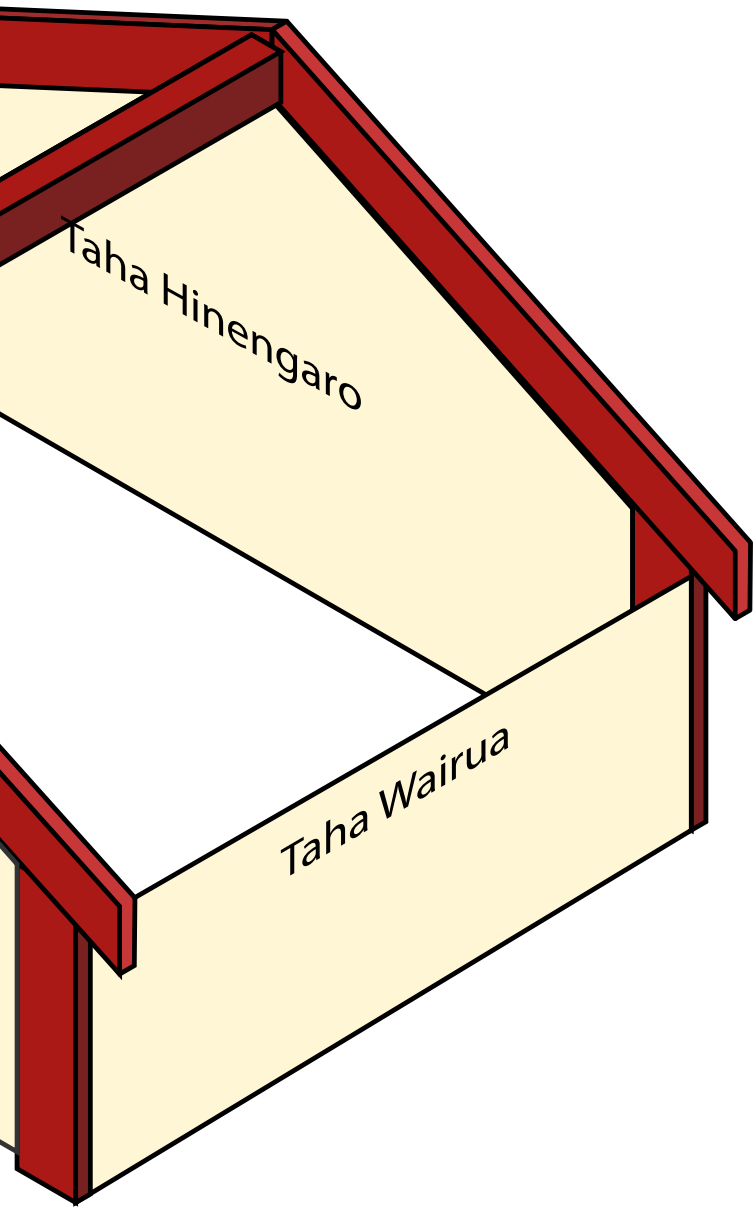
We need a Māori voice in all facets of the law; it affects our people and we each have a role to play. Wherever your passion may lie – whether it be employment law, intellectual property, whenua Māori or sports law – kia kaha, every single space is a "treaty-space" and is just as important as the next.

Hold fast to your identity

Ask yourself the big question: *are you a lawyer who happens to be Māori, or a Māori who happens to be a lawyer?*

Kia mau ki tō Māoritanga and stand up for what you believe in. Your approach to any issue that may arise in a workplace will be key to any resolution. Stay respectful and solutions-focused. After all, you cannot control what other people do, you can only choose how you react (and you'll feel much better for staying true to yourself).

Through following your own passion, you will become empowered to be unapologetically yourself. You do not have to change your values or foundational ethos in order to work in the law. In fact, it is these things that will bring you the greatest rewards. Find someone to work for who totally accepts that and supports it – they are out there.



Evan Mason

Don't wait for the change, be the change

We can't wait for others to make things happen; we need to be the drivers of the change that we want to see.

Encourage and educate others on your ethos and tikanga when you want to (and only when you want to – you will know when that is). Call out racism when you see it. Encourage your workplace to engage specialists to assist their workplace development, rather than call on you as their Māori employee for all of their Māori needs. Look to your wharenui and ask if you are looking after every dimension of your wellbeing.

There will always be tough days, so make sure you have your village of support around you. Ask for help, and listen to those who ask the same of you. I am so lucky to have mine filled with my whānau from home, university, workplaces, employment spaces and of course, Te Hunga Rōia Māori o Aotearoa. Look to your whakapapa in times of need and draw inspiration from those around you; through this you will see that you are never alone.

We need a Māori voice in all facets of the law; it affects our people and we each have a role to play. Wherever your passion may lie... kia kaha, every single space is a "treaty-space" and is just as important as the next

Conclusion

My whakaaro isn't new; it is drawn from our tīpuna who have come before me. It is drawn from inspirational rangatira in the profession who have shared their whakaaro and created a safe space for this kōrero. It is drawn from my own experiences which have helped to colour my perspective.

Balancing tikanga and the law as we know it will continue to be an ongoing battle for Māori and we may never find full satisfaction or harmony in the system. However, I have realised that happiness is a journey rather than a destination, and for me I have found peace in finding my voice and role to play in the system in our search for tino rangatiratanga.

Don't let being a lawyer define you, rather, let who you are define the kind of lawyer you want to be. Staying connected to my whakapapa and te ao Māori helps me to ensure the walls of my wharenui of wellbeing are balanced, and as part of that I am able to look after my mental health; just because you can't see it, doesn't mean it doesn't matter. ■

Alice Anderson, Ngāi Tahu, grew up in Winton, near Invercargill. She studied at the University of Otago and since graduating has worked in firms in Invercargill and Hamilton. Alice has recently relocated to Wellington to continue her legal journey.

Sarah Taylor is the co-ordinator of this series, a senior lawyer, and the Director of Client Solutions at LOD NZ, a law firm focused on the success and wellbeing of lawyers.

If you'd like to contribute to this series, please contact Sarah *sarah.taylor@lodlaw.com*

UPDATE
ACCIDENT COMPENSATION

ACC and the Woodhouse Principles: administrative efficiency

BY **DON RENNIE**

The foundation for the current ACC legislation is found in the recommendations of the 1967 Woodhouse Royal Commission Report "Compensation for Personal Injury in New Zealand" which proposed the abolition of the common law right to sue for damages for personal injury caused by negligence or a breach of statutory duty, and its replacement with a statutory system based on five fundamental principles: community responsibility, comprehensive entitlement, complete rehabilitation, real compensation, and administrative efficiency.

This is the fifth and final article in a series by Don Rennie that has discussed each of these principles and the extent to which they are embodied in legislation and in its administration by the ACC. Don Rennie is widely published in the area of accident compensation and personal injury and has been an important commentator and participant since the establishment of ACC. He was a special consultant to the three commissioners who set up the ACC, established by the 1972 legislation. He has been a member of the Law Society's Accident Compensation Committee since its establishment in 1990 and was convenor from 2002 until he stepped down earlier this year. While the views expressed in this article are those of Mr Rennie, and not necessarily those of the Law Society, the New Zealand Law Society acknowledges the outstanding contribution he has made to the legal profession and other participants in the ACC system.

The other articles in this series were published in LawTalk *917 (May 2018),* LawTalk *919 (July 2018),* LawTalk *920 (August 2018) and* LawTalk *926 (March 2019).*

The fifth principle in the Woodhouse Report relates to administrative efficiency.

Paragraph 62 of the report says that administrative efficiency needs no elaboration because it speaks for itself in terms that are clear enough. It says that administrative efficiency looks to: "... evenness and method in every aspect of assessment, adjudication and administration. The collection of funds and their distributions as benefits should be handled speedily, consistently, economically and without contention."

In **paragraph 495**, Woodhouse envisaged that the scheme would be administered by an **independent authority** which had the following six elements in its structure:

1. Recognition that the scheme involved a partial merger with some aspects of the social welfare system;
2. Administration would be by an independent authority whose whole responsibility would be to ensure the successful application in every respect of the principles and philosophy on which the scheme is based;
3. The independent authority set up by the Government should operate within the general responsibility of the Minister of Social Security and be attached to that department for administrative purposes;
4. The authority should be under the control of a board of three commissioners appointed by the Governor-General in Council for specified terms of at least six years;
5. The board chairman should be a barrister of at least seven years practical experience;
6. Importantly, no member of the board should be appointed as a representative of any particular group in the community.

A recommendation as to the procedure of the **independent authority** is set out in **paragraph 496** which says:

1. The pattern of assessment should be application, inquiry, investigation, and decision at the first level; review by a review committee at the request of the claimant; appeal to a review tribunal (of three members including a doctor and a lawyer) which should hold viva voce hearings at which the claimant could be represented; and a final appeal to the board;
2. On a point of law there should be an appeal to the Supreme (now High) Court;
3. Informal and simple procedure should be the key to all proceedings within the jurisdiction of the board;
4. There should be a discretion to deal with any unusual

circumstances and every decision should be based on the real merits and justice of the case;

5. Under the scheme there should be no reason for strictly limited periods of time within which claims could be made. A limited period of six years could be imposed with a wide discretion to the board to extend the time for any reasonable cause.

The ACC structure and operating systems were not reflected in the original legislation or in any subsequent amendment, yet the Woodhouse recommendations show that many of the problems which have arisen in the law and administration of the scheme were anticipated by the Royal Commission and principled and well reasoned solutions to those problems were proposed.

The 1972 Act

The ACC article in *LawTalk* 917, May 2018 ("ACC and the Woodhouse Principles: community responsibility", pages 22-23), refers to the original 1972 National government's Accident Compensation Act which established a hybrid scheme for personal injury, covering only earners and the victims of motor vehicle accidents but leaving the rest of the community with the common law right to sue for damages. That Act established the independent Accident Compensation Commission, as envisaged by Owen Woodhouse, but the drafting of the legislation mirrored the former insurance-based Workers Compensation Act 1956. For example, the 1972 AC Act contained a levy system based on the Workers Compensation risk-related industrial activity classification system. Woodhouse pointed out in **paragraph 314** that the system of classification based on risk fails to recognise that all industrial activity is interdependent and that 20 years previous to the report (ie, in 1947), it was abandoned by the United Kingdom. The report said there was therefore even more reason to abandon it in New Zealand in favour of a single flat rate levy based on earnings, adopting the first Woodhouse principle of community responsibility. The Workers Compensation Act required employers to be insured with private insurers, against liability for work-related injuries to workers.

In other words, the 1972 Act, among other things, required a levy system to be on a risk-related classification basis, and described a public insurance system for accident victims modelled on private insurance principles. From the beginning, the Act tried to implement the Woodhouse scheme infected with the private insurance legal virus. There has been no indication that a cure has yet been found which will destroy that virus. There is little evidence that either the authors of the original bill or subsequent ACC boards actually read the Woodhouse Report and understood how different thinking needed to be applied to the drafting task. The final 1972 Act was clearly not based on the five Woodhouse principles.

The 1973 Amendment

In the latter part of 1973 when the Kirk Labour government came to power, there was, for an unexplained reason, an urgent desire to implement the recommendations of the Woodhouse Royal Commission. However, instead of taking time to consider

how that could be achieved and what appropriate legislation would look like, it was decided that the existing 1972 Act would merely be amended by extending the cover provisions to include non-earners such as retirees, children and visitors to the country, and abolishing the right to sue to recover damages for personal injury. All the private insurance type of provisions in the 1972 Act were retained, thus further spreading the private insurance virus.

The consequences of the decision not to re-write the legislation have led to numerous problems over the years and are clearly the responsibility of the 1973 Kirk Labour government. The 1972 Act as amended in 1973, came into operation on 1 April 1974 and subsequent amendments, instead of being re-written to implement Woodhouse principles, have continued to spread the private insurance virus.

The 1982 Amendment

The 1972 Act as amended in 1973, stayed in operation with a number of minor machinery amendments until, in 1982 following the recommendations of the Quigley Cabinet Caucus Committee Review, there was a significant amendment by the Robert Muldoon-led National government, that abolished the statutorily appointed independent Commission, and established the Corporation. The ACC became no longer an independent commission established by statute, but a corporation with a politically appointed board of directors who were required to comply with government policy. None of the directors were required to have legal qualifications to administer the important and unique statutory legal system covering all personal injury. Some of the original board members represented interest groups of employers and workers, which Woodhouse specifically said in **paragraph 495(6)** of the report, should be excluded.

The establishment of the Corporation changed the character of the ACC scheme. It became no more than a large insurance operation with systems and procedures akin to any large commercial personal injury insurance company, but with a board required to carry out government policy. The emphasis had moved from a system for providing the statutory rights and entitlements of individual accident victims based on the Woodhouse principles, to a politically influenced insurance system. Levies to fund the scheme were to be on a risk-based insurance user-pays principle, including a provision for a competitive experience rating system. Consequently, the board adopted a philosophy to restrain the costs of the scheme, often at the expense of accident victims' rights. In this way, the private insurance virus became even more firmly established. Interestingly, a provision was made in the 1982 Act to change the funding system from "fully funded" to "pay-as-you-go".

The 1988 Law Commission Report

In 1988 the Law Commission, of which Sir Owen Woodhouse was then President, undertook a review of the ACC scheme and brought down a report which included a number of recommendations. These included extending entitlement to include sickness, abolishing the risk-related classification system for setting levies and replacing it with a single levy rate fixed by Parliament, and abolishing the separate compensation accounts.

None of the Law Commission recommendations have yet been reflected in changes to the legislation.

The 1998 Accident Insurance Act – Privatising ACC

Another disastrous change was made to the legislation in 1998 by a minority Shipley-led National government, when the Accident Insurance Act allowed private insurance companies to compete with the ACC in delivering statutory entitlements to accident victims for work-related injuries. This change moved the scheme even further away from the five basic Woodhouse principles and was absolutely contrary to the fundamental Woodhouse philosophy. The private insurance virus coming from the 1998 Act, resulted in an insurance pandemic affecting the operation of the whole scheme.

Since the introduction of the ACC scheme in 1974, the insurance industry had lost access to a huge pool of premium money previously involved in providing workers compensation and personal injury insurance cover. The 1998 Act allowed private insurers to recover some of that lost premium pool. The Act was long (482 sections and nine Schedules), prolix, complex, convoluted and difficult even for a lawyer to follow. It allowed the setting up of systems for accredited employers to act as agents of the ACC in delivering statutory entitlements to injured workers, and the opportunity for the self-employed and private domestic workers to purchase insurance cover and entitlements which would not otherwise be available to them. It was a true insurance system far removed from what Woodhouse had proposed.

Private insurers and the need for reserve funds

The Shipley-led National government in 1998 appointed Nick Smith as Minister for ACC. In championing the idea of competition between private insurers and ACC, he apparently realised that if the private insurance industry was to become involved, the private insurance principle of "reserves" had to be a requirement for registration as an insurer. The minister persuaded his fellow politicians and the public that: "ACC was running out of money and would become bankrupt because it had no reserves to pay the future cost of current claims, therefore levies would have to increase".

Insurance 101 teaches that if a private insurance company contracts to provide cover for events which create a liability to pay benefits in the future, the insurer must provide reserves against the possibility that it may, for whatever reason, go out of business. If that happens, the pool of reserve funds is available to pay ongoing benefits and costs. The pre-condition for accessing reserves is that the insurer no longer exists or otherwise ceases to provide the contracted benefits. To authorise the inclusion of the requirement for reserves in the 1998 Act, the government-of-the-day must have anticipated that the ACC and/or some insurers who contracted to provide benefits to injured claimants, might go out of business or cease to offer cover at some time in the future.

The Accident Compensation Act 2001

Following the election of a Labour-led coalition government in 1999, the Accident Insurance Amendment Act 2000 and the Accident Insurance (Transitional Provisions) Act 2000 were passed, removing competition from workplace insurance. Among other things, the Acts provided that from 1 July 2000, ACC would provide cover and entitlements for all work-related, as well as all other personal injury. No new accident insurance contracts could be written.

However, the Helen Clark-led Labour coalition government, while removing private insurers' ability to handle claims for cover, apparently overlooked the fact that claims for cover under each of the accounts were required, under the private insurance liability principle, to be "fully funded". That provision embedded in the Act was not changed but continued and was confirmed in the 2010 Amendment Act. The omission has allowed the ACC to continue applying the private insurance principle of proposing levies for government approval, on a fully funded basis for each account. In other words, the levies were set at rates in excess of the amount required to pay the annual cost of claims incurred in each financial year together with the continuing cost of claims incurred in previous years.

That surplus levy was calculated by actuaries and provided a fund for investment, ostensibly to provide for payment of entitlements for long-term serious injury cases payable in the future. Using the reserve fund for that purpose breaches the principle that reserves can only be used if and when the insurer goes out of business or ceases to provide the cover and entitlements under the insurance contract. It assumes the insurer will no longer be in receipt of premiums (levies) to pay claims. In other words, the ACC can only use the reserves to meet the ongoing cost of claims, if and when the ACC scheme ceases to operate.

Since the ACC resumed its functions of providing cover and entitlements for all personal injury, there has been no logical reason for the ACC to calculate levies on a fully funded basis. The provision was confirmed by s 169AA 9(b) as amended by s 17 of the AC Amendment Act 2010. There has been no political will in any government since 1998 to change the full funding private insurance principled provisions in the legislation. It may be because the ACC has accumulated, over the last 20 years, a reserve fund now in excess of $44 billion, making the ACC the biggest investor in the New Zealand stock exchange after the

National Superannuation Fund. The reserve funds are administered by an investment committee in the ACC which can be influenced by government's requirements for investments in public enterprises such as assistance with the purchase of Kiwibank or the construction of a new prison in Auckland.

The ACC has recently been criticised for providing funding for the purchase by the Crown of what have been declared to be illegal firearms. There is little evidence of the principles on which the current ACC's Investment Committee operates except its desire to protect the capital of the investment fund, and equal or exceed the fund's investment profile against the market benchmark. ACC's primary purpose appears to the financial health of the scheme. The make-up of the board emphasises members with financial and business acumen and expertise and not an international reputation in medicine or rehabilitation, which might result in policies of advantage to accident victims.

Reserves unprecedented in the public sector

ACC is a state enterprise and ACC levies are a form of compulsory tax based on earnings of employees, self-employed persons and motor vehicle owners. It is unprecedented in the public sector for a state enterprise to collect compulsory taxes in order to provide a pool of public money for investment to fund the possible future cost of current liabilities. For example, decisions made today in the areas of health, education, justice, defence and many other public areas, are certain to create future liabilities, but relevant ministries or departments do not have the ability to raise additional taxes to provide a pool for investment to cover those future costs. Liabilities, whenever created, must be budgeted for when they fall due and are part of the annual budgeting round procedures of government.

Partly because of the funding system of variable levy rates based on an outdated classification system outlined in the original 1972 ACC Act, and partly due to the adoption of the full funding principle, the ACC now has a massive reserve fund which it says is necessary to pay the cost of serious injury claims which will fall due in the future. The ACC claims that reserves are needed to pay the ever-rising cost of long-term claims, but that reflects the fact that the ACC board has never implemented the five Woodhouse principles which were based on common sense and logic.

With the data available to it over the last 45 years, the ACC should be a world leader in the treatment and rehabilitation of accident victims. Getting an earner back to work and off the system is a private insurance principle, but it does not indicate successful rehabilitation of the whole person as envisaged by Sir Owen Woodhouse. See my article "ACC and the Woodhouse Principles: Complete rehabilitation" in *LawTalk* 920, August 2018, pages 40-42.

Safety, accident prevention and rehabilitation

Woodhouse observed that if there was an active and

successful accident prevention programme in place, and an active and successful rehabilitation programme for accident victims in operation, the number of long-term injury claims would be fewer, thus reducing the cost to the scheme. The variable levy rate system puts a higher cost on levy payers in groups classified as high risk, but does nothing to reduce the severity of long-term injury claims in those groups. Neither would the proposed experience rating system, that allows competition between levy payers in the same classification group, result in lower severity of injuries.

The variable levy rates and the experience rating systems do nothing for safety and accident prevention but merely spread the cost of claims on the insurance "user pays" principle. The system ignores the effect of expenditure arising from the difference between frequency and severity of accidents, applying the Poisson distribution rule. An accident is an unlooked for, unexpected and untoward event but the consequences of an accidental injury is a matter of pure chance. For example, in the safest and best regulated environment a highly-paid executive may trip and fall down stairs. The result might be nothing more than bumps and bruises and the accident may not be reported. On the other hand, the fall may result in severe brain damage and the executive may need constant medical and personal care for life. The cause of the accident may have been carelessness or skylarking but the severity of the injuries and the financial consequences could affect the rate of future levy payable and disqualify the employer from an experience rated bonus. In such a case the outcome of the accident would be a matter of pure chance and have nothing to do with accident prevention or safety. The injury was caused by a random event in an otherwise secure environment and it would be unfair, unreasonable and illogical to penalise the employer through the levy system which could not apply until the following levy year.

Health and Safety at Work Act 2015

The most effective legislation to improve safety and reduce workplace accidents has not related to the ACC levy system, but to the Health and Safety at Work Act 2015. That Act places legal responsibility on a PCBU (person conducting a business or undertaking) to ensure that the workplace is safe. The Act deals with the management of risks and places a duty on the PCBU to eliminate or minimise risks to health and safety so far as reasonably practical. Those duties are not transferable to another person. The PCBU must have regard not only to its own workers, but also to contractors, visitors and the general public who come on to, or may be affected by anything that happens in the workplace. Penalties under that Act can be financially significant and can result in the workplace being shut down. That is obviously a significantly more effective penalty than having to pay a higher tax-deductible levy rate, or being disqualified from earning a bonus, as is the case under ACC legislation.

Fixing ACC – it's putting it right that counts

1. The ACC got off to an unfortunate start with the original 1972 legislation clearly not expressing and implementing any of the five Woodhouse Report recommendations. The hybrid 1972 Act, although it passed into law, could not in practical terms have operated alongside the common law right to sue for damages for personal injury. It mirrored the previous Workers Compensation Act and incorporated private insurance principles in its operation. In particular it incorporated a funding system based on the outdated industrial classification of risks and completely ignored the first Woodhouse principle of community responsibility.
2. The problems with ACC cannot be solved by once again amending the current Act. Continually amending existing legislation and expecting it to provide a different result is illogical. There must be a complete re-write of the legislation clearly incorporating the five Woodhouse principles.
3. An independent body of the kind envisaged in the Woodhouse Report would be answerable to Parliament, and not to the government of the day, for the administration of the unique statutory legal system covering all personal injury. Nor would it be subject to ministerial direction. The legislation establishing the Health and Disability Commissioner is an example of how it would be possible to establish a Commissioner for Victims of Personal Injury occurring in New Zealand.

4. The articles appearing in *LawTalk* issue 917 on community responsibility; issue 919 on comprehensive entitlement; issue 920 on complete rehabilitation; issue 926 on real compensation, together with this article on administrative efficiency, all indicate the failings of the ACC to administer the principles and recommendations of the Woodhouse Royal Commission Report on which the scheme should be based.
5. The ACC can hardly claim that it is merely carrying the will of the government of the day. The **ACC Service Agreement for 2019/20** makes clear the Government expectation that ACC should be able to demonstrate that claimants are able to access what they are entitled to easily and consistently. In that agreement the Government outlined its specific priorities which include to: " ...ensure that ACC functions as a publicly administered and delivered social insurance scheme distinct in character from a private insurance company."
6. The way the ACC operates, has all the hallmarks of a private insurance company in the following respects:
   - It applies insurance practices and procedures by placing the burden on the claimant to prove the injury is covered by the Act and that statutory entitlements apply. This ignores the fact that the ACC statutory cover is comprehensive and the common law rights of accident victims have been abolished. The ACC has the monopoly in decision-making regarding all claims. There is no evidence that the ACC has moved for changes to the legislation to ensure *claimants are able to access what they are entitled to easily and consistently,* as set out in the Service Agreement;
   - It applies a private insurance principle in attempting to "settle" claims by "negotiating" with the claimant either directly or with advisors, completely ignoring the provisions of **s 299 of the AC Act** that prohibits contracting out from the legislation. Any so-called "settlement" which allows the ACC to pay anything less than what the legislation provides, is unlawful and unenforceable. My article in *LawTalk* 916, April 2018 ("Fees for ACC reviews and appeals", page 17) indicates complications which can arise if the ACC acts unlawfully by paying entitlements to persons other than the claimant;
   - As noted above, it follows the private insurance practice of building "reserve funds" to cover future liabilities arising from current claims against the possibility it will go out of business or be unable to continue providing the contracted benefits. It relies on actuaries to calculate levy rates based on the "reserve funds" principle but ignores the fact that the ACC is a state enterprise and levies are a form of compulsory tax. The authority to collect levies is governed by the legislation which requires that funds from each account are to be applied to meet the costs of entitlements, administering the account, audits and assessments and any other expenditure authorised by the Act. It is unprecedented for a state enterprise to build a reserve fund from taxes for investment in a fund to pay the future liabilities arising from current decisions.
7. The Woodhouse report called for the establishment within the organisation of an efficient medical branch under the leadership of an experienced doctor of high quality. That has not happened. In the recent restructure of the medical section, the ACC Board has failed to follow the Woodhouse recommendation.
8. The review and appeal system administered by the ACC is far removed from that recommended by the Woodhouse Royal Commission. **Paragraph 308** of the report suggests that initial decision making, up to review level, should be within the organisation with an appeal to an appeal tribunal comprising three persons including a doctor and a lawyer. On a point of law there should be an appeal to the High Court. **Paragraph 309** suggested that informal procedure should be the key to all proceedings within the jurisdiction of the ACC and that a drift to legalism should be avoided. To use a phrase from a submission to the recent Royal Commission into the banking system in Australia, administrative philosophy may be better described as *delay, deny, litigate.*
9. Because of the way the ACC has been structured, and because of the way it interprets the legislation under which it operates, and with the lack of political and administrative will to put things right, the future of the ACC scheme looks bleak. There has been no White Knight in any recent parliament who would take the necessary action to change the legislation to adopt the Woodhouse principles and ensure they are implemented by ACC management.
10. Speakers at the first three Woodhouse Memorial Lectures – Sir Kenneth Keith (2017), Sir Geoffrey Palmer (2018) and Associate Professor Susan St John (2019) – all referred to the shortcomings of the legislation and its departure from the Woodhouse principles.

Nothing will change until there is political will to improve the rights of all accident victims by implementing the five Woodhouse Report Principles and recognising the logic on which the Royal Commission Report was based. ■

UPDATE
CHARITIES LAW

Charities law needs shakeup, Fellowship winner says

BY **LYNDA HAGEN**

A FIRST-PRINCIPLES REVIEW OF NEW ZEALAND'S CHARITIES law is essential to ensuring many deserving organisations gain – or simply retain – charity status, a Law Foundation-backed researcher says.

Charities expert Sue Barker says more than 10,000 charities have been deregistered since the Charities Act 2005 came into force. She says the very narrow interpretation of eligibility for charity status is making New Zealand an international outlier, and current review plans will not deal with the fundamental problem.

"The Charities Act is a case study in fast law not making good law," Ms Barker says. "We need to step back and ask what we are trying to do with this regime. Currently, we are preventing good charities from doing their work."

Sue Barker's drive to reform charities law has earned her the country's leading legal research award, the 2019 New Zealand Law Foundation International Research Fellowship. First awarded in 2002, this year's Fellowship will be the final award before the Foundation goes into recess next year. The fellowship is worth up to $125,000 annually for research that makes a significant contribution to New Zealand law.

"I'm absolutely honoured to be the 2019 International Research Fellow and very grateful to the Law Foundation for supporting this work," she says.

"Charities are fundamentally important to society – health, education, housing, poverty reduction, closing the wealth gap, protecting the environment, wellbeing, you name it. Yet the charities sector is often overlooked, or treated as an afterthought. It also suffers from a lack of research. What the award says is that charities matter, and that it's worth taking the time to try to get the legal framework right."

Approach to eligibility

Some decisions by the agencies responsible for administering the Charities Act show the stringent approach these bodies are taking to eligibility for charity status. In 2010 they deregistered the Queenstown Lakes Community Housing Trust, a council-supported body that helps residents into affordable housing. The decision, which appeared to overlook important public benefits, led to a review of every social housing provider in the country, in the middle of a housing crisis. The Government changed the law to settle the trust's $6 million tax bill and give community housing providers their own specific tax exemption. But unfortunately this didn't solve the problem, as without registered charitable status many social housing providers cannot access funding.

Another example is Greenpeace – 11 years since first applying, the organisation still does not have a final decision on its application for registration. In the face of catastrophic climate change, is our community well-served by preventing charities from furthering their charitable purposes?

Ms Barker is director of a Wellington law firm specialising in charities law. She says the current review of the Charities Act is a once-in-a-generation opportunity to create a world-leading framework of charities law for New Zealand – one that genuinely facilitates rather than frustrates charitable work. But there are difficulties with the nature, scope and timing of the review.

She is a member of the Government's Core Reference Group for reviewing the Act. Together with Dave Henderson from Trust Democracy and with philanthropic support, she has collaborated with Internal Affairs on 23 consultation meetings around the country.

"It really is important to make the most of this opportunity – it might be decades before there's another chance. The International Research Fellowship will enable me to take a sabbatical for a year to fully review all 363 submissions on the review and spend time in Australia, Canada, the UK and Ireland, to really understand how their regimes are working and lessons for us.

"The aim is to provide an independent perspective on what a world-leading charity law framework might look like. This would feed into the government's current review process, to assist with the development of law reform in this important area," she says. ■

Charities are fundamentally important to society... Yet the charities sector is often overlooked, or treated as an afterthought. It also suffers from a lack of research

Lynda Hagen ✉ *lynda@lawfoundation.org.nz* is Executive Director of the New Zealand Law Foundation.

UPDATE
HEALTH AND SAFETY AT WORK

Payment of a fine takes priority over payments to shareholders and directors

BY **LUCY MOFFITT**

A SUBSTANTIAL INCREASE IN maximum penalties under the Health and Safety at Work Act 2015 has seen companies submitting financial hardship at sentencing and has resulted in many fines, that might otherwise have been imposed, being significantly reduced, or not imposed at all.

Where a company legitimately has very limited financial means at the time of the offending and sentencing, this approach is necessary to give effect to the applicable sections of the Sentencing Act 2002. Sometimes, however, a company's financial circumstances at sentencing may appear to be significantly more dire than they were at the time the offence was committed. In the recent sentencing appeal decision of *YSB Group Ltd v WorkSafe New Zealand* [2019] NZHC 2570, the High Court highlighted the need to be aware of how corporate offenders can present their financial circumstances to appear less able to pay a fine.

Under the Health and Safety in Employment Act 1992 the maximum fine for breach of a strict liability offence was $250,000, and $500,000 in respect of a knowledge offence. Under this legislative regime, submissions of financial incapacity were less common at sentencing. It is perhaps not surprising that when fines increased under the Health and Safety at Work Act 2015, the frequency of financial incapacity being raised at sentencing also increased significantly. The maximum fine under the Health and Safety at Work Act, for a strict liability offence, in respect of a PCBU that is not an individual, is now $1.5 million and for a reckless offence $3 million.

YSB Group Ltd was sentenced in the District Court in respect of an offence of failing to ensure, so far as reasonably practicable, that the health and safety of other persons was not put at risk from work it was undertaking. The offence related to the death of a member of the public who fell from his mobility scooter while attempting to avoid a damaged and uneven section of footpath. The damage had occurred during construction work.

In the District Court, YSB Group was fined $100,000 and ordered to pay a further $100,000 reparation. The fine had been reduced from a starting point of $550,000 to take into account mitigating factors and financial capacity. YSB Group appealed the fine imposed to the High Court. The appeal hearing focused on whether or not the District Court had made sufficient allowance for YSB Group's ability to pay the fine. YSB Group submitted that the fine imposed should have been no more than $15,000. WorkSafe submitted that sizeable payments had been made or were proposed to be made to shareholders and directors of YSB Group since the incident, and that these amounts could have been applied to the payment of a fine. The High Court found that payment of a fine is a higher priority than payments to shareholders and directors of a company.

On reaching this position, the High Court also considered the need to ensure deterrence of corporate offenders (both generally and in the particular case).

The High Court found, at [41] of the decision, that this was: " ... not a case where the company genuinely lacks funds to pay a fine; it is simply a case where there is money to pay the fine imposed, but this will mean shareholders and directors will receive less than they otherwise would have received had the company not offended in the way it did."

The court determined that the fine should not be reduced as it was not manifestly excessive or arrived at through any error on the part of the sentencing judge. The appeal was dismissed.

This decision has provided useful guidance in the sometimes challenging area of sentencing corporate offenders. The decision is likely to result in a reduction in the number of submissions based on financial incapacity at sentencing, where that financial capacity is a result of how the corporate offender has allocated its funds. ■

Auckland barrister Lucy Moffitt
lucy@lucymoffitt.com was previously a senior solicitor with WorkSafe New Zealand.

UPDATE
IMMIGRATION

Temporary work visa changes announced

BY **HASEEB ASHRAF**

On 17 September 2019 Immigration Minister Iain Lees-Galloway announced a shake-up to the temporary work visa policy which would be gradually implemented until 2021.

Mr Lees-Galloway initially proposed a set of reforms to the immigration policy and sought Cabinet's approvals and public submissions between December 2018 and March 2019. These proposals were to be discussed with Cabinet by June 2019. This consultative process included inputs from industry associations, economic development agencies, local government, iwi, trade unions, education providers and other relevant stakeholders.

These changes will impact 26,000 businesses across New Zealand which employ migrant workers and the processes that they need to undergo to recruit them. Currently, there are more than 54,000 workers on temporary work visas.

These changes implement terms of the coalition agreement between the Labour Party and New Zealand First which committed to "ensure work visas issued reflect genuine skill shortages… [and] take serious action on migrant exploitation."

A briefing paper by the minister commenting on the state of affairs in the temporary work visa space last year noted that "piecemeal improvements are not sufficient and we need to reshape the entire model to achieve a system that both puts New Zealanders first and supports businesses with genuine shortages."

In November 2018 we saw a change to employer assisted work visas and a tightening of post study work rights which indicated a change from employee to a more employer focused system.

With the changes announced in September 2019, Immigration New Zealand is wanting to, firstly, make our work visa system more employer focused to counter migrant exploitation and introduce more checks, balances and obligations on employers hiring migrant workers to ensure that they are complying with minimum employment standards and following good employment practice.

Secondly, there is a push for employers to employ more New Zealand workers in some industries and incentivise them to recruit more New Zealanders by improving pay and employment conditions. This is in line with a recent report of the Productivity Commission which identifies a need for improvement in pay and work conditions as well as investment in capital and technology in many sectors.

In a consultation discussion paper from MBIE, the following issues and concerns were raised:

- An unresponsive labour market which does not respond to skill and regional labour shortages. This affects the ability to affect labour market change.
- The growth in migration of lower skilled migrants who are displacing New Zealanders in sectors which usually hire many welfare beneficiaries, with there being too few incentives for employers and industry to employ New Zealanders.
- Issues of compliance with too few checks and balances on employers hiring migrant workers and that employers with poor track records are able to access migrant labour.
- The various visa options provide for complexity which also results in difficulty for employers and applicants to follow the system and results in operational inefficiency as well as delays.

In responding to the above concerns, Mr Lees-Galloway has, within his announcement, referred to the introduction of one employer assisted work visa to replace the six current categories and for this visa to be processed through a new gateway framework, which includes:

- The *employer gate* which assesses whether the employers are accredited to employ migrant workers.
- The *job gate* in which a labour market assessment is conducted to make sure that no New Zealanders are available to meet the employer's needs.
- The *migrant gate* which vets the applicant's health and character as well as their capability.

Changes to be gradually implemented

The main changes which are to be gradually implemented until 2021 include:

- A new temporary work visa to replace the existing six with an employer-led approach as opposed to existing employee/applicant-led process.
- Remuneration will be used to assess the skill level

of occupations rather than the Australian and New Zealand Standard Classification of Occupations (ANZSCO).
- Employer Accreditation (separate from current accreditation in place) to become mandatory for all employers wishing to employ migrant workers by 2021.
- Changes to the Talent (Accredited Employer) Work Visa including a change to the remuneration rate from $55,000 to $79,560 as well as limiting the period of accreditation to 24 months.
- A general strengthening of the labour market test for low-skilled occupations. There will be a focus on filling labour shortages in rural and regional areas which will entail three-year work visas being issued in low-skilled occupations within these areas where there is a genuine labour shortage.
- The negotiation of sector agreements between Immigration New Zealand and industries which heavily rely on migrant labour to ensure that the pay and work conditions are attractive to New Zealanders and address workforce needs more effectively.
- Reinstating the ability of low-skilled workers to support their partners and children as dependents on visitor or student visas. If partners are wanting to work, they must apply for a work visa on their own right.
- Better alignment of Government institutions, MSD, Immigration NZ and the education sector – to ensure that skills and labour shortages are filled by New Zealanders and that the employment needs of employers, young people and other job seekers are met.

Throughout the consultative process reference was made the need for the labour market to be more responsive to sectoral and regional needs. For example, as in Scotland, where Regional Skills Assessments (RSAs) and Skills Investment Plans (SIPs) are both jointly used as tools to assess skill shortages in key sectors as well as various geographical areas of Scotland and data on which to base future investment in skills.

New version of ANZSCO released

ANZSCO is a system which classifies occupations based on skill level, the qualifications, licensing, registration and/or work experience that individuals require to be suitably qualified for a list of classified occupations. Each occupation has a code as well as a description of the tasks in which the individual working in that job should be engaging in.

It is used by practitioners and by Immigration NZ to assess the currency and tenure of the work visa to be issued to applicants.

The minister, in a recent briefing paper, noted anomalies in some ANZSCO classifications for some occupations, and the consequences of this on the immigration system is seen as a major challenge to the "fairness and coherence of our system."

Currently, an example of contention is how managerial roles within the retail sector and in particular the food and hospitality industry are being relegated to supervisory level roles and being assessed as low-skilled as opposed to mid-skill level managerial positions.

Individuals employed in an occupation with a mid-skilled (level 1-3) classification are eligible for a three-year work visa option. Further they can support their partner and children as dependents and are not subject to an offshore stand down period. These jobs are being reclassified as low-skilled occupations (level 4-5) meaning that they are now only eligible for one-year work visas, are subject to a stand down period in that they must leave New Zealand for a period of 12 months after three consecutive visas and are unable to support their partners as dependents unless they had done this prior to August 2017.

On 29 October 2019, Immigration NZ circulated an amendment circular which noted that 44 occupations within appendix 7 which are otherwise classified as Level 4-5 (low-skilled) would be treated as an exception in Essential Skills Work Visa and Skilled Migrant Category instructions on the basis that applicants are paid at the New Zealand median income. On this basis, the occupation will be upgraded to as if it is skill level 1-3. This is applicable from 29 October 2019.

Immigration will continue to use ANZSCO (v1.2) up until mid-2020 after which v1.3 will be used for the Skilled Migrant Category only and the classification will be entirely scrapped for temporary work visas.

This decision is in line with Immigration NZ's approach to fill sectors of the economy which are experiencing acute labour shortages such as residential and aged care.

For individuals holding a work visa the skill level of their job remains the same and the changes are not to be considered as retrospective.

This has opened the pathway to residency for many individuals previously assessed in lower skilled occupations who would not otherwise have been able to apply for residence. This directly affects essential skills work visa applicants as well as residence applicants in the Skilled Migrant Category who are now able to claim skilled work experience as well as an offer of skilled employment. Individuals on an essential skills work visa who fall under these occupations, will be able to support their partner and dependent children and will not have to leave New Zealand for the stand down period after three years.

Where to from here – implications for practice

Immigration law practitioners including the author, attended an ADLS Incorporated dinner with the Minister of Immigration on 8 June 2019 at the Northern Club in Auckland. Mr Lees-Galloway explained the approach that the Government was taking on employer assisted visa changes announced in November last year as well as the most recent and stated that they were looking for a more pragmatic immigration system which reacts to the needs of our economy and more specifically the labour market.

This article does not conclusively cover how the above policy changes in the temporary work visa space will be implemented but rather provides an indication of how policy is going to be shaped within the next three years. Further clarifications are required to understand the specifics of how proposed policy changes will be implemented. This is a consultative and gradual process which we expect to come to fruition by the end of 2021.

Overall, what we can see is that immigration policy is alive and kicking and that it is yet to be seen how the above changes are implemented, especially the process of accreditation which all employers will have to undergo by 2021 and how the remuneration-based skill level assessment will play out for temporary work visas. ■

Haseeb Ashraf ✉ *haseeb@legalassociates.co.nz* is a specialist immigration lawyer practising at Auckland based law firm Legal Associates.

UPDATE
RELATIONSHIP PROPERTY

The New Zealand Relationship Property Survey 2019

BY **JAMIE DOBSON**

Business advisory firm Grant Thornton and the Law Society's Family Law Section have released the report on their second survey of the trends and issues impacting on the practice of relationship property law.

AN INITIAL SURVEY WAS CONDUCTED IN 2017. The 2019 survey builds on some observations of that survey, recording trends in family law practice. Some key findings based on recent events such as the Supreme Court's decision *Scott v Williams* [2017] NZSC 185, [2018] 1 NZLR 507 in terms of economic disparity and the Law Commission's review of the Property (Relationships) Act 1976 broaden the survey's scope.

Family lawyers were invited to participate and 253 completed the 2019 survey, spread across New Zealand. Of the respondents, 66% of were women, outnumbering men about two to one. Female participation is likely to increase, presenting a question to the profession as to how men might be encouraged to practise in family law.

Key findings of the survey show that relationship property continues to be some of the most significant legal work for New Zealanders when it comes to their assets. Family lawyers are now advising on even higher value relationship property pools across New Zealand.

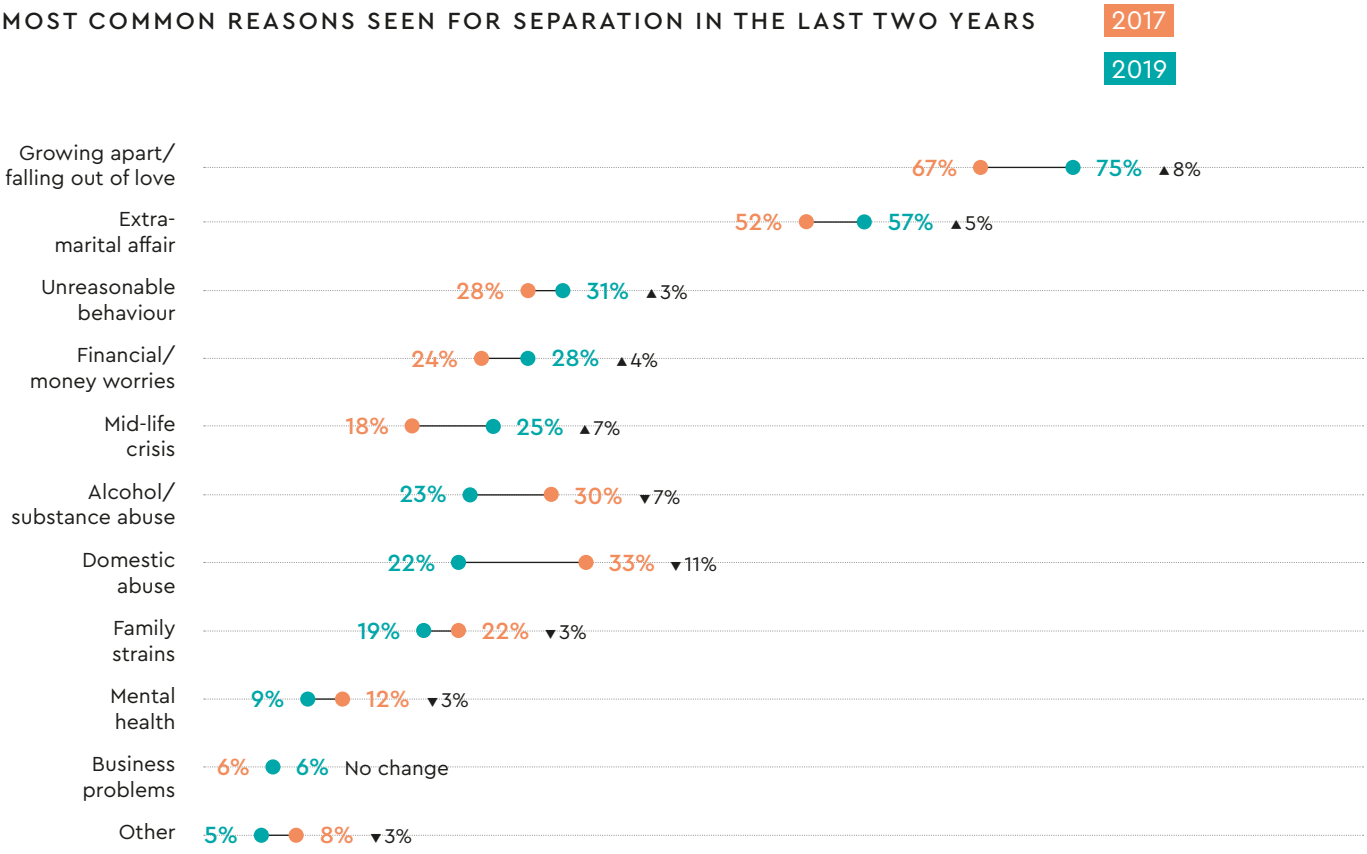
	% of survey respondents		% of FLS members	% of NZ population
Region	**2017**	**2019**	**2019**	**2019**
Northland	3%	4%	4%	4%
Auckland	30%	37%	31%	35%
Waikato	8%	7%	7%	9%
Bay of Plenty	7%	6%	5%	6%
Central North Island, Taranaki & Whanganui	4%	3%	7%	5%
Gisborne & Hawke's Bay	4%	5%	5%	4%
Manawatu, Wairarapa & Horowhenua	4%	3%	5%	4%
Wellington	10%	15%	12%	11%
West Coast, Nelson & Marlborough	9%	4%	4%	4%
Canterbury	14%	11%	13%	13%
Otago & Southland	7%	5%	7%	6%

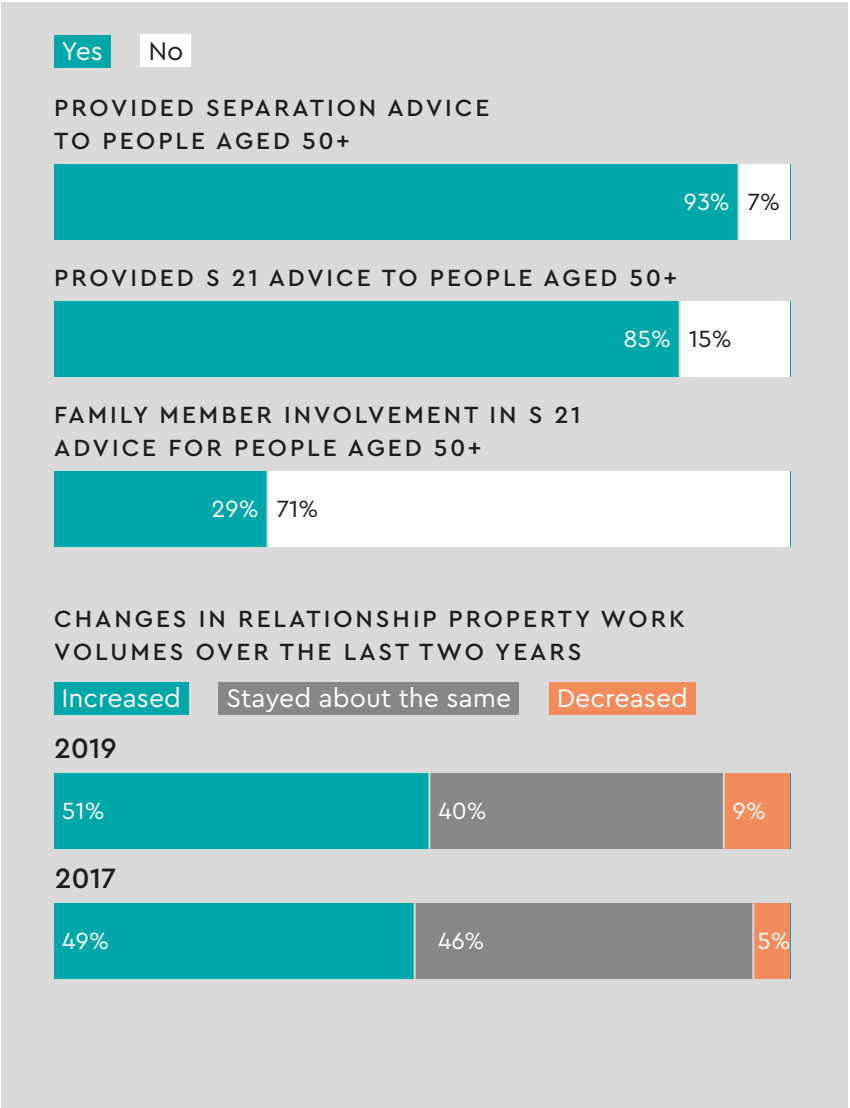
Family lawyers' clients

People in their 40s, who have been together for 10 to 19 years, and have a net worth of $500,000 to $1 million, remain the clients who family lawyers see the most, making this the 'danger zone' for relationships. This has not changed since 2017, with growing apart/falling out of love and extra-marital affairs still the main cause for separations. A total of 59% of family lawyers acted for people in their 40s, and two-thirds advise on relationships between 10 and 19 years.

A continued rise was noted in 'silver splitters' – 93% of lawyers provided advice to clients aged over 50. Furthermore, of the 85% of respondents who said they provided advice to this age group on section 21 contracting out ('pre-nup') agreements, nearly a third said there were other family members involved in seeking that advice, indicating the likelihood of adult children from previous relationships. A family member's involvement in this type of advice is likely to add professional complexity for family lawyers, raising issues of independence, client obligations and undue pressure.

MOST COMMON REASONS SEEN FOR SEPARATION IN THE LAST TWO YEARS





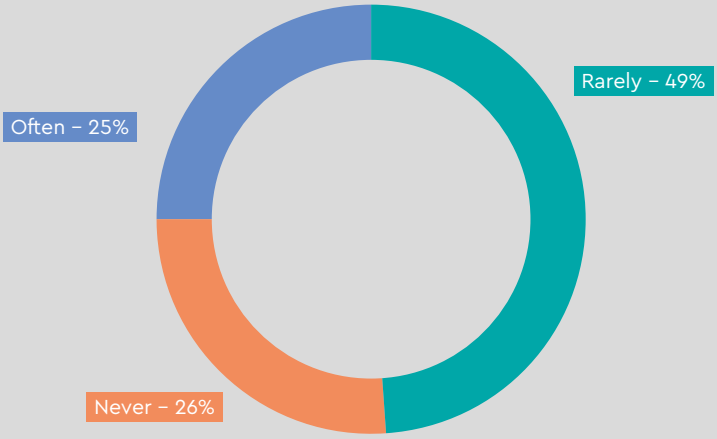
Across the board, family lawyers underestimated their workloads in providing relationship property advice in the last two years. In 2017, almost all respondents predicted their relationship property workload would decrease or stay the same. In 2019, 51% reported an increase in relationship property work over the past two years.

Despite this trend of an increase in work related to separation and relationship property, only a quarter of respondents regularly refer clients to counselling. These findings were surprising given the context in which advice is provided. Counselling can be helpful to those going through a stressful time and assists in resolving minor issues which may not require a lawyer. This finding may reflect that free counselling sessions are no longer available through the Family Court, making counselling a cost many people are reluctant to bear when they feel that their relationship is beyond repair.

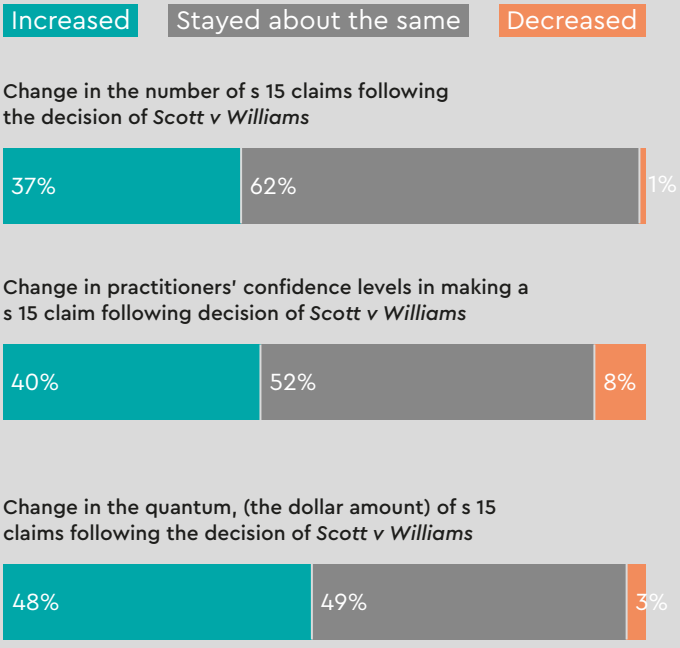
Key issues facing providing legal advice in relationship property

The Supreme Court decision in *Scott v Williams* [2017] NZSC 185, [2018] 1 NZLR 507 was an important moment in New

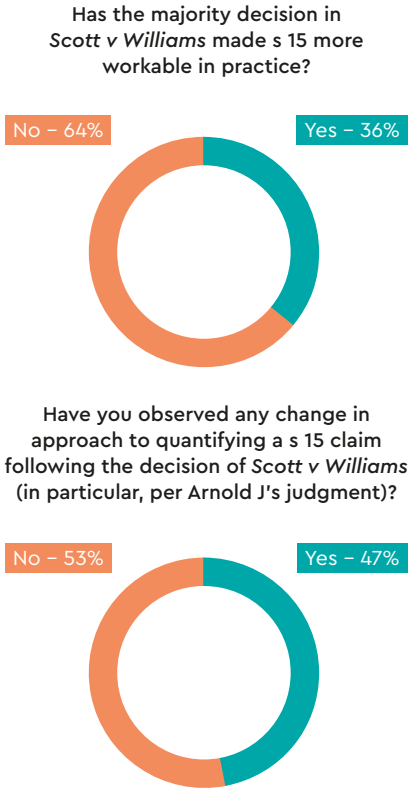
REFERRED RELATIONSHIP PROPERTY CLIENTS TO COUNSELLING



VIEWS ON S 15 CLAIMS FOLLOWING SCOTT V WILLIAMS



S 15 IN PRACTICE FOLLOWING *SCOTT V WILLIAMS*



Zealand family law jurisprudence that highlighted the issue of economic disparity in relationship property cases.

The case relates to s 15 of the Property (Relationships) Act, which allows for one party to be compensated if the living standards of the other party are likely to be significantly higher due to the 'division of functions' within the relationship. A majority decision of the Supreme Court, including Elias CJ, held that where there has a been a relevant division of roles, any disparity will be assumed to have resulted from that division. Much of this was consistent with the initial decision by the Family Court in 2009.

Nearly two-thirds of family lawyers thought the majority decision in *Scott v Williams* had not made s 15 claims more workable in practice. Although 37% did not know if it had – suggesting they had not advised clients on a s 15 claim in the last two years.

While the decision indicates a materially different approach to previous s 15 decisions, around a third of respondents either agreed, disagreed or did not know if it had

led to some change in the approach to how economic disparity is calculated. What is more certain, however, is the increase in claims, dollar amounts of awards, and (perhaps) resultant practitioner confidence in making a s 15 claim. Of those who made observations on claims and dollar amounts (excluding the "don't knows"), notes of decrease were scarce compared to those who noted increases in s 15 claims in their work and awards being larger in value.

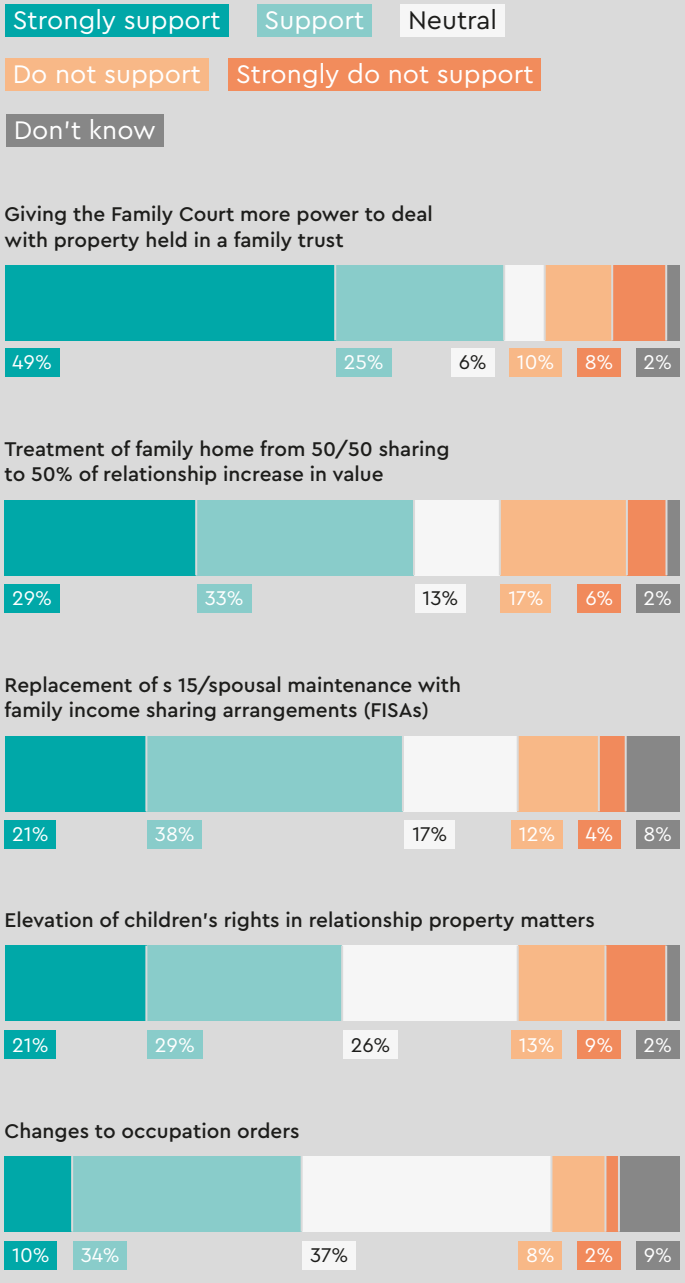
The finding that 40% of family lawyers are reportedly more confident in filing a s 15 claim on economic disparity might be expected, as the approach under *Scott v Williams* appears more likely to lead to a higher income differential than the approach under *M v B* [2006] 3 NZLR 660 (CA), and so a higher award. It will be encouraging to those who believe historic awards have been too low.

Section 15 matters were addressed in the Law Commission's report on the Property Relationships Act 1976. Of the commission's proposals, replacement of s 15 with family income sharing arrangements (FISAs) was recommended, which would require partners to share their combined income for a limited period after separation. FISAs would be subject to conditions such as the separating parties having children, and having been together for 10 years or more, or having built or sacrificed careers because of the relationship. A total of 59% of respondents were in favour of this arrangement.

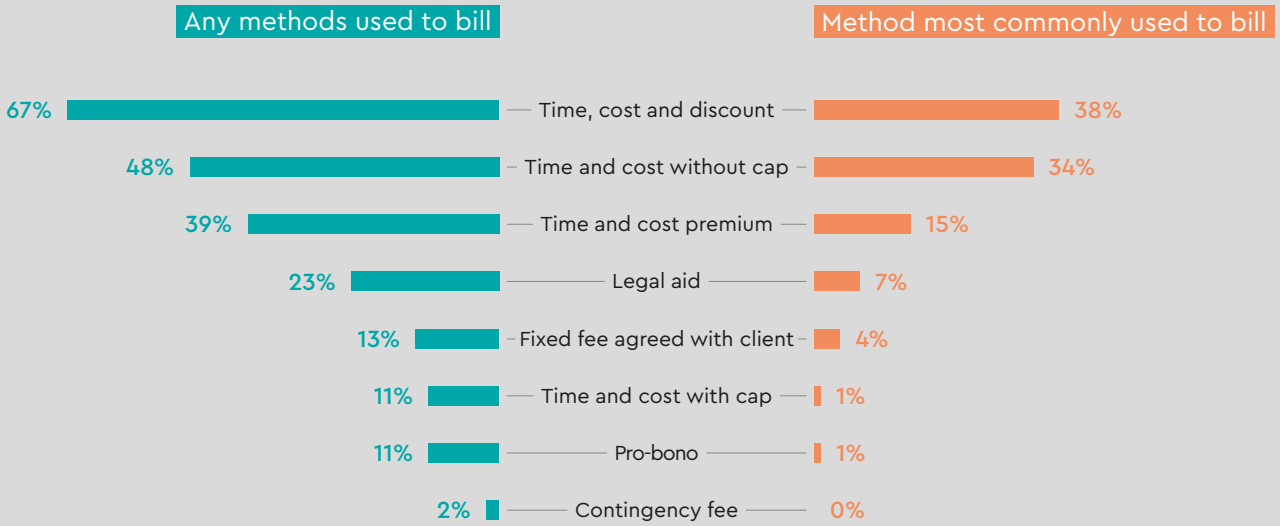
Strongest support was shown by lawyers for the Law Commission's proposal to enable the Family Court to have more power to deal with property held in a trust. Almost three-quarters of respondents either supported or strongly supported this proposed change. A possible reason for this support is that the change could address the concerns of 38% of practitioners who think uncertainty exists at the interface of trust law and relationship property law.

Changing treatment of the family home in separations from a 50/50 split was also supported. Rather than dividing the full value of the home down the middle, the Law Commission suggested that if one partner owned the home before the relationship, only the property's increase in value during the relationship should be shared.

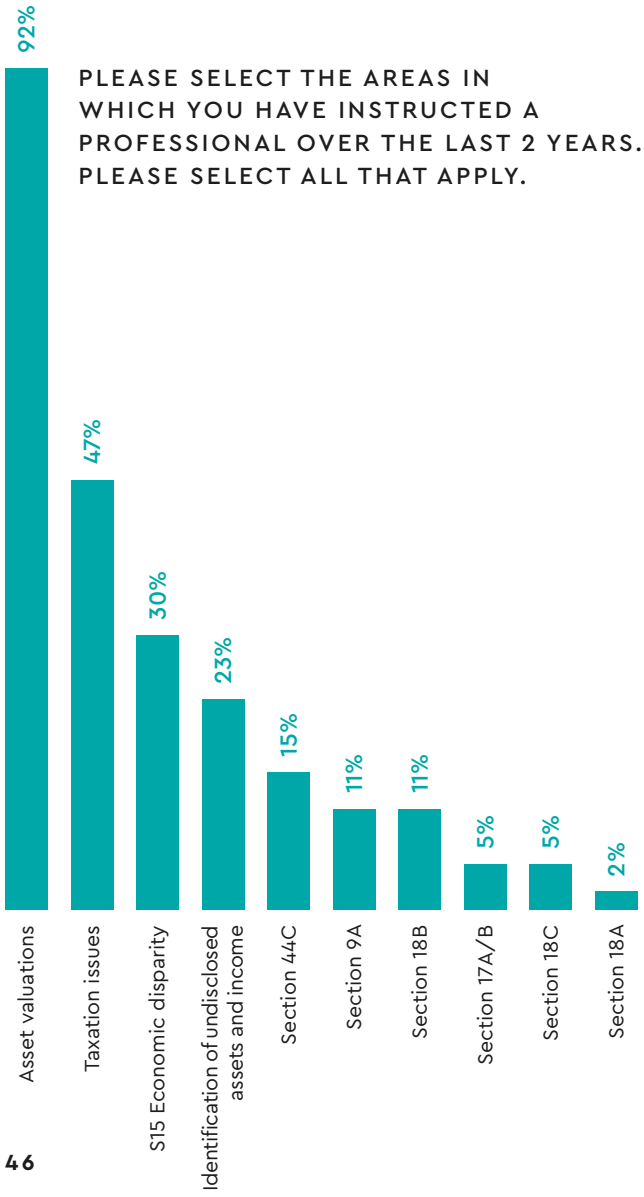
PRACTITIONER SUPPORT FOR THE LAW COMMISSION PROPOSALS



BASIS OF FEES USED IN RELATIONSHIP PROPERTY MATTERS



PLEASE SELECT THE AREAS IN WHICH YOU HAVE INSTRUCTED A PROFESSIONAL OVER THE LAST 2 YEARS. PLEASE SELECT ALL THAT APPLY.



Drop in legal aid work

Lawyers reported doing less legal aid work in the area of relationship property. In the 2017 survey, 35% of lawyers undertook work funded by legal aid. This was down to 23% in 2019. Many respondents (44%) ceased legally aided relationship property work in the last two years. This may reflect the administrative complexity of legal aid, the low remuneration paid to legal aid providers, or increased work volumes in other areas. Further research is required in this area to better identify the causes for such a noticeable decline.

Most family lawyers think the allocation of court time has not improved, with 40% of respondents responding that the allocation of court time for relationship property cases has worsened, only 6% reporting an improvement and 34% thinking it had not changed.

Only 31% of respondents were involved in a long cause fixture during the last two years. This is despite 81% of lawyers saying they had used litigation, indicating most proceedings do not go the distance.

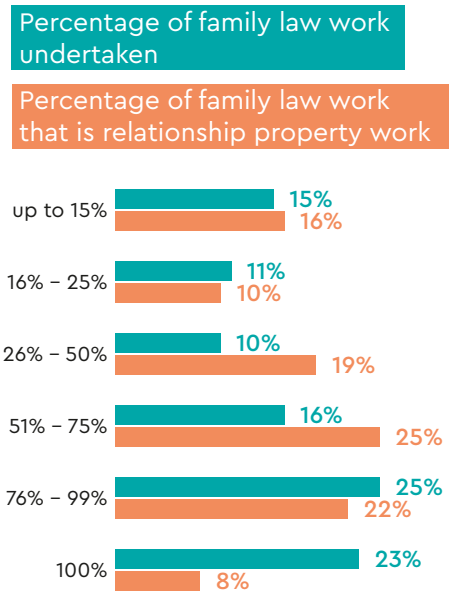
Family lawyers generally need to wait at least four months for a hearing date, and often at least seven months. Following the hearing, decisions were typically delivered in less than three months. This means the total time taken from hearing application to decision for long cause fixtures to be settled by the court is about a year.

Given the wide range of issues with providing relationship property advice, family lawyers offer high levels of experience in a complex area of the law. Many regularly discount their fees, enhancing the proposal of value when this is communicated to clients.

Many practitioners obtain legal opinions from senior counsel (30%), further enhancing the quality of advice they can provide to their clients. More than half of these lawyers seek a substantive brief from outside legal opinions.

A total of 96% of family lawyers have used other specialist professionals in relationship property matters in the last two

FAMILY LAW AND RELATIONSHIP PROPERTY WORK UNDERTAKEN BY PRACTITIONERS



years, including real estate, business and tangible asset valuers. With family homes being the most significant asset in relationship property separations, real estate valuers were the most instructed outside professionals which relationship property practitioners used.

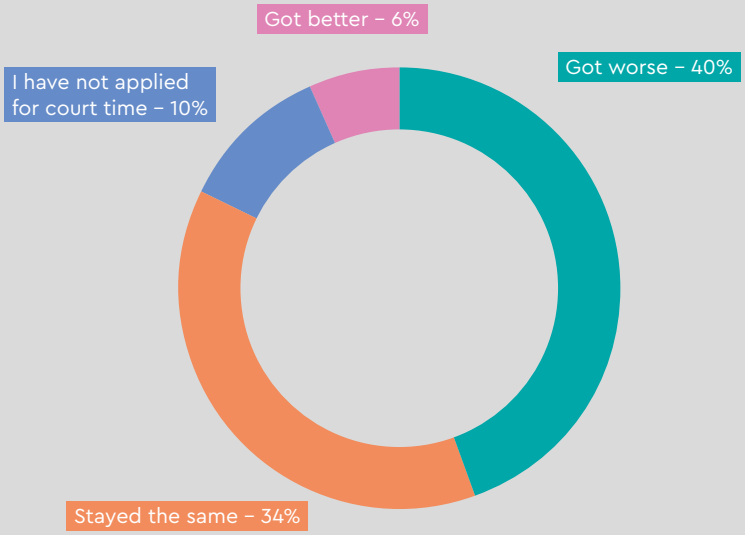
Hourly rates and billing

The average standard hourly rate across New Zealand is $332 for relationship property advice. These services cost the most in Auckland ($371) and the least in the Central North Island ($279). Tracking costs and how family lawyers charge will indicate more visible trends in future surveys and will pick up on any innovations in billing from the profession.

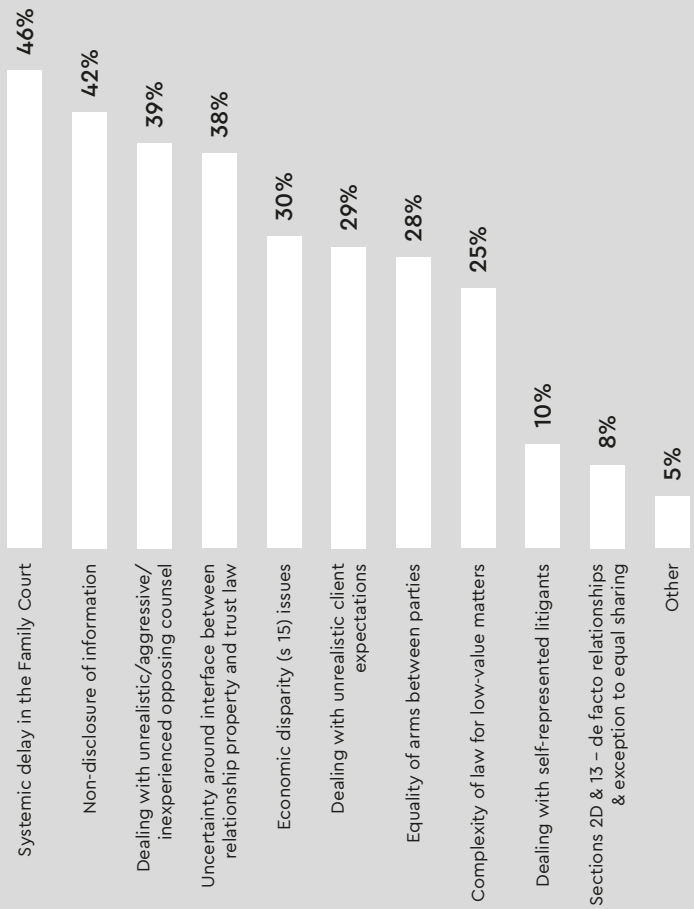
The most common methods used to bill relationship property clients are time, cost and an application of a discount, and time and cost without cap. Most practitioners often provide flexible payment terms to clients, with 11% of respondents having conducted relationship property work on a pro-bono basis.

The 2017 relationship property survey established a snapshot of who family lawyers serve and how they serve them. This biennial survey and report tells us about the work of family lawyers in relationship property matters. Over time it will identify the key trends and factors affecting the provision of legal services in relationship property matters.■

ALLOCATION OF COURT TIME FOR RELATIONSHIP PROPERTY CASES



PROBLEMATIC ISSUES ENCOUNTERED IN RELATIONSHIP PROPERTY CASES



UPDATE
TRUSTS

The new Trusts Act 2019

Key changes to consider

BY **RHONDA POWELL**

The first major reform to trust law in the lifetime of most New Zealand lawyers will occur on 30 January 2021 when the Trusts Act 2019 comes into force. All lawyers will need to come up to speed with the new provisions and *LawTalk* will assist by providing regular information in the lead-up to January 2021. In this issue we include the first article on the changes in a series by Auckland barrister and trust specialist Rhonda Powell, while professional trustee counsel Henry Stokes looks at some of the impacts on trustees and beneficiaries.

THE TRUSTS ACT 2019, WHICH COMES into force on 30 January 2021, is the first major trust law reform in New Zealand in 70 years.

Many of the key changes are aimed at making trust law more accessible to both lawyers and the public, strengthening the ability of beneficiaries to hold trustees to account.

This article provides an overview of key provisions of the Act. Subsequent articles will focus in more detail on particular aspects of the Act and the day-to-day considerations for lawyers.

Now is the time for lawyers to review their deeds and their practices to ensure they will be fit for purpose when the Trusts Act 2019 comes into force.

Application and guiding principles

The Trusts Act will apply to all express trusts that are governed by New Zealand law, including those created before the commencement of the Act. It also applies to statutory trusts such as intestate estates, and to other trusts recognised at common law or in equity, if a court deems it appropriate.

The Act is not a complete code. It will co-exist with relevant rules of common law and equity.

Section 4 sets out the principles that apply to those powers or performing functions or duties under the Act (including courts, trustees, and lawyers). A trust should be administered in a way that:

- is consistent with its terms and objectives; and
- avoids unnecessary cost and complexity.

The duty is to 'have regard' to these principles. Lawyers drafting documents recording trustee decisions may consider adapting their precedents to incorporate reference to the s 4 principles.

Mandatory and default trustee duties

The Trusts Act specifies the core trustee duties that were already part of the law. It then incorporates a new concept by classifying the duties as either 'mandatory' (ss 23-27) or 'default' (ss 29-38). In exercising any duty, a trustee must have regard to the contents and objects of the trust (as well as the s 4 principles).

Mandatory duties must be performed by the trustee and may not be modified or excluded by the terms of the trust. Any purported exclusion of a mandatory duty will have no effect.

Arguably, the exclusion of mandatory duties may also be evidence that there was no intention to create a trust in the first place (an argument accepted in *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2017] EWHC 2426 (Ch)) and thereby undermine the asset protection strategy if the trust is ever challenged.

Default duties may be modified or excluded by the terms of the trust, subject to certain limits as set out in s 5 and Schedule 2. Many default duties are commonly excluded by trust deeds. This practice will continue to be acceptable (provided that the exclusions fit within the permitted limits).

However, the Act imposes a statutory duty on any person advising on or preparing the terms of a trust to take reasonable steps to ensure that the settlor understands the meaning and effect of any modification or exclusion of any default duty.

Lawyers drafting trust deeds will need to adapt their practice to ensure that they give specific advice about default duties. Development of client information leaflets that are tailored to the firm's trust precedents may be a reliable and efficient approach. This can be backed up by verbal advice.

Special trust advisers/ delegates and nominees

Another option opened up by the Act is the ability to appoint a 'special trust adviser' to advise the trustee. A special trust adviser will not have the power of a trustee and the trustee will not be bound to follow their advice.

The new rules on exercise of trustee powers by others (ss 67-73) enable a trustee to go further and delegate certain powers or functions to another person.

Appointment of investment advisers may be a growing practice for New Zealand trusts with fluid assets and could be helpful for life-interest trusts for which investment decisions will affect the balance struck between classes of beneficiaries. The Trusts Act gives the trustee power to determine whether return on an investment is to be classified as income or capital. This is one of the powers that cannot be delegated.

Retention of information

The Act requires trustees to keep core trust documents, including documents setting out the terms of the trust or varying those terms, records of the trust property appropriate to the value and complexity of that property, records of trustee decisions, contracts, accounting and financial statements, appointment, removal and discharge documents, letters of wishes by the settlor, and other documents necessary for the administration of the trust.

This could mean a significant change in practice for some trustees, and the need for lawyers who act as professional trustees to check that their paperwork is comprehensive.

It is permissible for one trustee to hold most documents, but each trustee must hold at least a copy of the terms of the trust and any variation to those terms.

These rules may appear onerous but they should be seen as routine and essential to good trust administration.

Disclosure of information

The Trusts Act creates a presumption that a trustee must make 'basic trust information' available to every beneficiary and 'trust information'

available to beneficiaries who request it. However, before providing the information, trustees must consider a range of factors and if the trustee reasonably considers that the information should not be disclosed, then it may withhold the information.

'Basic trust information' includes the fact that a person is a beneficiary, the name and contact details of a trustee, details about any change to the trusteeship, and the fact that a beneficiary may request a copy of the terms of the trust or 'trust information'.

'Trust information' is information that is reasonably necessary for the beneficiary to have to enable the trust to be enforced.

Importantly, the reasons for trustee decisions are not required to be disclosed. Presumably this means that trustees' reasons for deciding not to disclose information would also not need to be disclosed.

The trustee has an active duty to consider at 'reasonable intervals' whether the trustee should be making the basic trust information available. This should become a routine part of trustee meetings.

It will be important for trustees to develop robust practices of decision-making around the provision or withholding of trust information and to seek appropriate advice to help them strike the right balance. Lawyers should be prepared to offer specific advice on disclosure to every trustee-client.

Exemption and indemnity clauses

The Act makes it clear that trust deeds must not limit a trustee's liability or provide an indemnity for dishonesty, wilful misconduct or gross negligence. Any terms in a trust deed that purport to limit the liability of the trustee or to indemnify them in breach of these provisions is invalid.

This is means that trustees can no longer rely on broad indemnity clauses that purport to protect them against gross negligence. They may still be protected in relation to ordinary negligence, if this is covered by an appropriately drafted limitation of liability and indemnity clause.

As with contracting out of default duties, lawyers will have a statutory duty to take reasonable steps to ensure that the settlor understands the meaning and effect of any limitation or indemnity clause contained in the trust deed. Explanation of limitations and indemnities should be part of standard advice when establishing a trust, and should be provided both verbally and in writing.

Appointment and removal of trustees

The statutory powers for appointment and removal of trustees have been modernised and broadened to minimise the need to apply to the court.

The Act confirms that a person with a power of appointment or removal of trustees must exercise it honestly and in good faith, and for proper purpose.

Retiring as a trustee is to become slightly more difficult in so far as a discharge must be given in writing. Lawyers will need to review their firm precedents in light of the new provisions.

Abolition of the rules against perpetuities and accumulations

The rule against perpetuities and remoteness of vesting is abolished. Trusts which might otherwise have breached the rule against perpetuities for failing to specify a termination date are deemed to terminate after 125 years. If permitted by the trust instrument, trusts already in existence with shorter trust periods may be extended up to 125 years.

Lawyers should consider advising clients about whether it is possible under the terms of the deed to vary a trust to take advantage of the longer trust period (currently a maximum of 80 years) so as to have the option to continue the asset protection benefits of the trust for longer.

Other changes

Other changes include:

- reduction of the age of majority from 20 to 18;
- codification and extension of the rule in *Saunders v Vautier* (1841) 4 Beav 115 that adult beneficiaries may unanimously bring a trust to an end;
- changes to the grounds on which the court may review trustee decisions; and
- new alternative dispute resolution procedures.

Conclusion

The Trusts Act 2019 comes into force in just over a year. Those advising settlors and trustees of New Zealand trusts should consider a comprehensive review of trust deeds and provision of information to clients. It is also a good opportunity to review succession plans for trusts, and to reconsider whether each particular trust is really necessary.

Whether or not they choose to act as independent trustees, lawyers will play a critical role in guiding trustees through understanding and applying their duties, including the routine exercise of balancing considerations before deciding what to disclose. If the Act's provisions are complied with, we can expect significant improvements in trust practice. ■

Dr Rhonda Powell ✉ *www.athene.co.nz* is a barrister, and principal of Athene Trust Law. She specialises in all aspects of trusts and estates law, and acts in both advisory and advocacy capacities.

UPDATE
TRUSTS

The Trusts Act 2019

Moving on from the 1950s

BY **HENRY STOKES**

The Trusts Act has been passed and we have commenced the 18-month countdown to its coming into effect on 30 January 2021. As is often the case with Acts where we are given time to prepare, there is a lot of information available and plenty of discussion – but whether there is much action is a lot less evident.

There is likely to be a large flurry of action as we get closer to that 2021 deadline, but as of right now, what does the Trusts Act 2019 mean for trustees and beneficiaries of trusts in New Zealand?

The Trusts Act 2019 is the first major re-write of New Zealand trustee legislation since the Trustee Act 1956. Society has changed enormously since the late 50s: the nuclear family is increasingly the exception, not the norm, and trusteeship is now intended to protect many more complex and diverse situations than orphanhood.

Alongside the many amendments to the legislation between 1956 and the present day, trust law has also been evolving through the courts – and while the evolution of law through common law is both a good and very necessary thing, that form of change can make the law difficult to follow and also difficult to access and understand.

One of the main aims of the Act is to fix that opacity, and although all of trust law can never be recorded in one location, it is indisputably a good outcome to have some clear expectations and obligations recorded in one place that is accessible to the public, while still allowing for the evolution of trust law through the courts.

Many trustees may feel vulnerable to beneficiaries as a result of the Trusts Act 2019. However, the fundamental principle of trust law has always been that a trustee is looking after assets for the benefit of others and not for themselves. This can be an extremely difficult task when a trustee is also a beneficiary, but it can still be difficult for an independent/professional trustee to adequately discharge all of their obligations and duties when carrying out the act of balancing all beneficiaries' interests.

It is fair enough that beneficiaries should be able to obtain or be provided with sufficient information to ensure their interests are being looked after. Put yourself in those shoes by asking yourself: if I were a beneficiary of a trust would I feel entitled to information to ensure it is being run correctly and that my best interests are being cared for adequately? I can say for myself the answer is a resolute YES.

What does the new Act mean for trustees? It means that trustees must be at the steering wheel at all times. Trusts must be proactively managed; trustees cannot sit back and merely respond to incoming requests or leap into action only for a one-off or periodic sale or acquisition of a property. There is continuous work associated with the role of trusteeship. If a trust is being administered correctly by a professional trustee there will be

costs attached to that, and trustees will need to ask whether the trust provides a sufficient benefit to warrant the cost of having it in the first place. This is an essential question – it goes to the heart of new trust law, and trustees should be asking it and examining their position and responsibilities well in advance of 30 January 2021. Trustees need to be ready to consider the options should the answer be NO.

Obligation nothing new

The obligation to actively manage a trust is nothing new; it has always existed. What has changed with the Trusts Act 2019 is that the obligation is now there for the world to see. It is so clear that the difference between how a professional trustee and a layperson as trustee are going to be treated is likely to diminish. If you are going to act as a trustee you must know your obligations, you must know the terms of the trust, and you must discharge your duties and obligations without the need of the beneficiaries forcing you to do so. Remember: *trusteeship cannot be a part-time activity, it is a job*. That is an issue for both layperson trustees and professionals.

For beneficiaries the message is clear: you can expect more information than you may have received under old trust law. Some beneficiaries will learn for the first time that a trust (or trusts) exist of which they are a beneficiary. They will be told who the trustees are and how to contact them. They will also be told that they have a right to request more information. Where beneficiaries are finding out about a trust they did not know existed, chances are that a request for further information will be made, because the basic trust information does not give a beneficiary even the slightest idea of what the trust holds and whether or not it is being run correctly. This means most trustees should reasonably expect requests for further information following their provision of basic trust information. Whether trustees decide to pre-empt that by supplying more information upfront than just the basic trust information will be their own decision. However, doing so could well set the stage for more efficient and open long-term process and provide a solid foundation for a very good working relationship between trustees and beneficiaries.

To be clear, the provision of information to beneficiaries should be seen as an opportunity to set the relationship between trustees and beneficiaries on the right foot. From a beneficiary's perspective, when

trustees provide more information than just the requisite basic information – without more needing to be requested – it communicates that trustees have nothing to hide and want to be open with and helpful to beneficiaries. In particular, people who are learning for the first time that they are beneficiaries may well appreciate the extra care and diligence taken by trustees who want to give extra information and educate them as to their rights and the nature of the trust.

Conversely, just because you may not take that step does not mean you have something to hide or do not want to have a good relationship with the beneficiaries. Again, consider a question from a beneficiary's perspective: if you were a beneficiary of a trust, you requested information and that request was met with resistance, might you wonder what the trustees don't want you to know? Might you wonder whether something important is being withheld? This would be an understandable reaction.

The obligation to actively manage a trust is nothing new; it has always existed. What has changed with the Trusts Act 2019 is that the obligation is now there for the world to see

The Trusts Act is a major opportunity for all in the trustee arena. It is an opportunity to review how we are acting as trustees, to examine how we build relationships with beneficiaries, and to determine how we can best operate to ensure that top-level trusteeship is delivered to all New Zealanders.

Are we ready?

The difficulty with this opportunity is that it won't expire but we may not all be ready by the time that the opportunity fully presents itself. While there seems to be a comfortably long timeline, through to January 2021, this is something of an illusion – the time for action is now. The nature of the new requirements of the Trusts Act are such that there is no reason why we can't be fulfilling many of them now, so by January 2021 they have already been integrated as standard practice.

Now is the time for all trustees to be taking stock of their trusts. Is a trust the right vehicle for that particular situation? Should the trust be varied? Do trustees wish to retire, and if they do, do they need to be replaced? All these questions take time first to address and then to ascertain what needs to happen next and implement it. Extra time should be allowed for the appointment of new trustees and, if necessary, upskilling them as to their obligations and the consistent work they will need to do.

Among professional trustees, many are considering whether they wish to remain acting as trustees in general (be it personally or through corporate trust companies). If you are in that situation it is something you need to address very soon, because there is quite a process involved. Considering and exploring your options can take some time; then you will need to communicate with trust clients so they are informed of your thoughts and their options. Once a decision is made, implementation can take time. Trusteeship should no longer be an add-on to a professional practice. If professionals are going to be involved in trusteeship it needs to be a main focus with active management. In short – timing is crucial and action is required now, if you want to have a clean slate by 30 January 2021.

While the Trusts Act 2019 is easy to view as ushering in a whole new, somewhat scary world, it is our big opportunity to commit to trusteeship and form open relationships with trustees and beneficiaries. That, in a nutshell, should be the ultimate trustee goal. ■

Henry Stokes ✉ *henry.stokes@pgtrust.co.nz* is General Counsel at Perpetual Guardian. He previously served as General Counsel – Retail for state-owned trustee company Public Trust and was a partner of Hamilton law firm McBreens Solicitors.

ACCESS TO JUSTICE

Lawyers need to do more to ensure CALD clients get equal access to justice in courts

BY **MAI CHEN**

The Superdiversity Institute for Law, Policy and Business launched its latest report, *Culturally, Ethnically and Linguistically Diverse Parties in the Courts: A Chinese Case Study,* on 18 and 20 November 2019, at CPD sessions in Auckland, Wellington and Christchurch. The ultimate goal of the research was to identify any issues and challenges faced by the courts in New Zealand in ensuring equal access to justice for culturally, ethnically and linguistically diverse (CALD), particularly Chinese parties in the courts in New Zealand, and to determine whether any changes are needed to ensure courts are better equipped to administer justice.

Census and migration statistics show that New Zealand is becoming increasingly diverse. The Superdiversity Stocktake defines superdiversity as being "the substantial increase in the diversity of ethnic, minority and immigrant groups in a city or country, 'especially arising from shifts in global mobility'." Superdiverse cities have been defined as those where migrants comprise more than 25% of the resident population, or where more than 100 nationalities are represented (Mai Chen *Superdiversity Stocktake,* Superdiversity Centre, Auckland, 2015, at 52).

The 2018 Census shows that 27.4% of people were not born in New Zealand (up from 25.2% in the 2013 Census); 15.1% of New Zealand's population identified as Asian (up from 11.8% in the 2013 Census), and 70.2% identified as New Zealand European (a decrease from 74% in the 2013 Census) ("New Zealand's population reflects growing diversity", 23 September 2019, Statistics New Zealand).

A case study of Chinese parties

However, the report is a case study of Chinese parties as research shows that Chinese are one of the CALD groups facing the greatest barriers when they appear before the New Zealand courts. Recent net migration statistics also show that Chinese are the biggest migrant group arriving into New Zealand, after returning New Zealand citizens. For instance, in the year ended January 2019, 14,700 migrants arrived from China, with the next biggest group being India, with 12,600 migrants ("Net migration remains around 50,000"

Report launch event photo by Claudia Chilcott, NZLS Auckland photographer


SUPER
DIVER
SITY

9 August 2019, Statistics New Zealand). In the 2018 Census, China was the third most common birthplace for those usually resident in New Zealand, after New Zealand and England – 2.9% of the usually resident population were born in China, an increase of 0.7% from the 2013 Census ("2018 Census totals by topic – national highlights", 23 September 2019, Statistics New Zealand).

Many of the findings and recommendations will be equally applicable to *all* CALD parties in New Zealand and will help better equip our courts to provide equal access to justice for everyone.

As a former Attorney-General of New Zealand, Chris Finlayson QC, writes in the foreword to the report: "This is not a work to be read and shelved but read and implemented throughout the justice system. There is no going back. Major demographic change will not be reversed so we must adapt to the new world. Not some time in the future but now."

Melbourne Law School Associate Professor Andrew Godwin has said that culture is relevant in the courtroom in assessing evidence and the credibility of witnesses, in determining legal relations and intention and substantive elements, and also to procedure/decision – where a court decides on points of procedure and the form an order will take ("Chinese Perspectives on the Law", presentation at Judges' Meeting, Federal Court of Australia, 25 August 2017).

Scope of the research

The research included interviews (conducted on an anonymous basis) with senior court judges, as well as with two retired District and Family Court judges of Chinese ethnicity. About 20 practitioners were interviewed, including Queen's Counsel and senior prosecutors. The research also benefits from the research and insights of prominent academics and experts in the Chinese rule of law. Importantly, a number of experienced interpreters were also interviewed.

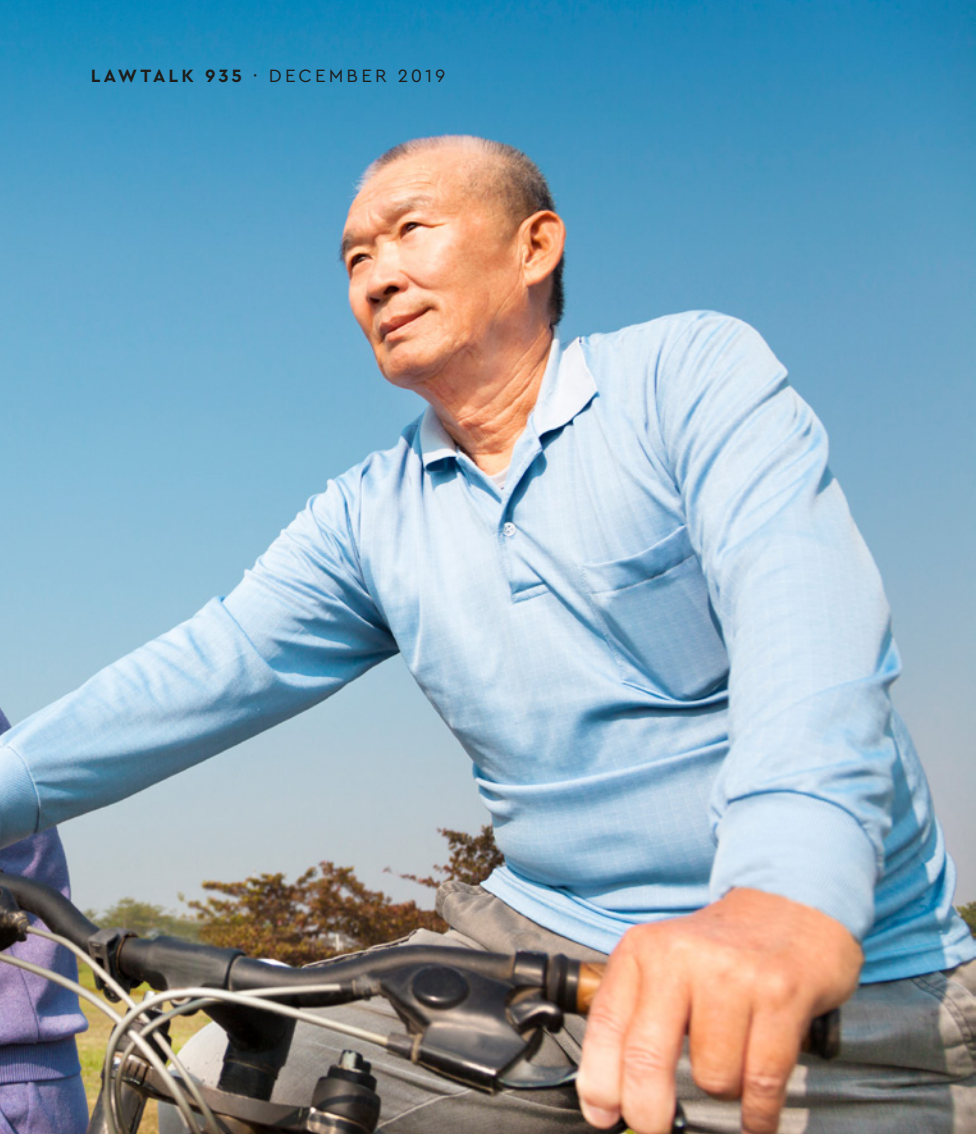
Another critical aspect of the research was a comprehensive review of over 100 cases featuring parties of Chinese or Asian ethnicities in the senior courts since the year 2000. Over 1,000 cases were reviewed to identify key cases of relevance. The key issues and challenges that arose from the interviews with judges, practitioners and interpreters were reflected in the key issues that came out in the case review. The research included a review of relevant data as well as literature and research from New Zealand and international studies. We identified ten times as many cases of relevance in the High Court in Auckland than in all the other High Court registries combined.

The report has implications for a large number of organisations/individuals including the Ministry of Justice, the New Zealand Law Society, mediators, law schools, continuing legal education, law firms and other agencies (read the report for a full list of recommendations), but I focus below on the key findings and recommendations concerning lawyers, judges and interpreters.

Judges' perspectives

The main problem impacting on the ability of CALD parties to receive equal access to justice identified by the research and interviews concerns communication, which after all is the essence of the court process. It is the lawyer's role to advocate their client's case to the judge or jury, as well as communicate effectively the need for an interpreter. The report finds this communication has not been as effective and efficient as it could or should be. Lawyers need to be doing more and better for their CALD clients.

Interviews with judges and lawyers revealed that Chinese litigants and defendants are more likely to struggle with the English language, and are reliant on interpreters that may be of variable quality. The interviews and case review also showed that Chinese parties often deal with each other on the basis of trusting relationships, rather than through written agreements, which means that there is no or inadequate contemporaneous documentary evidence to assist the court in civil disputes. In turn, this increases the importance of the court's reliance on *viva voce* (oral) evidence, the meaning of which can be distorted through the use of interpreters. Where there is contemporaneous documentary evidence, it is often drafted without legal input and will require translation from Chinese into English, which can distort the meaning and clarity of



the documents. The result is that lawyers in particular, but also judges, need to work harder to ensure equal access to justice for CALD clients and parties.

Other key findings identified from the interviews with judges included:

- Particularly in Auckland, the growing Chinese population in New Zealand means judges are dealing with greater numbers of Chinese in the court system;
- Some judges have observed challenges arising from self-representation by Chinese litigants. The challenges faced by Chinese litigants-in-person appear to be more acute than for New Zealand European litigants-in-person, due to the different rule of law culture they come from or their inability to speak English proficiently;
- Judges and lawyers raised concerns about the variable quality of interpretation provided by interpreters in New Zealand courtrooms. Judges interviewed observed that use of interpreters at a trial can take twice as long, and that this was not being adequately taken into account when trials are scheduled on the basis of counsels' estimates of the hearing time required;
- The adversarial system in New Zealand courts may exacerbate the challenges in ensuring equal access to justice for Chinese parties. Courts in China adopt an inquisitorial approach, and thus Chinese parties may expect the New Zealand court to function in a similar way;
- Challenges with Chinese witnesses who travel to New Zealand from China for the purpose of giving evidence, due to a lack of understanding by the witnesses as to the role and function of a witness in New Zealand.
- Information about a Chinese litigant or witness' background; for example, which country they were born in, and how long they have been in New Zealand (or other English speaking common law countries), may be very relevant to the matter the judge is presiding over, including to determine the English language capability of the parties; and
- Concerns that Chinese jurors are more likely to request to be excused from serving due to their English language capability or because they do not sufficiently understand the process and their role (although judges noted that Chinese jurors generally respond dutifully to their summons and show up to court).

The interviews and case review also showed that Chinese parties often deal with each other on the basis of trusting relationships, rather than through written agreements, which means that there is no or inadequate contemporaneous documentary evidence to assist the court in civil disputes

Recommendations for enhanced pre-trial process

The report recommends the implementation of an enhanced pre-trial process, and the use of the same judge, registrar and interpreter throughout the whole trial process where possible. This will allow early identification of the need for an interpreter, to ensure adequate time is scheduled for the trial and to enable the judge to be made aware by counsel of any issues and challenges that may arise due to cultural factors during the trial.

The report also recommends that the Ministry of Justice fund cultural reports requested under section 27 of the Sentencing Act 2002, to enable the judge to order these reports to assist in sentencing decisions, and that a mechanism should be introduced to enable judges to access cultural guidance in civil disputes. This guidance can help explain why Chinese parties have acted the way they have, for

example, in lending a large amount of money to a friend or relative with no documentary evidence establishing the purpose or term of the loan, in refusing to settle even though the amount at stake is far less than the legal fees that would be incurred in continuing the legal action and in getting their spouse to pass on their remorse for a crime to the judge.

The lack of contemporaneous documentary evidence, coupled with reliance on *viva voce* evidence through an interpreter, means that judges may need to be more willing to admit relevant evidence when it is presented in less traditional formats.

The report recommends directions to juries on unconscious or conscious bias, particularly in criminal law cases such biases, based on cultural norms and held by jurors, might inappropriately affect a juror's impartial assessment of the facts and evidence before them in drug and fraud cases, for example.

The report also recommends ongoing cultural training for the judiciary to develop what Australian Justice Emilios Kyrou calls a "mental red-flag cultural alert system to give them a sense of when a cultural dimension may be present so that they may consider what, if anything, is to be done about it." Early completion of an Equal Treatment Bench Book for New Zealand by the Institute of Judicial Studies is also recommended.

Interpreters

There is no mandatory formal qualification required to practise as an interpreter in New Zealand. Thus, the report recommends most urgently the need for a uniform system of certification or accreditation for interpreters, and the use of qualified interpreters in courts wherever possible. Other key findings from interviews and research on interpreters include:

- It is important to properly match interpreters with witnesses; for example, the Mandarin spoken in Singapore will be very different to that spoken in rural China;
- Appointment of interpreters in the criminal jurisdiction is generally done by the Central Processing Unit at the Ministry of Justice, and in most cases, the court simply adopts the decision of the unit, with the costs borne by the state;
- In civil proceedings, the appointment of interpreters is left to the parties. The party calling a witness will generally be responsible for paying the interpreter, and this may impact on the neutrality of the interpreter, and also the quality, as the party may simply choose the cheapest interpreter available;
- Interpreters are not given adequate time to prepare for a trial, are often not able to receive court documents to assist them in preparation for a trial and do not have a dedicated place to sit in court; and
- Pay rates for interpreters are low, and interpreters feel the profession is not well-defined and of a low status. Anecdotal evidence suggests this has resulted in interpreters moving overseas.

The report recommends shifting responsibility for the booking and arrangement of interpreters from a unit within the ministry to the Court registry, to allow judges to approve interpreters in every case. The report also recommends that the Ministry of Justice consider public funding of interpreters in civil cases as well as criminal, so as not to erect an unfair barrier to accessing justice for CALD parties and the introduction of a system of qualified and experienced "duty interpreters" employed by the court and able to provide quality interpretation services in trials.

Other recommendations made relating to interpreters include:

- The need for court interpreting to be recognised as a profession, and for court interpreters to be appointed as officers of the court;
- That the pay rates for interpreters be increased, in particular by reviewing the rates set in the Witness and Interpreters Fees Regulations 1974, which have not been updated since 1996;
- That court interpreters receive induction and training in the courtroom process; and receive training on cultural nuances;
- That a formal interpreting protocol and complaint mechanism be established through the accreditation system introduced; and
- That a decision be made as to where interpreters should sit and stand in court, and that interpreters and judges are informed as to this place. In the long term, when future courtrooms are developed we recommend that a designed place for the interpreter to sit, ideally a desk, be built in to the courtroom design.

Lawyers' perspectives

Most importantly, the report finds that lawyers need to be doing a lot more to ensure that their CALD clients are getting equal access to justice. The research shows that issues and challenges faced by Chinese from China are more acute than for CALD litigants of other ethnicities, as they do not come from a country where English is widely spoken (such as India or Singapore), and also due to the different rule of law culture in their country of birth, as they do not come from a country with a Commonwealth background, such as Hong Kong. The Chinese cultural concept of "face" or *mianzi* was also identified as an impediment toward Chinese parties reaching a settlement in civil disputes, and that in the criminal context, it may mean that a person of Chinese ethnicity is less likely to plead guilty or show remorse for their offending.

Some Chinese lawyers alleged discrimination, for example, unfair criticism, patronising behaviour, derogatory remarks about themselves

and their clients, and stereotyping, from New Zealand European practitioners and from judges, due to their ethnicity. Some Chinese lawyers said that Chinese clients sometimes preferred a New Zealand European lawyer to avoid any prejudice from the judge or jury – on the reasoning that European judges and jury members would not discriminate against their own.

The research identified emerging issues related to the growing number of small boutique Chinese law firms that are only servicing Chinese clients, and also the growing number of Chinese lawyers going into sole practice with limited experience. This is partly driven by not being able to secure employment at law firms, and firms not being comfortable with Chinese lawyers providing legal advice in Mandarin – which New Zealand European lawyers cannot supervise. There is a sense that young Chinese lawyers are being isolated by working in Chinese law practices with only Chinese clients and other Chinese lawyers.

Some of the other key findings identified from interviews with lawyers include:

- Lawyers representing Chinese clients face a difficulty in understanding and then explaining in court why their Chinese client has acted in a way that may feel foreign to a New Zealand European judge or lawyer, but not to a person of Chinese ethnicity. For example, it is not unusual for Chinese to complete a major business transaction without a legally drafted contract, or without a contract at all, and without legal advice;
- Chinese lawyers appear less likely to work in criminal law as they, or their families' prefer they work in commercial law, which is perceived to be more lucrative and of higher status. Alternatively, they prefer to work in areas that do not require court advocacy, due to their lower English language competency;
- Chinese accused of criminal offences may seek representation from their family lawyer who speaks Mandarin (but generally only advises on transactional matters), or, a New Zealand European lawyer (as they think they will face less discrimination from the judge if they do) who might lack an understanding as to their culture and will also be unable to communicate with them in their language;
- Regulatory agencies and Police are struggling to deal with the evidence of Chinese parties in criminal proceedings, as it will often be contained in large volumes of "chat" messages (in particular, WeChat - the message app of choice for many Chinese - , WhatsApp or similar services) that require translating - although evidence in text or other message form is increasingly common in prosecutions of persons of all ethnicities; and
- There can be misunderstandings with Chinese clients about legal fees, due to the different way legal fees are charged in China (usually a success fee).

Use of mentoring programme recommended

The report recommends that the New Zealand Law Society consider how to use the mentoring programme that is currently being piloted in Auckland and Canterbury Westland to enable mentoring for young Chinese lawyers on avoiding discrimination and stereotyping, to encourage Chinese lawyers to work or stay working in litigation and in the criminal law field, and to assist New Zealand European lawyers working with Chinese criminal accused to properly understand their clients' instructions. It also recommends that all bodies that currently accredit mediators develop training and guidance for lawyers working with Chinese clients to enable lawyers to properly advise their client on mediation, how it works in New Zealand and the advantages of mediating a case rather than pursuing it through court. ■

Mai Chen ✉ *mai.chen@chenpalmer.com* is Chair of New Zealand Asian Leaders and the Superdiversity Centre of Law, Policy and Business. She is managing partner at Chen Palmer and an Adjunct Professor at the University of Auckland Law School.

ACCESS TO JUSTICE

Are legal disrupters steering people off the road?

BY **ALLIE CUNNINGHAME**

The choices faced by a person stripped of their driver's licence and wanting to apply for a limited licence illustrate the dangers as well as the benefits of disruption in the legal market, and how more attention to the regulatory pitfalls and opportunities could improve access to justice in New Zealand.

Limited licence applications are ripe for disruption as they are usually straightforward and template based, yet lawyers offering help with these applications often charge upwards of $1,000. It is no wonder that businesses have swooped in with cheaper online services promising to get drivers back on the road for far less. Cheaper and more convenient services should be good news, especially for low wage earners. Yet the University of Otago Legal Issues Centre has identified serious questions about these services – for consumers as well as regulators.

The centre started by putting ourselves in the shoes of a de-licensed driver. A person who has been disqualified from driving and wants to apply for a limited licence so they can, for example, drive to work, has at least three options. They can pay upwards of a thousand dollars for a lawyer to represent them, they can pay a little less for an online service to help them, or they can do it themselves, perhaps with free help from Community Law or another community provider.

The lawyer option

Let's look at the lawyer option first. For lawyers, the limited licence procedure is usually relatively straightforward. The documents (notice of application, affidavit(s) in support, draft order) can be drafted by relying on templates, and the tests of "extreme hardship to the applicant" and/or "undue hardship to any other person" are well settled at law. Yet the price charged by most lawyers for preparing a limited licence application and appearing at court are high – the Community Law guide to applying for a limited licence (on *communitylaw.org.nz/*) suggests, at page 5, that the cost "could be more than $1000". Given the low level of transparency around lawyers' fees, a person wanting to hire a lawyer may feel this is a price they have to pay to keep working, and some may even pay considerably more.

Now let's look at the experience of a person who cannot afford a lawyer. We assumed most people would start by looking for information online. A Google search for "limited licence NZ" turns up varied resources on the first page of search results – community law centres, NZTA, lawyers – along with 'disrupters', the cheaper online services.

Disruptive services

We looked at three of the disruptive services. These services produce limited licence documents and send them to the applicant, who can then file the documents and appear in court in person. One website provided template documents only for applications following demerit point suspensions, while the other two websites provided services to individuals who have been either disqualified following a conviction or suspended for excess demerit points.

Who are these providers? Only one website gave any indication of who was behind it. This provider stated that he was not a lawyer, but had previous work experience giving him "experience of the limited licence process". He also gave his name and a New Zealand mobile phone number. None of the websites offered a registered company name or physical address. One provider made it clear what it was *not*: "xxx is NOT a law firm and we do not provide ANY legal advice to applicants", and that it created documents for self-represented litigants. On another page within its site, this provider stated that it "uses solicitors that are members of the New Zealand Law Society … As part of the application process, the applicant will be contacted by our lawyers and sent their terms of

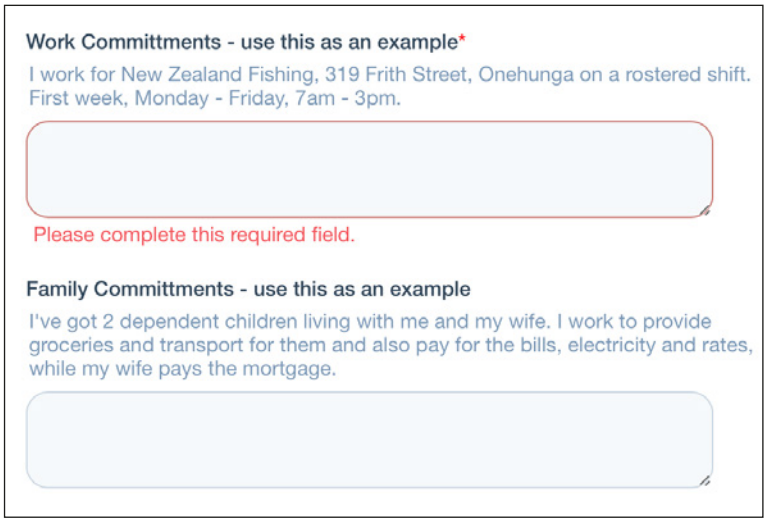
Cheaper and more convenient services should be good news, especially for low wage earners. Yet the University of Otago Legal Issues Centre has identified serious questions about these services – for consumers as well as regulators

engagement." This suggested to us that the provider may be a clearing house working with lawyers who are independent contractors. The same provider also advises applicants to "seek their own independent legal advice and direction … regarding their application" which would seem to be unnecessary if users are being connected with lawyers via a clearing house model. The third provider stated that it was a "WINZ registered supplier" with "3 Decades of Expertise". We could not find any statements on its website to confirm that it was run by a New Zealand lawyer, nor could we find any disclaimers making clear that it was not.

Not knowing who is behind some of the websites makes it hard to know how a dissatisfied customer, the Police, the courts, or the Law Sociey, might follow up in the event of any concerns arising. We assume that unless they clearly say so, no website offering limited licence services is run by a lawyer holding a practising certificate. This means that individuals using their templates will not have the benefit of professional indemnity policies or the Law Society's Lawyers Complaints Service.

Advice on success prospects

An issue with these services, from a consumer perspective, is that there is no advice on the prospects of success. This arguably avoids the problem of the providers encroaching on the reserved area of work provisions (s 6, Lawyers and Conveyancers Act 2006) as if providers do not evaluate information entered and tailor it, or ask for additional information to ensure that the application satisfies the test, then the service may not qualify as "legal advice". For the user (and also for the courts), this presents difficulties, as they may be filing an application that lacks any prospect of success. By way of example, we accessed the online form for one provider without having to pay. We were therefore able to see the text boxes that asked for information that would be used for the hardship tests:



While we assume that this information would be set out in the affidavit in a way to illustrate the hardship test, we were not prompted to explain why we could not get to work without driving, or whether we were required to drive as part of our employment. Both of these issues need to be covered off in the supporting affidavit to satisfy the test.

A lawyer who charges a client for filing a limited licence application without making any attempt to consider the merits, or who files documents that do not address the points required by the court, runs the risk of a finding of unsatisfactory conduct. We consider that, at the least, some of these online providers are putting individuals in a situation where they are spending money on an application with no prospect of success. The examples given on the data input page that we accessed might result in some individuals whose applications have no prospect of success coming to this realisation while entering information, and proceeding no further. Other users might proceed, and if unsuccessful, would have to avail themselves of "money back guarantees", where offered.

Providing legal advice

If the online providers did offer to assess their customers' prospects of success, this might be considered providing legal advice about contemplated proceedings in court and so encroach on a reserved area of work. Some providers did appear to us to be skirting up to the very edge of this line – one provider stated that their "previous experience" resulted in them "knowing exactly what is required" for an application to succeed. Another took what seems like an even greater risk – despite clearly stating that they were not lawyers, they offered a "document review" for an additional $220:

"Document reviews of your application, affidavit and draft orders reviews increase the accuracy of your documents and will be more favourably received by the Police and the District Court. Failing to convince the Court that you need a limited licence means, the application will be declined and you lose your Court Filing fee of $200."

From a regulatory standpoint, it is an offence for non-lawyers to offer services in the reserved areas of work. It is not clear whether the Law Society is interested in the issues that arise with online providers, and whether it has the appetite or resources to follow up with them. For a consumer protection standpoint, these providers raise issues. The reason for a reserved area of work is consumer protection, ensuring quality service to the public, and a complaints mechanism if the service falls short. We found some inaccuracies in the websites, for example one suggested that limited licences could only be for "five days of driving" even though there is no law to that effect. If consumers do encounter a substandard service, there is no mechanism to address the problem.

The counter argument is, however, that the reason these services have arisen is that lawyers are charging too much. The University of Otago Legal Issues Centre is supportive of innovations that result in more affordable legal services, and is concerned about the high costs asked for by some lawyers providing limited licence services.

However, some of these disruptive services did not strike us as particularly good value given their limitations. One provider offered its most basic service for $800, with no guaranteed timeframe for delivery. While it did offer a money back guarantee if the application was unsuccessful, this would only be paid if the customer had sought an adjournment from the court to amend their application. The demerit-only provider was $375 (with "priority rush" an additional $270) – no mention was made of GST. In contrast, one lawyer advertising their services online charges a flat fee of $599 plus GST, which includes service of the application on the police and the court appearance. Other lawyers are, however, charging much more, allowing for these disruptive services to flourish.

Community providers

Now let's look at a third option, community providers of the service. Community Law Aotearoa's limited licence guide came up on our Google search, in amongst, but not standing out from, links to the disruptive services. As well as explaining the law and procedure in plain English, the guide contains templates that explain the information required to satisfy the legal tests, for example:

> Being unable to drive would cause me an extreme hardship because [why is it so important that you keep this job? For example, what qualifications and work experience do you have? How difficult would it be to find another suitable position without a driver's licence?

While Community Law will not generate the formatted documents for the applicant, an applicant who has time to type their information into the templates may be as well – or better – served by this free resource. This service offers better consumer protection while recognising that many people simply cannot afford what lawyers charge.

The example of limited licence provision is just one example of the shifting ground in the provision of legal services. Will the reserved area of work be policed as new disruptive services enter the market? Why are many lawyers continuing to price their services out of the reach of many New Zealanders, opening up space for competition? Why are people paying for anonymous services when there is free information and assistance from a known and trusted provider such as Community Law? Is it a simple case of competing for prominence on Google or do we need other efforts to raise awareness of the free help available?

We expect that these questions will continue to rise in a number of different areas of the legal services market as the justice gap continues to leave many New Zealanders unable to access regulated, lawyer-provided assistance. ■

Allie Cunninghame ✉ *allie.cunninghame@otago.ac.nz* is a Professional Practice Fellow with the University of Otago Legal Issues Centre.

Law Society comment: The Law Society welcomes referrals in relation to potential regulatory offences and regularly deals with concerns raised by members of the public and people in the legal community. When concerns such as those referenced in the article above are referred to the Law Society they are investigated to ascertain whether any regulatory concerns may arise under the Lawyers and Conveyancers Act 2006. The focus of the Act offence provisions are related to misleading representations and people who are not lawyers undertaking the type of work which only lawyers are permitted to. There are a wide range of services that people who are not lawyers are able to provide and there is no ability for the Law Society to look into the quality of these service providers. However, the Law Society will look at how services are promoted to the public. When regulatory concerns are raised, an investigation would typically involve examining whether there is evidence that any legal consumer appears to have been misled about the status of any person and/or entity providing legal services. In general, the regulatory process involves trying to work constructively with providers of legal services to make the required changes to ensure that there is no scope for legal consumers to be misled or confused. If that approach does not resolve the issues of concern, further consideration would be given to what other formal steps may be available.

ACCESS TO JUSTICE

New name, new place

Porirua Kapiti Community Law Centre

BY **TRACEY CORMACK**

The former Whitireia Community Law Centre says its recent move from Hagley Street in Porirua will improve access to legal services for its clients.

It also has a new name to go with the new location – the Porirua Kapiti Community Law Centre. The newly fitted out offices are on the ground floor of the BNZ Tower, which is also close to the Porirua District Court, but now more accessible to clients, being at street level in the heart of the shopping precinct.

The centre was started in 1995 on the campus of the Whitireia Community Polytechnic following the demise of the Cannons Creek Community Law Centre. The law centre moved from the polytech in 1997 but there was always some lingering confusion regarding the 'Whitireia' part of the name and whether the law centre was still linked to the polytech. Mike Sceats, the centre's Managing Solicitor, recalls that people have come to the law centre to enrol in classes, or thought the law centre might be a place one could study to become a lawyer.

"The old name gave no indication of the area we cover, so we were constantly having to explain to people that we look after residents from Grenada North to the Otaki River, the same area served by the Porirua District Court," says Mr Sceats. "Whitireia is a local maunga (mountain), but outside of a few who know our history, most people didn't know why we had that in our name."

Mr Sceats says being called the Porirua Kapiti Community Law Centre will give people a better idea of where they are and what they do.

Whiti te ra – into the light

The law centre has also adopted the moto 'whiti te ra' meaning 'into the light' – a reference to Ngāti Toa Rangatira's famous haka 'Ka Mate Ka Mate'. The motto speaks to the law centre's mission to 'elucidate' the complexities of the law for lay people and at the same time emphasise the strong bond with Ngāti Toa who have been represented on the law centre's governing board from the outset. The new logo has similarly been approved by Ngāti Toa Rangatira.

Mr Sceats says the old offices in Hagley Street were cramped and seismically dubious. The lawyers' computers were all donated and the phone system was 23 years old. Some clients found access to the third floor difficult so the lawyers would have to borrow a room from the Whare Manaaki Inc, Porirua Women's Refuge, on the ground floor.

It also has a new name to go with the new location – the Porirua Kapiti Community Law Centre. The newly fitted out offices are on the ground floor of the BNZ Tower, which is also close to the Porirua District Court

After 10 years without an increase in funding to community law centres (CLCs) nationally, the 2018 Budget allocated an increase of $2.2 million to be divided between the 24 CLCs throughout Aotearoa. The Porirua centre received $60,000 and Mike Sceats says some of that allocation was used to raise the salaries of his junior lawyers to the living wage while the remainder was saved toward the move.

Mr Sceats says he doesn't understand how the Ministry of Justice allocates funding between law centres, "but as I understand it, I'm not alone".

"Long ago the Legal Services Agency devised a funding system based on the number of hours each centre spent on client files. Then it was thought to be more appropriate to gear funding to the number of clients. Then it was hours again and now we're back to the number of clients, but only those we provide 'casework' services to. Legal information is free and not means tested."

The law centre has a comparatively high casework target for a catchment area of about 100,000 people when compared with Wellington/Hutt CLC which serves 300,000 but then, as Mike Sceats says, "this law centre has always punched above its weight and regarded itself as a law practice".

"Unlike most CLCs we only hire legally qualified staff, and our volunteers are either third or fourth year law students, or international students completing the 'overseas placement' component of their

degrees". In its 24 years the centre has hosted over 50 students from Germany alone.

Several years ago, the 24 CLCs formed Community Law Centres o Aotearoa (CLCA) to be an organisation for information sharing, advocacy and, where authorised, a bargaining agent with the government. CLCA negotiates some aspects of funding, but individual CLC trust boards all sign individual contracts with the ministry for their core funding, including the target number of casework clients. And any CLC can only count each client once, even if they come in multiple times.

Increase in clients

The centre has had a 15.9% increase in clients through the door in the last year, which was on top of an increase of 18% the year before. They are also contracted to deliver free legal education sessions to community groups – a minimum of 30 education sessions reaching at least 500 people. To meet these targets, law centre staff interact with a number of local NGOs – such as Partners Porirua (gateway classes at schools, clinics and marae), the East Porirua mosque, Wesley Community Action, Māori Woman's Refuge, staff training, domestic violence education and clinics at the Kapiti CAB.

While the centre can take 40 inquiries a day there is also a massive unmet need. For example, when talking to local groups Mr Sceats discovered almost no-one in Porirua had prepared a will or an EPA. A survey of similar groups in Kapiti revealed more than 90% of attendees had prepared one or other or both. As a consequence, the law centre immediately applied for (and received) grants from the Lotteries Commission, COGs (Community Organisation Grants Scheme) and Trust House to employ an additional staff member dedicated to helping low income clients complete EPAs and wills. The law centre has a target of 400 EPAs, and they are hoping to meet that target by the end of the year.

The centre is unable to provide some specialist services such as ACC advocacy and while the lawyers will give information in contested family law matters they won't act for either party. That is because the law centre aims to be a resource for all those who need to find out the relevant law. The new offices will provide a slightly bigger space with more interview rooms but given the level of unmet legal need Mike Sceats estimates he could easily employ an extra two or three full-time equivalent legal positions.

Mr Sceats says that the major disappointment for all staff is the inability to help those who are unable to afford a lawyer but who still do not qualify for free legal help. This group, often referred to as 'the working poor' earn a little more than the income test levels set by the Ministry of Justice. Sometimes the centre takes them on and maybe they will give the centre a donation afterwards – "This is a large growing group of people," says Mr Sceats.

After two years of 'saving their pennies' Porirua Kapiti Community Law Centre found their new office. An architect assisted them at a discounted rate and they have furniture donated by the ministry and some "dog-eared items" from the old site. They also acknowledge community grants from the lotteries and COGS (Community Organisation Grants Scheme) and Trust House.

"We have saved hard for the $100,000 needed for the move. We will be running with a 1% margin of error – it is a risk, but it was time to make the jump. We want to remind everyone in our community of the great work we do and where they can find us. We were honoured that the Minister of Justice, Andrew Little, Porirua Mayor Anita Taylor, Judges Hastings and Doyle, Taku Parai, Chair of Ngati Toa Rununga, Kaumatua from Ngati Toa and many others, were gathered on 18 November to cut the ribbon," Mr Sceats says. ■

ACCESS TO JUSTICE

Update on legal aid

BY **GEOFF ADLAM**

GROSS LEGAL AID PAYMENTS TO PROVIDERS were up 13.5% in the year to 30 June 2019 from the previous year. Total gross payments of $179.7 million were well up on the $158.3 million paid in the 2017/18 year and the highest since major changes were made to legal aid entitlements in 2011.

Information released by the Ministry of Justice shows that legal aid providers received an average gross payment of $144,112 and the median payment was $99,449.

The average and median payments per provider have risen steadily since 2013, with the average payment up 36% in the five years since 2014/15, and the median payment up 46% in that time.

The ministry says payments to firms are for legal services provided by approved providers under the legal aid schemes and may not have been made directly to any individual named in the report. The payments include the fees of approved providers, including those claimed on behalf of other approved providers, and disbursements for general office costs, travel costs, and special disbursements, which include fees for agents, expert witnesses, forensic tests, interpreters and special reports, such as medical or valuation reports.

As usual there were big variations between the payments received by providers, showing that a sizeable proportion of legal aid lawyers do not make much from legal aid. While eight providers received gross payment of over $1 million, 135 providers – 11% of the total – were paid less than $10,000. In the year to 30 June 2019, half (49.8%) of providers received gross payments of over $100,000. This was up from 45% of providers who received gross payments over that level in the year to 30 June 2018. The providers who received over $100,000 took 85.2% of the total payments, meaning the remaining 14.8% of gross payments went to 50.2% of providers.

GROSS LEGAL AID PAYMENTS, YEAR TO 30 JUNE

Year	Payments	Providers	Average	Median
2019	$179,707,442.95	1247	$144,111.82	$99,448.59
2018	$158,318,520.26	1205	$131,384.66	$90,497.00
2017	$143,379,904.64	1193	$120,184.33	$83,152.80
2016	$134,759,778.10	1210	$111,371.72	$73,528.42
2015	$130,215,953.30	1224	$106,385.58	$68,147.22
2014	$124,580,223.80	1240	$100,467.92	$63,064.61
2013	$130,258,884.90	1311	$99,358.42	$63,132.73
2012	$148,306,784.40	1465	$101,233.30	$62,152.27
2011	$154,090,071.28	1488	$103,555.16	$62,257.61

GROSS LEGAL AID PAYMENTS, YEAR TO 30 JUNE 2019

Size of payment	Providers	% Providers	Total Value	% Total Value
$1 million +	8	0.6%	$11,757,849.76	6.5%
$500,000 – $999,000	41	3.3%	$28,156,104.38	15.7%
$200,000 – $499,999	221	17.7%	$63,898,603.42	35.6%
$100,000 – $199,999	351	28.1%	$49,226,160.75	27.4%
$50,000 – $99,999	258	20.7%	$19,590,317.82	10.9%
$30,000 – $49,999	99	7.9%	$3,893,184.77	2.2%
$10,000 – $29,999	134	10.7%	$2,580,747.38	1.4%
$0 – $9,999	135	10.8%	$604,474.67	0.3%
Total	1247	100.0%	$179,707,442.95	100.0%

HIGHEST TOTAL GROSS LEGAL AID PAYMENTS BY LOCATION, YEAR TO 30 JUNE 2019

Centre	Providers	Total gross	% New Zealand	$100,000+
Auckland	433	$57,149,834.20	31.8%	206
Christchurch	110	$14,610,395.00	8.1%	53
Wellington	79	$13,891,747.48	7.7%	41
Hamilton	75	$11,928,135.86	6.6%	47
Rotorua	39	$8,325,381.06	4.6%	22
Tauranga	47	$6,409,899.80	3.6%	19
Whangārei	34	$5,711,911.22	3.2%	22
Lower Hutt	17	$4,620,316.38	2.6%	12
Palmerston North	21	$4,590,206.75	2.6%	15
Dunedin	43	$3,925,875.22	2.2%	14
All Others	349	$48,543,739.98	27.0%	170
Total	1247	$179,707,442.95	100.0%	621

There are noticeable variations in average and median payments around the country. The Auckland Council area has over 44% of New Zealand-based lawyers but accounted for 32% of gross legal aid payments in 2018/19. Rotorua, with 1% of lawyers received nearly 5% of gross legal aid payments, and Kaikohe (18 lawyers, 0.1% of total) received 1.3% of gross payments.

Grants by legal aid types

The Ministry of Justice now provides timely information on a range of justice matters in the Research & Data section of its website. Legal aid statistics for the year to 30 June 2019 are now available. These show that there were 77,058 legal aid grants, of which 75.4% were for criminal legal aid. Expenditure on criminal legal aid made up 58.1% of the total. Data on expenditure on legal aid in the 2018/19 year differs from that of gross payments to providers because of timing differences, and expenditure on criminal legal aid excludes grants assigned to the Public Defence Service "because they are not funded from legal aid".

Information on legal aid recipients

The ministry also provides demographic information on legal aid recipients. The "unknown" category is high for grants by ethnicity. A summary of some of the key indicators is given on page 68.

Some other indicators

National MP and justice spokesperson Mark Mitchell has been busily submitting a large number of written parliamentary questions to the Minister of Justice, Andrew Little. Some of these relate to legal aid and Mr Little's (always prompt) answers to the latest batch provide some useful indicators on New Zealand's legal aid system at October 2019. The number of each written question is provided with each piece of information.

HIGHEST AVERAGE GROSS LEGAL AID PAYMENTS BY LOCATION, YEAR TO 30 JUNE 2019*

Centre	Providers	Average	Median
Kaikohe	7	$331,611.98	$301,764.04
Gisborne	12	$286,654.53	$160,620.13
Whanganui	14	$279,721.28	$220,003.02
Whakatane	7	$277,315.02	$158,423.16
Lower Hutt	17	$271,783.32	$211,709.01
Tokoroa	3	$238,707.29	$302.113.06
Hastings	13	$238,219.66	$198,233.26
Palmerston North	21	$218,581.27	$168,735.72
Rotorua	39	$213,471.31	$111,454.42
Rest of New Zealand	1114	$131,723.63	$95,301.49
Total	1247	$144,111.82	$102,216.14

**Minimum of 3 providers per location*

LEGAL AID GRANTS BY LEGAL AID TYPE, YEAR TO 30 JUNE

Type	2019	2018	2017
Criminal	58,106	57,489	56,057
Family	17,485	17,885	17,897
Civil	1,171	1,227	1,021
Waitangi Tribunal	296	206	152
Total	77,058	76,807	75,127

LEGAL AID EXPENDITURE BY LEGAL AID TYPE, YEAR TO 30 JUNE

Type	2019	2018	2017
Criminal	$96,498,233	$81,093,364	$68,794,351
Family	$46,809,111	$45,152,410	$42,400,602
Civil	$6,088,199	$5,748,427	$5,599,516
Waitangi Tribunal	$16,409,801	$15,871,030	$15,487,388
Total	$165,805,345	$147,865,231	$132,281,857

Applications

At 30 September 2019 the Ministry of Justice data showed that there had been 7,042 applications for legal aid made between during September. (WPQ 35444).

During September 2019, 6,475 applications for legal aid services were approved (WPQ 35443) and 408 applications were declined (WPQ 35442). Total applications and those approved or declined during the month do not correlate exactly, but the data indicates that around 6% of decided applications were declined in September 2019.

Approval of applications

During September 2019, it took an average of one day to approve a legal aid application. A provider is assigned at the same time an application is approved (WPQ 35349). During September 2019, 86 applications for reconsideration of a legal aid application were made, with 34 (40%) overturned based on new information, three (3%) overturned with no new information and one modified (1%). This means 48 (56%) were not successful (WPQ 35437).

Legal aid debt

At 1 October 2019, $148.1 million in legal aid debt was outstanding (WPQ 35441). At the end of September 2019, 30% of legal aid recipients had been set a repayment requirement. This was determined through the number of legal aid recipients with an initial prescribed repayment amount set for their legal aid grant, divided by the total number of legal aid recipients (WPQ 35440).

Approved providers and caseloads

At 1 October 2019 there were 2,314 approved legal aid providers. Of these, 187 (8.1%) were Public Defence Service employees (WPQ 35445). There were 894 approved duty lawyers (38.6% of total) (WPQ 35429 – it is noted that no PDS duty lawyers are shown for the Bay of Plenty in the answer). The providers had an overall average of 38.37 active cases (cases that were open in the Legal Services Management System database, with no final invoice received) (WPQ 35446). In the table opposite, the average active cases per provider column includes both PDS and non-PDS providers. ■

PROPORTION OF PEOPLE GRANTED LEGAL AID, YEAR TO 30 JUNE 2019

Measure	Criminal	Family	Civil	Waitangi Tribunal
Age 10 to 18	3%	1%	1%	0%
Age 19 to 29	40%	31%	17%	<1%
Age 30 to 39	31%	31%	29%	3%
Age 40 to 49	16%	19%	22%	5%
Age 50 to 64	9%	14%	24%	49%
Age 65 and over	1%	4%	7%	4%
Age unknown	<1%	<1%	0%	1%
Male	69%	30%	59%	43%
Female	17%	42%	21%	54%
Other gender	<1%	0%	0%	0%
Gender unknown	14%	28%	19%	3%
NZ European	10%	17%	10%	0%
Māori	17%	11%	12%	42%
Cook Island Māori	1%	0%	1%	0%
Samoan	2%	1%	0%	0%
Other Pacific	<1%	<1%	0%	0%
Other ethnicity	6%	6%	12%	1%
Unknown ethnicity	64%	65%	65%	58%

APPROVED LEGAL AID PROVIDERS BY JUSTICE SERVICE REGION, 1 OCTOBER 2019

Region	Non-PDS Total	Non-PDS Duty	PDS	PDS Duty*	Average active cases/ provider
Northland	88	33			35.76
Auckland	723	243	109	80	29.87
Bay of Plenty	174	72	9		40.32
Waikato	200	72	17	9	32.45
Gisborne	34	18			48.13
Hawke's Bay	68	25	7	4	43.27
Manawatu-Whanganui	76	35			48.19
Taranaki	48	15			35.35
Wellington	298	88	20	17	37.86
Nelson	48	18			25.35
Marlborough	12	8			29.50
West Coast	7	5			52.38
Canterbury	222	80	18	13	37.32
Otago	77	32	7	5	28.21
Southland	52	15			28.39
Total	2127	759	187	135	38.37

**Answer to WPQ 35429 shows none in Bay of Plenty.*

LEGAL HISTORY

The (then) Supreme Court judges

BY **SIR IAN BARKER QC**

Sir Ian Barker continues his personal observations on some of the key players in the law when he was a new lawyer.

Supreme Court judges of the 1950s and early 60s were few in number and rather remote figures. Certainly, when compared to today's echelon of about 25 High Court judges and four associate judges in Auckland alone.

In what follows, I include some judges who were in their last years in office when I was a law clerk. I never appeared before them but observed their performances in an era before time costing and quotas of billable time, when employers did not mind law clerks spending time observing trials when they were "up the hill" filing documents. I then revert to judges before whom I appeared in my early years of practice.

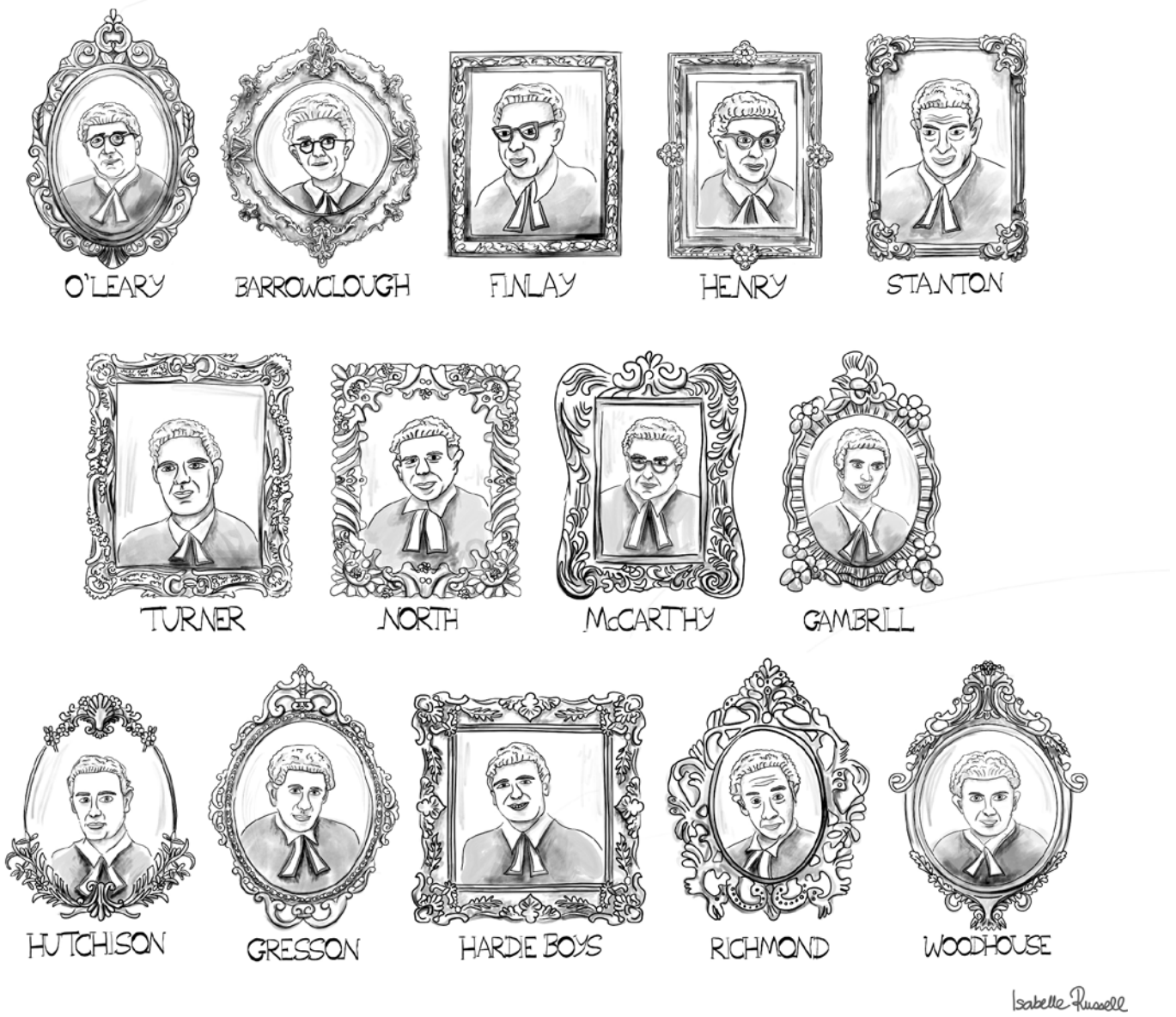
The most famous/notorious trial which attracted the greatest law clerk attention in 1953 was *Prevost v Prevost and Hutter* before **Sir Humphrey O'Leary CJ** and a jury. In those pre-Family Court days, one could sue the co-respondent (ie, the "other party") for damages for adultery. This only applied to males who had to be cited as co-respondents. Female "other parties" were called "persons entitled to intervene" and needed neither to be cited nor to take part in the proceedings unless they wished to do so. They could not be sued for damages.

Mr Prevost was a wealthy businessman and Mr Hutter was a well-known racing commentator. The evidence revealed what were, for the time, glitzy, even risqué goings-on amongst members of what was called "a smart cocktail set", including one man described as "a cocktail lawyer". Lots to take in and gossip about for legal people!

▲ Humphrey Francis O'Leary, his wife and son. 17 October 1932 Ref: PAColl-6301-21. Alexander Turnbull Library, Wellington, New Zealand.

It was said that the strain of this trial was too much for O'Leary CJ who died not so long afterwards. He was replaced as Chief Justice by Sir Harold Barrowclough, famously described by the late Professor Davis, long-time Dean of the Auckland Law School, as "a good soldier".

Sir Humphrey O'Leary was apparently



a pleasant and congenial man who had been a good advocate and President of the New Zealand Law Society. He was close to the Labour Party which appointed him as Chief Justice over the establishment candidate, **Sir Wilfred Sim**, who had National Party affiliations.

As an aside: my only experience of Sir Wilfred was when I was in the old Wellington Court library preparing to argue my first major appeal in the Court of Appeal the following day. I had committed the gross breach of Wellington protocol by sitting in Sir Wilfred's place. I had been unaware of this very Wellington custom of reserving seats for VIP members of the profession without any indication to ignorant Jafas of the pre-emption. Sir Wilfred was not particularly gracious, unlike TP Cleary who was courtesy and understanding personified when I unintentionally pinched his space in the library.

Barrowclough CJ's appointment was not received kindly by the profession. It was said that Sidney Holland, the then Prime Minister (arguably one of the worst of that category in my lifetime) appointed Barrowclough to reward him for his service as a general during the war. He was not noted as a good advocate nor as a particularly astute lawyer. He was often overturned on appeal but was said to be a good leader of and shop-steward for his judges and a reasonable administrator. I appeared once before him in his last year on the bench as a junior for the plaintiff in a personal injury case. Senior counsel squabbled consistently throughout, and it was all too much for the judge who threatened to leave the bench unless counsel became more reasonable.

The senior judge in Auckland for some years was **Sir George Panton Finlay** of whom an elderly idiosyncratic steward at the Northern Club was once heard to enquire "Potage, Sir Jarge?" Finlay J was said to have been decidedly user-unfriendly on the bench – particularly to younger or inexperienced counsel. The only time I witnessed this style in those neophyte days was to hear him rebuke a not-so-accomplished counsel for putting up what the judge thought was a spurious defence. He had practised in Te Kuiti in his younger days, specialising in Māori land law.

Theatrical in court

Sir George could be a bit theatrical, as on the occasion when he swore-in **Trevor Henry** as a judge in 1954. Unlike as in all the very many swearings-in which I

have attended (including my own in 1976), the new judge took his oaths of office not from the bench but whilst standing at counsel's table in counsel's robes and wig. The court then adjourned and returned for the customary welcoming speeches with the new judge as one of its members. I have often thought that Finlay J got it right and that his procedure was more logical in that the new judge did not assume the judgment seat nor don the judicial bling until he/she had been sworn-in.

Sir Trevor's appointment was the first time I had encountered the legal rumour-mill which is alive and well – even today when judicial appointments are exceedingly common and not considered worth noting by Auckland's sole tabloid newspaper (which used to be a journal of record). The mill was and is activated when a lawyer is about to be elevated. My then employer had asked Sir Trevor to act for a client who had been seriously injured in a motor accident and who was suing for damages – as one could in pre-ACC days. Sir Trevor mysteriously declined what was a great brief but told my employer that he couldn't say why. That intimation was legal code for "I have been appointed a judge".

Sir Trevor was sent on appointment to preside in Dunedin and was that city's last resident judge. He used to visit Auckland to sit occasionally. Whenever he did so, there was a marked fall-off in the number of criminal sentence appeals. Henry J knew about the power to increase a sentence on the hearing of an appeal. Post official retirement, he was a temporary judge in Auckland when I was first appointed to the bench in 1976. He was very generous with his advice to a young judge – particularly in criminal matters where his experience was unrivalled. He lived until the age of 105 and was as sharp and as interesting as ever to the end.

Sir Joseph Stanton was kind and avuncular on the bench. He had been Auckland City Solicitor for many years before appointment. Not as sharp legally as Finlay, he was popular with the bar.

One of New Zealand's greatest judges, **Sir Alexander Turner**, had been one of three Queen's Counsel to have been the first appointed in the reign of Queen Elizabeth II in 1952, along with LP Leary and HP Richmond. Sir Alex became President of the Court of Appeal and had been one of the members of what I consider to have been one of the best judicial combinations on that court in my time and since: North P, Turner and McCarthy JJ.

Sharp and agile mind

Turner J had an extremely sharp and agile mind. What distinguished him from a few others of high intelligence was that he had no tickets on himself. His career at the bar had seen him undertake a variety of cases including criminal defence work – such as the famous George Horry case where a murderer was convicted without any evidence of the corpse of the deceased ever being located. He was also academically inclined and his editing and reinvention of *Spencer Bower and Turner on Estoppel* was one of this country's best-ever legal works, acclaimed throughout the common law world.

He was the first judge in Auckland to conduct Chambers hearings in the presence of all counsel with matters on the Chambers List. With other judges, counsel would crowd the corridor near the judge's chambers and be summoned – one case at a time – to face the judge. On any Chambers List there would be a mixture of cases – many routine, but also defended unusual applications under a variety of statutes. Turner J always did his homework and was many jumps ahead of counsel. He dealt with each case in the presence of assembled counsel and those who had not prepared or who had been sent along thoughtlessly by a senior partner without proper instructions to seek an adjournment were often in for a nasty surprise. One always felt educated by the treatment he gave to legal situations which were outside the common experience.

Turner J had the extraordinary knack of articulating in succinct phrases one counsel's best argument and then articulating the best argument for the opposition. Usually this happened during submissions. The judgment was always concise and clear and rarely appealed – let alone successfully appealed. His knowledge of all aspects of the law was truly encyclopaedic. Whilst fairly demanding of counsel, he was never nasty or humiliating to them.

On the Court of Appeal, his style did not always blend in well with that of Sir Alfred North. They were quite different personalities. North P was the more forceful. He had an instinctive feel for the law whereas Turner J was more academic. But the combination produced good judgments which were enhanced by the more pragmatic approach of **Sir Thaddeus McCarthy** – the third member of this memorable court.

After its creation as a permanent court in 1958, in one of many instances of Justice Department inadequate judicial housing efforts, the Court of Appeal was located in a shocker of a building in Ballance Street which had once housed the Public Trust Office. Previously, the court had sat in the Wellington Supreme Court building which before its fairly recent renaissance, had many deficiencies. The Court of Appeal building's subsequent reincarnation in Molesworth Street was obviously an improved facility. There, Sir Thaddeus gave the judicial input into the design and considered that only the President's Chambers should be provided with an en-suite. The other judges would have to share a lavatory (men only were catered for in those days,)

On his retirement, Sir Alex became Butterworth's principal editor and recruiter of textbook authors. He masterminded the Fourth New Zealand Edition of *Halsbury*. It was almost impossible for someone whom he targeted as an author – either of a text or of a *Halsbury* topic – to refuse his job offer, given Sir Alex's encyclopaedic

knowledge of the law, his fame as a judge and an engaging manner. You instinctively felt flattered that he had chosen you of all people for what was to be an epic contribution to a particular field of law.

Formidable advocate

Sir Alfred North had practised in Taranaki where he built up a solid reputation before being invited to join Earl Kent in Auckland. He became a formidable advocate there. With a crippled leg and an adenoidal and easily imitable voice, he did not suffer fools gladly either at the bar or on the bench. I got to know him in mellower mode in the years following my appointment to the bench because he happened to live down the road from me. He was always keen to hear the latest legal and judicial gossip and would often summon me to partake of a large gin and tonic. Fortunately, I didn't need to drive to his house. His war stories were always interesting, and his quick perceptive mind stayed with him to the end. He died suddenly in 1981.

I was admitted as a solicitor in 1957 at a time when I needed only to pass papers in International Law and Conflict of Laws to gain my LLB degree. The regime of the times permitted admission as a solicitor without requiring completion of the full degree course. Why those two subjects were considered essential for a barrister but non-essential for a solicitor remains a mystery. I find it ironic that those two subjects, which we students then considered academic and of no practical use, should assume some importance for me in my "third career" when I undertook international arbitrations.

Having passed quite easily these two subjects which I found interesting even in the late 1950s, I was admitted as a barrister in February 1958 by **Justice Shorland** who was a kindly, able, hard-working and courteous judge who was great to appear before. Sadly, he died suddenly about three years later whilst on sabbatical in France.

His daughter, **Anne Gambrill**, was one of the first Masters to have been appointed when the office was created in 1987. Although she ran her court in a relaxed way and was a highly successful appointee, as one of the first Masters, Anne had to put up with the Justice Department's disapproval of their creation. The department had Masters on five-year appointments which was not constitutional for a judicial officer. The anodyne term "Associate Judge" was introduced some years later. She and the late Pat Towle were pioneers in the role and, along with Master James Thomson in Wellington and Master Hansen (later Sir John) in Christchurch, they earned the respect of the bar for the new creature in the judicial menagerie.

Admission 1958-style

There was no mass admission ceremony in 1958 with red robes and Queen's Counsel being asked to move, etc. About six of us were ushered into the judicial presence, one at a time, along with counsel moving. The whole process was over in a few minutes after the admittee had taken the prescribed oaths and the judge had offered formal congratulations and exchanged pleasantries with counsel moving.

My first appearance in the Supreme Court (apart from obtaining a decree absolute in a divorce case) was before Hutchison J and a jury. **Hutchison J** was senior puisne, sent from Wellington to "help out" Auckland which was, as ever, needing extra judicial horsepower. He was rather gruff but basically pleasant to appear before – with expressive bushy eyebrows.

Paul Temm (admitted on the same day as me) and I appeared on legal aid for three young tearaways (who would be deemed innocuous today) charged with being rogues and vagabonds in a public place. Paul and I managed to find them a legal out which was reported as *R v llich Newson and Tonge* [1958] NZLR 670. So not only did we win our first jury trial but our first case made the Law Reports. All good for the ego! The quaintly-worded charge which our clients faced has now been superseded by something like disorderly behaviour. Criminal legal aid was then in the gift of the judge who almost always granted it on the highest of the niggardly scales of remuneration – in preference to having to deal with a defendant in person.

Paul and I appeared together again in the Privy Council in 1966. He led me in *Frazer v Walker* [1967] 1 AC 569, [1967] NZLR 1069 and I led him in *Jeffs v New Zealand Dairy Production and Marketing Board* [1967] 1 AC 551, [1967] NZLR 1057. Their Lordships' concern at this unusual arrangement was assuaged when they were informed that we had been admitted on the same day.

The judges used to take a lunch-time constitutional (weather permitting), not straying too far from base and wearing their black homburg hats, useful for doffing when greeting a lady.

Terence Gresson was appointed to the bench at the age of 42 (the same age at which I had been appointed) in 1956. He was very much of the Christchurch establishment and had a patrician air. Good-humoured and very professional, he ran his court with grace and style, whilst always with the requisite dignity interspersed with humour. I remember one undefended divorce day when **Jimmy Dickson**, a then elderly and idiosyncratic practitioner, was presenting a petitioner who alleged a verbal separation

Justice Terence Arbuthnot Gresson (1914–1967)

Sir Ian's recollections of Justice Gresson are indicative of the affection and respect with which he was held by the profession. His death by suicide on 14 November 1967 at midnight was a major shock, but the prevailing attitudes and conventions of the time meant it was not discussed.

Justice Gresson's son Nicholas was aged 27 at the time of his father's death. He has revealed that he tried to obtain help for his father, and was criticised for speaking out both before and after the death. Regardless of the family viewpoint, the Chief Justice Sir Richard Wild remained totally supportive of Nicholas throughout.

Nicholas Gresson QSM is a poet and last year he published a fourth collection of poems, *The Writing Point* (Australian Scholarly Publishing). This includes a poem, "The Hand at Midnight", which, in his own words "gives honour to my father and his pain – this should be spoken". With the permission of Nick Gresson and the support of his wife, Auckland barrister Dr Elizabeth Gresson, *LawTalk* would like to honour Justice Gresson and his son by publishing "The Hand at Midnight".

The Hand at Midnight

From the lies in a thousand slips she fed him death,
from a thousand loves she turned his sight,
and that last night she sank him
in the quicksand grip of a family mansion –
so far from home,
in solitary confinement she left him
to spread his last breath by law
and cast his final judgement.

And round about his mates are stepping past
drunk with respect, damning his retreat,
he alone selecting himself for death.

'And should it be so?'

Passing borders of a life lost in clotted hope
by a driveway, by a river, by a bridge, by a sunken garden,
where athletic breaths and calls are lost in the wind,
the loss of a thousand loves set in a thousand storms.

'Come my father, so swiftly.'

This is the way she got in
and this was the mien she knew...
alone she could burn and set the hand to midnight
satisfied to swoon in her mocking moonbeams,
assured her perfection and completion
breaking the pace of his being, the tide of his love.

Perhaps autumn leaves, their fires to fuel,
or Ireland's lore could hold in faith a light,
could charm beyond a church bell's harvest...
but the door had been shut fast.

Only the cat was welcome to the inside hearth
all else estranged
nothing left but the weave of her thousand snares.

Night scratches time in a soft soul
touches tangled flowers and rhyme
his eye to the last riverbank, caught.

'Can it be, my father?
Will it be...?'

Alive the profusion of sweet peas by the wash-house
edging the drying-green of a fading *Gartmore*,
passing footprints in the grass, the hollow bark of dogs.

A long driveway reaching to another time...
autumn leaves casting a last cushion for his head.

Countless trees cry on a nor'west wind.

Nicholas Lyon Gresson 22 February 2017

▲ Chief Justice, Sir Harold Barrowclough (left) and Registrar, G R Holder being escorted by Constable W J Firmin to the new Court of Appeal, Ballance Street, Wellington. Evening Post, 5 Feb 1960 Ref: EP/1960/0507-F. Alexander Turnbull Library, Wellington, New Zealand.

agreement as the ground of divorce. He blatantly led his client on the vital evidence of the alleged verbal arrangement with her husband – and some judges would have expressed grave annoyance at such disregard of the rules of evidence. TA Gresson J in his cultivated voice, having listened to this then said: "Mr Dickson, as the years advance, it becomes increasingly difficult to refuse you. Decree Nisi."

The profession was dismayed when Justice Gresson committed suicide in late 1967. I was involved in a case which ran for some time in 1966 before him. Almost a year after he had finished the hearing, he wrote a judgment, signed it, gave it to his Associate for delivery and then died. There was litigation over whether judgment could be delivered after his death. See *Westfield Freezing Company Ltd v Steel Construction Company Ltd* [1968] NZLR 680.

Fearful to the unprepared

Reginald Hardie Boys J (father of Sir Michael who became a Court of Appeal judge and Governor-General) was a confident and forceful figure on the judicial scene. Not claiming to be a legal scholar, he brought to bear his considerable knowledge of human nature, born of years of practice. He was particularly empathetic to juries in both criminal trials and personal injury litigation. Yet his civil judgments over a wide area showed an appreciation of the relevant law and an ability to deal with complex factual situations. He could be a bit scary if counsel were unprepared.

Richmond J was appointed in 1960, my second year after admission. I had encountered him in what was one of his last instructions in practice. He was acting for a construction company which had gone into receivership or liquidation owing heaps to the usual unhappy cohort

of subcontractors. (Nothing much has changed since then. At least in 1960 there was the rather flimsy protection for subbies offered by the liens legislation which was repealed in 1989 and sort of replaced years later by the Construction Contracts Act.)

A creditors' meeting was held in the former office of the company. Kip Richmond, acting for the liquidator, presided, seated on an apple box. Attending solicitors – most of them young like me because the fee potential was not great – sat wherever they could or else stood around. Kip dealt with all enquiries and articulated potential legal problems with considerable aplomb and knowledge but with great courtesy to all, including the neophyte lawyers.

So, I was well-disposed towards him when his appointment came a few weeks later. There was some criticism then of his perceived lack of experience in criminal law – a comment often made then and now about appointees who had only civil experience in litigation. But Kip proved them wrong and managed many important criminal trials with the same aplomb he had displayed at the Tru-cut Homes Ltd (in liquidation) creditors' meeting just described. He went on to the Court of Appeal, becoming President.

On the bench he shook his head a lot because of some neurological condition and always asked questions in a rather tentative manner as if seeking the answer from somebody who knew what it should be. But wise counsel were rarely fooled by this approach. He was a very sound and knowledgeable lawyer who usually knew the answers before he asked the questions. The naming of a high-powered set of Chambers in Auckland after him was a great recognition of his standing and ability. As a guest at Auckland Law Society Council dinners for visiting judges at the long-closed Professional Club in Kitchener Street on the odd occasion when the Court of Appeal sat in Auckland, he was a fan (in appropriate moderation) of Jacob's Creek Shiraz which he always called "Jackson's Creek".

Owen Woodhouse was appointed in 1960 from practice in Napier to sit in Auckland. He brought charm and a relaxed approach to a somewhat stuffy culture and was understanding of and helpful to young lawyers. His informality was often visible on undefended divorce day when he lowered the barriers for formal proof in areas where some of his colleagues insisted on strict compliance with the rules of evidence. This characteristic was often to be seen in his dealing with evidence of verbal separation agreements in divorce petitions. He and **Sir Graham Speight** – each faced with a list of 30 undefended divorce petitions – were said to have had a bet over which one of them would get through the list first. Legend had it that "Woody" won.

On the Court of Appeal, he wrote some judgments which might be categorised as "forward-thinking" or "socially interesting". He would try to persuade the colleagues with whom he sat to agree with his approach – not always with success. He was good at persuading long-winded counsel with a plethora of appeal grounds to abandon the grounds which had little chance of success, to concentrate on what he considered the arguable grounds. But the colleagues on the bench did not always agree with his assessment of the arguable grounds! He succeeded in abolishing wigs and gowns in the Court of Appeal in 1986 on "an experimental basis". There were never any reports on the success or otherwise of the "experiment" which was in fact Woody's way of imposing his views on a somewhat sceptical bench and bar.

His ability to engineer change was best seen in the eponymous report of the Royal Commission which he chaired (nobody these days recalls the names of the other Commissioners) allegedly on reform of workers' compensation. By stretching some generality in the terms of reference, the report of the Royal Commission recommended abolition of personal injury litigation and the establishment of a scheme to compensate all victims of injury, workplace, motor accident or any other type of injury such as sporting injury. The legal profession was divided but legislation incorporating some, but not all, of the Commission's recommendations was enacted in 1972 with additions by a different government in 1973 to come into effect on 1 April 1974. This narrative is not the place to discuss the implementation of the report nor the tinkerings by a succession of politicians with its principles and the use by the said politicians of the funds generated by the scheme. The profession adapted well and, on the principle "The Lord giveth, the Lord taketh away", new horizons for litigators appeared with such statutes as the Matrimonial Property Act and the Commerce and Fair Trading Acts. ■

Sir Ian Barker QC was admitted as a solicitor in 1957 and has had a long career in the law, as a solicitor, barrister, Queen's Counsel, High Court Judge, law academic, arbitrator and mediator.

ALTERNATIVE DISPUTE RESOLUTION

Principles of influence: likeability

BY **PAUL SILLS**

To be a successful mediator, it is important to have some degree of influence and persuasion over the disputing parties. Not in terms of the outcome but in terms of the process and the conversation that the parties need to have with each other. This enables the mediator to guide the parties through the process efficiently, ideally allowing them to resolve their dispute.

Psychology professor Robert Cialdini has investigated theories of social interaction and conducted substantial research in the areas of persuasion and influence. Through this research, six principles of influence have been developed and applied to mediation and negotiation. I discussed the principle of reciprocity in my most recent article (*LawTalk* 934, November 2019, "Reciprocation bias and Hanlon's razor", pages 42-43). In this series, I will discuss the remaining five principles: the principle of liking, followed by the principles of authority, scarcity, consistency and, finally, social proof.

While we may like to think that we don't care whether our peers like us or not, social science suggests that likeability contributes to our ability to be successful influencers and persuaders. People prefer to say 'yes' to those they like.

Pam Holloway and Michael Lovas, authors of *Axis of Influence: How Credibility and Likeability Intersect to Drive Success* (2009, Morgan James Publishing), assert that likeability is not a gift but a skillset. Their research shows that the more likeable we are, the more successful we seem to be in life, business, and in receiving service from different service providers such as doctors, etc. In terms of influence, our actions are more susceptible to being shaped by those who we respect and admire. If we do not think favorably toward someone, we are less likely to value their contributions to our lives.

Through their research, Holloway and Lovas have developed "seven components of likeability", which are: having a positive mental attitude, being open, non-judgemental, having inner security, the ability to show vulnerability, demonstrating empathy and, finally, relatability. These components can be seen to contribute to the success of individuals throughout their studies.

Relatability significant

While all seven components of likeability are valuable in the process of mediation, Professor Cialdini believes that relatability is a particularly significant skill and characteristic for mediators to demonstrate. The ability for a mediator to drive and direct the parties in their negotiations whilst also remaining actively present in the conversation is vital in achieving likeability in the eyes of the parties. It is therefore important that the mediator makes it clear to the parties that their role is not to make decisions for them but to facilitate a collective conversation which, ideally, will lead to an agreeable resolution. Rather than being an authoritative figure, a mediator should be more grounded within the discussions, ensuring that the parties see them as being available for help and guidance rather than judgement.

Mediators can also foster relatability by acknowledging the similarities of the disputing parties. Highlighting features such as shared desires to maintain a business relationship, minimising costs, minimising publicity, etc, are all ways in which a mediator can unite parties through relatability. Parties that are made aware of their similarities are less likely to be as hostile toward each other. In addition, likeability is attributed to how much in common we have with someone else.

> **Successful questioning is the key to building rapport with others and fostering relationships in both our professional and social interactions**

> "The wise man doesn't give the right answers, he poses the right questions"
> — Claude Levi-Strauss

Our ability to ask beneficial and valuable questions has also been shown to enhance our likeability and thus our success. As professionals, we are expected to be able to successfully extract information from our clients through asking the right questions. However, many of

us do not evaluate how our own questions can be honed as a skill, or more importantly how asking questions could relate to our own likeability. Successful questioning is the key to building rapport with others and fostering relationships in both our professional and social interactions.

Focus on self

Harvard psychology scientists carried out a study to determine the link between questioning and interpersonal relationships. They found "the tendency to focus on the self when trying to impress others is misguided, as verbal behaviours that focus on the self, such as redirecting the topic of conversation to oneself, bragging, boasting, or dominating the conversation, tend to decrease liking". In contrast, "verbal behaviours that focus on the other person, such as mirroring the other person's mannerisms, affirming the other's statements, or coaxing information from the other person, have been shown to increase liking". (Karen Huang et al, "It Doesn't Hurt to Ask: Question-Asking Increases Liking" (2017) 113 JPSP 430 at 431)

Asking questions demonstrates an interest in the other person/party, which is a likeable quality.

In mediation, successful questioning is a fundamental part of the process. A party's ability to adequately communicate their concerns and feelings can be achieved through questioning. This allows for the main issues to be clearly expressed and heard by the other party.

It is also important that the mediator asks questions in order to ensure that all aspects of the dispute are laid out and addressed. From here, settlement discussions can be held. Further, it is important that parties are given the opportunity to ask each other questions or seek clarification throughout the process. Rather than each side communicating their issues and then moving on, allowing them to ask each other questions demonstrates the idea that each party has a genuine interest in the other side's arguments and a mutual desire for settlement.

While likeability may appear trivial, it is clear that it contributes to our success in both social and professional relationships. In mediation, being relatable is particularly important because parties that are able to envision each other's similarities (that is, find the other party relatable) are more active in settlement discussions. The ability and opportunity to ask relevant questions also contributes to our likeability and it is important for mediators to facilitate this in order to minimise feelings of hostility between parties. In addition, asking relevant questions of those around us suggests a genuine interest and respect toward them, and this is reciprocated.

In mediation, the opportunity to ask questions highlights the respect between parties, suggesting a mutual desire for resolution. If we are able to reflect on our actions in relation to others, we are more likely to conduct ourselves in a more likeable fashion. The next article will investigate the relevance of authority. ■

Paul Sills ✉ *paul.sills@paulsills.co.nz* is an Auckland barrister and mediator, specialising in commercial and civil litigation. He is an AMINZ Mediation Panel member.

ALTERNATIVE DISPUTE RESOLUTION

Family feuds — litigate, arbitrate or mediate?

BY **KERI MORRIS** AND **CHRIS LAHATTE**

NOW THAT WE HAVE RECEIVED THE REPORT FROM THE Independent Panel's review of the family justice reforms and also following the release of the Law Commission's report on suggested changes to the Property (Relationship) Act 1976, we ponder other areas of family law where similar access to justice issues that affect families arise. These are specifically issues relating to decisions over property or personal care under the Protection of Personal and Property Rights Act 1988 and the Administration Act 1969.

Typically, these disputes are driven by emotion and complex family relationships. Often, they can be time-sensitive and fraught with financial implications for the parties involved.

It is well established that the costs associated with bringing a dispute to court – including legal and court costs – together with the delay in getting time before a judge create an access to justice issue. We all know this. In her statement following her appointment as Chief Justice, Justice Winkelmann said:

> "Access to justice is the critical underpinning of the rule of law in our society: it is the notion that all, the good, the bad, the weak, the powerful, exist under and are bound by the law. That condition cannot exist without access to courts, and without the ability to obtain a just resolution of claims before those courts. Cost, delay and a lack of representation all can act as barriers to justice."

Even if a person can afford to start down this path, the damage to family relationships can be devastating and echo through generations to come. The reality is that many of these disputes are over relatively small amounts of money which can mean there may not be very much left for them by the time they reach the end of this process. Even if the person is eligible for legal aid, it is not a free service and they may be required to pay any "winnings" back to the Ministry of Justice.

So, what can lawyers, arbitrators and mediators do?

As dispute resolution practitioners all of us can assist clients to look at alternatives to court applications. Lawyers giving clients legal advice are vital, especially when they can help clients consider alternatives such as arbitration and mediation.

Arbitration as an alternative

Usually cheaper, often quicker, and widely used overseas, arbitration is an alternative to a court process. Arbitration can be tailored to suit the needs of the parties and the complexity of the dispute. The level of formality is determined by the parties, the parties choose the person who will decide the dispute and a decision will be made quickly. Both the process and decision are confidential, which can limit the harm done. Arbitration can be used with mediation to great effect. For example, in a recent relationship property case, parties reached agreement on all but one issue – whether a portion of the funds used for the purchase of the family home were relationship property or a debt owed to one of the parties' parents. The impasse created an opportunity for arbitration to finalise their relationship property. The ability to use mediation and arbitration enables parties to reach their own agreements but also provides them with the opportunity to have a quick and cost-effective determination should there be outstanding issues.

Even during arbitration, parties can reach an agreement between themselves. An example is a case where the parties disagreed over the wording to be inscribed on a deceased family member's tombstone. The arbitrator took an inquisitorial approach which also enabled the family to reach agreement, thereby avoiding the determination of the arbitrator.

The benefits of mediation

Where there is an urgent need for decision, such as a care decision for an elderly parent, dispute resolution which assists the parties involved to develop a plan will save cost time and damage – including as much as possible the person who is the "subject" of the dispute. An example of a case where mediation may have avoided a rather unfortunate series of court cases is *Carrington v Carrington* [2018] NZHC 505, where a family became deeply divided over the care of their

mother who suffered from senile dementia. This went through the Family Court and then on appeal to the High Court. It showed a family who all had their mother's best interests at heart, but fundamentally differed on where she should live. The financial and emotional cost must have been devastating.

Most will be very familiar with the devastating case, *Takamore v Clarke* [2012] NZSC 116; [2013] 2 NZLR 733, which was splashed across the media. In spite of a number of court decisions, there was no resolution and the family remained unable to agree on the final resting place.

Recently a FairWay mediator assisted a family to decide on the funeral arrangements and burial place of a family member killed tragically in a car accident. This was done by phone, involving six family members and enabling the release of the body from the hospital so that the family member could be buried with all family engaged.

FairWay mediators have also had great success mediating disputes about wills and estates. In situations where the deceased has no will and different loved ones want different things, disputes can further complicate an already tough situation for the deceased's loved ones. This is especially true if matters of religion and culture are at the heart of the issue. Not surprisingly, these differences can tear families apart. The skill of mediators who assist parties through careful questioning techniques to recognise their own positions, interests and needs as well as the interests and needs of others involved in the dispute will help families find common ground and sometimes even create a new pathway which will lead to the restoration of relationships and agreement.

Closure

Mediation can also bring closure.

In one such case that FairWay mediated, the mother had died and in her will had passed her home on to her caregiver. Her estranged only daughter – who hadn't seen her mother for over 10 years due to mental health issues – wanted to contest the will, but after having spent several thousand dollars in lawyers' fees was now out of money and emotionally drained. Having reached a standstill, the daughter approached us for mediation. We contacted the former caregiver who agreed to mediate.

The outcome was everything a mediator could hope for and life changing for the parties. Not only were cherished family photos returned, but the house was tidied up for sale (with the assistance of the daughter's partner), sold and the profits shared between the parties. Stories were told of the mother's latter years and the daughter got to understand that the "caregiver" was much more than a paid worker to her mother. The caregiver got to hear about the daughter's disappointment over the loss of her relationship with her mother. The caregiver was able to give her some comfort from the fact that her mother never forgot about her. These are opportunities that could not occur through an adversarial process yet will have a profound effect on people's lives. And for anyone who thinks that mediation has to be face-to-face, this mediation was all done by video conference. ■

Keri Morris ✉ *keri.morris@fairwayresolution.com* is a mediator, conflict coach and Head of Family Services at FairWay Resolution Ltd. Chris LaHatte ✉ *chris@lahatte.co.nz* is a lawyer, mediator, restorative justice practitioner and arbitrator with his own private practice.

PRACTICE

Succession planning: a strategic approach

BY **EMILY MORROW**

If you are a New Zealand lawyer reading this article, you are part of an inter-generational cohort turnover in the New Zealand legal profession. What does this mean? I am referring to the fact that the generation of baby boomer lawyers are generally reducing their level of practice, becoming consultants (instead of partners) and/or retiring. Simultaneously, the incoming generation of younger lawyers are moving towards or are stepping into partnership and other leadership positions. This is inevitable and predictable. Nevertheless, many lawyers are in denial about this and many law firms are not addressing the issue of succession planning. Denial and inaction are not strategies.

Conversely, some firms are embracing this inter-generational cohort turnover and taking advantage of its opportunities. These firms are responding strategically and proactively. And they are doing so in ways that benefit both the departing and arriving generations. They are doing succession planning right.

Assuming a law firm wants to take a strategic approach to succession planning, what should it do? What will ensure optimal financial, personal and professional outcomes for the firm and its partners?

Thinking and acting strategically involves looking critically at what is going on now, making some well educated guesses about the future and then taking appropriate actions. Law firms will therefore be well advised to focus on the current and future skills, personnel needs and financial issues that are involved in successful succession plan.

Strategic succession planning retreat discussions

An excellent way to start engaging in succession planning is for the partners or directors (for convenience, I will refer to firm owners as partners rather than directors), to schedule a planning day to consider the topic. The purposes should be to identify succession planning options (both for individual partners and for the firm) and discuss possible next steps.

In terms of options, consider the following spectrum. At one end is the "last one out turn off the lights" and at the other end is passing along a robust and lucrative practice to the next generation in a way that preserves and enhances the present and future economic value of the practice. There are many permutations along the way including mergers, acquisitions and a sale of a portion or all of a practice.

I suggest the following topics should be discussed by the partners during strategic succession planning retreat(s):

Financial considerations

Financial considerations include the cost of hiring and training younger lawyers, partner buy-outs and buy-ins, re-training lawyers, phasing out partners and the like. In addition, there are, of course, individual financial considerations for a partner who is considering retirement. Does that partner have the financial wherewithal to leave in the foreseeable future?

Although the topic of financial planning for one's ultimate retirement is beyond the scope of this article, it is relevant in terms of whether a firm has partner buy-ins and buy-outs. Some firms view such arrangements as being a way to finance a departing partner's retirement. However, increasingly firms are reconsidering this practice as it can make it difficult to attract new partners. Some firms are paying partners (who previously bought in) the present value of their future buy-out well in advance of their retirement and then dismantling the buy-in/buy-out structure going forward. Thereafter, the expectation is that partners will fund their own retirements through current earnings and the firm will finance capital expenditures through internal or third party debt.

Personnel considerations

Every law firm has a unique culture based on its history, leadership and lawyers. Although a firm's culture is flexible, it can only accommodate a certain amount of deviation from the norm by partners and others before problems develop. Firms need to understand their culture to know who will fit in well personally and professionally as part of a succession plan. Although lateral hires can work well, it is often more difficult to integrate such lawyers than those who are "homegrown". This can often make or break a succession plan.

Skills considerations

Firms often focus on the practice areas that will need to be covered

when a partner leaves. It's important for a firm to evaluate both the current and potential future practice areas that are available to it. For example, a firm may choose not to replace a departing partner if the future prognosis for his/her practice area is poor, and to bring in a partner with expertise that is more tailored to market opportunities. Firms will need to be astute about identifying and evaluating current and future opportunities.

Other topics for discussion during a strategic succession planning retreat

Individual partner's plans

What are each partner's current thoughts about his or her future in the practice? I typically encourage partners to talk in general terms about their future plans, realising that their thinking may change over time. The thinking of each partner will collectively inform the actions of the whole partnership.

Getting the right partner mindset

Some partners get uncomfortable thinking and talking about retirement and worry about the change in status, self image and identity it can entail. Some are concerned they will be marginalised within the firm and amongst their clients if they start planning for retirement. Taking the topic of succession planning and retirement out of the closet, sooner rather than later, can mitigate these concerns. It can be helpful for a neutral third party to ask the tough questions such as: "What are your plans?" "When might you intend to retire?" "Who will take over your practice?" "What resources will you need from the firm to transition your practice to someone else?" and "How will this be communicated to your clients?"

Starting early with succession planning

To optimise the many benefits of proactive, strategic succession planning, I recommend firms start the process no less than five years before a partner's anticipated departure. It takes quite a long time to get the process right and it is often easier to talk about these things when they are not immediate eventualities.

Articulate clear outcomes and benchmarks

The succession planning process should include timelines, clear objectives, hiring decisions, plans for cultivating and training new talent, business development considerations and so forth. Having benchmarks and timelines will ensure accountability and success.

Communicating a firm's succession plan to clients

Optimal client care during the active phase of a succession plan is critical. For example, if a partner is going to be departing in the next 12 months, I suggest a letter be sent to clients sooner rather than later explaining what will be happening, who will be taking over his/her practice and presenting the change in a very positive and professional way. This will strengthen the firm's relationship with clients.

In some cases, it can be helpful to raise the issue well in advance of a particular partner's departure. For example, if a firm has long time, well-established client relationships, it may be advisable to be relatively transparent about the succession plan to reassure clients that their legal needs will be met, even if something happens unexpectedly to the partner with whom they currently work. This can be a significant marketing opportunity for a firm.

What to do if the succession planning process derails

People change their minds, stuff happens and the unexpected occurs. A strategic succession plan needs to be sufficiently detailed and specific to provide guidance but also flexible enough to address the unexpected. The partners' ability to be nimble, communicate effectively and work closely with each other will be critical throughout the whole process.

Mind the generational differences

I was speaking with a partner in his mid to late 60s in a mid-sized regional firm who described the firm's efforts to create a succession plan for his practice. He explained the firm had hired a younger, female lawyer and that although she was capable and personable, it had not worked out. When I enquired as to the reasons, he explained that her "work ethic" was not in alignment with that of other older partners in the firm. She had young children, was interested in part-time work and generally wanted more flexibility and a different work/life balance.

This illustrates one of many issues that can arise in this inter-generational cohort turnover. The departing generation consists, in many cases, of primarily male

lawyers who came of age at a time when fewer couples equally shared child rearing and other household duties. The incoming generation is likely to be at least 50% women, in their early to late 30s and very interested in work/life balance issues as part of a sustainable and appropriate work ethic.

These issues need to be discussed candidly so all parties understand their respective objectives and agree on appropriate ways to address everyone's needs. I have found that clients are often very accepting of different work style approaches, especially if these issues are openly discussed. For example, if a new incoming partner is a mother with young children and wants to leave the office regularly at 3pm, clients will typically be okay with that, as long as there is somebody available to address their needs in a timely way.

Should the retreat be facilitated or not?

This will depend on the extent to which the partners are comfortable discussing the topic of succession planning openly and comprehensively. It can be a loaded issue in some partnerships. In other firms, partners discuss the topic frequently and it is not a challenging issue.

If the topic is likely to be sensitive and/or potentially contentious and/or if the partners are unsure about options that might be available to the firm as best practices, then having the retreat designed by and facilitated by an external consultant can be helpful. In addition, the firm gets the benefit of a neutral, third party perspective.

Going back to the spectrum of succession planning options I mentioned earlier in this article, my starting point in working with firms is that most lawyers spend a major portion of their waking hours building a practice and serving their clients. This is their life's work. Accordingly, it's worth spending some time and effort trying to figure out how to preserve and optimise the benefits of that lifetime of work. It's not a one-size-fits-all process. The trick is to find tailored solutions that will wear well over time and meet everyone's needs You too can do this. ■

Emily Morrow ✉ *pelmorrow@me.com* has worked as a lawyer and senior partner with a large firm in the United States and is an Auckland-based legal practice consultant.

Source of articles in *LawTalk*

LawTalk often includes some articles from providers of services and information to the legal services industry. These draw upon the experiences of those providers and are published because they have information which is considered valuable to lawyers in their work. The New Zealand Law Society does not endorse any service providers and the articles are published without payment.

PRACTICE

Are you approaching eDiscovery in the most effective way?

BY **ANDREW KING**

MENTION DISCOVERY TO MOST LAWYERS AND THE FIRST thing they think of is cost, complication and burden – *not a great starting point!*

This is at the same time as the discovery process continues to be an integral part of any litigation or investigation.

The challenges with discovery are not new, although they are compounded by the sheer volume of documents that now exist. With data volumes doubling every 18-24 months, this creates considerable impacts with the document volumes now experienced in most matters.

As a result, it is very easy for the costs associated with the discovery process to quickly spiral out of control.

With so much changing so quickly, it is important to ensure that you are approaching eDiscovery in the most effective way possible.

Working smarter

It can be easy to lose sight of the true objective of any discovery exercise. This should be to facilitate a method of getting to the most important information quickly, cost effectively and accurately.

Having worked with eDiscovery exercises for the best part of 20 years I realise we need to be a lot smarter in how we approach discovery to meet this objective. Often, practices used in the past will no longer work, or they will only add further cost, time and complexity.

The discovery process today does require more front-loading of work. This work will assist in limiting the scope of discovery to what really matters providing

considerable value later in the process. The time invested at the outset could save thousands down the track, not to mention lessening the burden for you and your firm.

These are exciting times, as there are now options to help take some of the cost, complication and burden out of the discovery process. If you are prepared to continue to evaluate your eDiscovery practices every 12-24 months, you will ensure you are approaching the discovery process in the most effective way possible.

An eDiscovery health check is a great way to start

A great starting point is to get a fresh perspective of how you currently approach the discovery process.

Even if you are currently satisfied with your existing eDiscovery process and software, an independent perspective will help you approach the discovery process efficiently and cost effectively. Again, I stress impartial advice – *not solely from those with a product or service to sell.*

It can be a great opportunity to find out what others are doing – is their discovery approach giving them an advantage over you?

A typical eDiscovery health check will usually consist of –

- A discussion of what you are currently doing (with both your process and software) plus what you are looking to achieve; and
- Practical recommendations to improve your eDiscovery process.

The health check can be as simple as a phone conversation with some easy to implement recommendations. This perspective can help with how you approach all matters, that you can then adapt to suit the specifics of the case.

It is not all about the technology

Far too often when eDiscovery is mentioned, attention first turns to the technology. Sure, embracing the right technology is important, although first you need to consider your wider approach to discovery – with the technology being part of your wider approach.

It is important to work out what you want to do and then equip yourself with the tools to achieve this. This may be completely different to other firms that could have other requirements.

Don't get me wrong; some of the eDiscovery technology available today is fantastic, and I wish just some of the tools were available a few years back. Sometimes it is the small incremental changes that can help simplify your discovery process. These changes can help save you and your client considerable time and money by simply ironing out any efficiencies in your process.

How can we do this better

Discovery practises continue to evolve, largely due to the impact of technology. Yet these are also exciting times, as we can approach discovery more effectively to remove much of the cost, complication and burden.

To ensure you are approaching eDiscovery in the most effective way possible it is crucial to regularly evaluate your eDiscovery practices. A fresh perspective with some practical recommendations may be just what you need. ■

Andrew King ✉ *andrew.king@e-discovery.co.nz* is the founder of E-Discovery Consulting.

LAWYERS COMPLAINTS SERVICE

Complaints decision summaries

John Campion suspended from practice for two years

Former Hamilton lawyer John Campion has been suspended by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal from practising for two years from 17 October 2019.

Mr Campion was found guilty of unsatisfactory conduct by the Tribunal on 19 July 2019 (*[2019] NZLCDT 20*). There were three sets of charges, under the Law Practitioners Act 1982 and the Lawyers and Conveyancers Act 2006. They alleged a large number of professional failures relating to the administration of estates, and of trusts. Some of the alleged failures involved an examination of Mr Campion's dual role as a lawyer and a trustee.

The Tribunal noted that Mr Campion does not currently hold a practising certificate. It said he was elderly and in poor health at times. However, it said his conduct in the course of the disciplinary proceedings had deprived him of potential mitigating features of remorse and insight.

In considering an appropriate penalty, the Tribunal said it considered Mr Campion's offending to be at the high end of misconduct. It said the primary aggravating feature was his previous disciplinary history which extended back to 2012.

The Tribunal accepted the submission of the lawyers standards committee which brought the proceedings that given the extent of Mr Campion's failures, his extensive disciplinary history, and his failure to engage with the disciplinary process, a suspension from practice was necessary to mark the seriousness of his misconduct.

To properly uphold professional standards, to provide personal and general deterrence and to confirm that the Tribunal would not treat lightly such serious breaches of expected standards, it considered that a suspension of two years was required.

As well as suspending Mr Campion, the Tribunal ordered him to pay compensatory orders of $19,146 and total costs of $43,549.

Queenstown lawyer fined $15,000 and censured after criminal convictions

A Queenstown lawyer has been fined $15,000 and censured by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal, after receiving two criminal convictions.

Adam McAra Copland was convicted in July 2018 for driving with excess breath alcohol and disqualified from driving for six months as part of his sentence. However, in September that same year, he was convicted of driving while disqualified.

Both of those offences carried penalties that include a maximum period of imprisonment of three months.

The first offence took place in Auckland and Mr Copland made the decision to not tell anyone about it, including his family and law firm partners.

But following the second conviction, Mr Copland promptly reported the situation to the New Zealand Law Society and disclosed everything to his family and to his law firm partners.

In making its penalty decision, the Tribunal highlighted significant steps Mr Copland took in addressing his issues and seeking help. It said that it was impressed by the level of insight shown by Mr Copland and that after the second offence "he did everything right".

The steps taken by Mr Copland included:

- reporting to all the people that mattered;
- immediately seeking help;
- taking time out from his practice;
- cooperating with the disciplinary process;
- engaging with a clinical psychologist to explore the underlying causes of his conduct, such as stress, his drinking and lifestyle patterns.

The Tribunal acknowledged that Mr Copland continues to see the psychologist on a monthly basis. Mr Copland also wrote a letter to the New Zealand Law Society, expressing his remorse and the steps he was taking to address his issues.

The Tribunal took these rehabilitative actions into account when deciding not to suspend Mr Copland and instead imposed a fine of $15,000 along with a censure.

It said Mr Copland had brought the profession into disrepute but agreed that he had taken steps which are ongoing to address his personal issues. The censure, it said, is more than mere words.

"It is a record that will always remain on your file and remind you and others

RUSS + ASSOCIATES
LAW. TAX. AML.
www.russassociateslaw.com
+64 9 972 0184
• Corporate and international tax
• Tax transactional and advisory
• AML/CFT advice
• AML/CFT audit
• Structuring
• Contentious tax matters

that such behaviour will not be tolerated or go unmarked."

Censure for breaching confidentiality

[All names used in this article are fictitious]

A lawyer who breached her obligation of confidentiality has been censured and fined $2,500 by a lawyers standards committee.

The lawyer, Somerset, acted for Mr and Mrs Clywd before they both died.

When one of their daughters, Ms Surrey, saw Somerset about her parents' estates, Ms Surrey asked Somerset to contact the estate's solicitor to ask whether she was a beneficiary of a trust and about other issues relating to her parents' will and her entitlement.

After meeting with Ms Surrey, Somerset realised that she had previously advised Ms Surrey's parents. However, on the basis that Ms Surrey simply wanted Somerset to act as a conduit between herself and her siblings, Somerset did not consider she had a conflict that prevented her from acting for Ms Surrey at that stage.

Somerset subsequently emailed the estate's solicitor asking if he was the lawyer for the estates of Mr and Mrs Clywd.

Following an email from Ms Surrey seeking advice on progress, Somerset spoke to the estate's solicitor. After that conversation, Somerset advised Ms Surrey that she could not continue to act for her and that she should instruct an independent lawyer.

Four days later, another lawyer, Dundee, advised Somerset that he was now acting for Ms Surrey and asked for certain information.

Somerset emailed Dundee and provided information about the late Mr and Mrs Clywd and copied the estate's solicitor into the email.

Another of the Clywd's daughters then complained to the Lawyers Complaints Service about Somerset providing Dundee with confidential information, which was then passed on to her siblings.

In her response to the complaint, Somerset initially denied she had breached Mr and Mrs Clywd's confidentiality. The denial was based on the fact that Ms Surrey was already aware of the information Somerset provided.

By the time of the standards committee hearing, Somerset acknowledged that she had breached her clients' confidentiality, apologised for the breach and said she was, in providing the information, trying to be "transparent" with all parties.

The standards committee determined that the breach of confidentiality was unsatisfactory conduct.

"The obligation to keep clients' information confidential is a strict obligation and must be taken very seriously," the committee said.

"The obligation cannot be ignored or waived.

"A desire to be 'transparent' or helpful does not excuse a breach of the obligation. Nor can the obligation be ignored or excused when a lawyer believes that information is already known to the person the information is provided to."

As well as the censure and fine, the committee ordered Somerset to pay $500 costs.

Serious breaches of professional obligations

Anthony Morahan has been censured and fined $2,500 for serious breaches of the professional obligations he owed to both the court and his client.

A lawyers standards committee commenced an own motion investigation after a District Court Judge referred a copy of his minute to the New Zealand Law Society. The minute noted that Mr Morahan had failed to appear for his client "on at least three occasions ... or to adequately explain to the Court why he could not appear". The client was due to stand trial in respect of a criminal matter.

The minute ordered Mr Morahan to personally pay $400 costs, pursuant to section 364 of the Criminal Procedure Act 2011.

When ordered by the District Court to file a memorandum explaining his failure to appear, Mr Morahan responded by emailing the case manager. Mr Morahan apologised for "any inconvenience to the Court resulting from my indisposition and inability to attend when this matter was called". He said he had "endeavoured to emphasise" to his client that he was incapacitated, "out of action", and unable to work. He said he had advised his client to instruct new counsel since he "would not begin rehabilitation nor be able to return to work until next month".

Upon receipt of Mr Morahan's response, court staff conducted an internet search and learned that Mr Morahan was suspended from practice. A three-month suspension had been ordered by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal in respect of an unrelated matter. Mr Morahan had appealed that suspension but it was confirmed by the High Court about two months before Mr Morahan's failure to appear.

Concern at failure to inform Court

The committee was concerned about Mr Morahan's failure to inform the District Court about his suspension. "With a trial scheduled the matter was clearly urgent," the committee said. Yet Mr Morahan, by his own admission, "took no steps to inform the Court of his suspension ahead of the trial date."

"Mr Morahan, as an officer of the Court, had a positive duty to ensure that it was aware of his suspension so that arrangements could be made ahead of time to reschedule [the] trial."

The committee said it "could see no reason why Mr Morahan could not have been completely frank in his dealings with the Court, particularly given the inconvenience that had already been caused by his

failure to appear on [his client's] behalf."

The committee was also concerned that Mr Morahan had breached his duties to his client. It considered that, immediately upon learning that his suspension had been confirmed by the High Court, Mr Morahan should have contacted his client and advised him he was about to be suspended, explained that he could no longer act for him, and explained to his client that he would need to find alternative counsel. Mr Morahan was unable to provide any evidence to show he had done this.

The committee accepted that Mr Morahan did eventually advise his client to seek alternative counsel but considered that he had been deliberately vague when telling his client why he could not act. It considered Mr Morahan should have disclosed the fact of his suspension, so that his client had an understanding of the real reason he was unable to act.

Further, despite claims by Mr Morahan that he had been attempting to help his client find alternative representation, his client was still without representation by the time a standby trial date arrived. "In the circumstances [Mr Morahan's client] was required to attend Court unrepresented, with the result that the trial could not proceed," the committee said.

Breach of professional obligations

The committee concluded that "Mr Morahan's failure to promptly advise [his client] of the fact of his suspension and to take steps to ensure, at a much earlier date, that [his client] had found alternative counsel for his standby trial date of 9 February 2016 was a breach of his professional obligations."

The committee determined there had been two incidents of unsatisfactory conduct by Mr Morahan – the first in respect of breaches of his duties to the court, and the second in respect of breaches of his duties to his client. It rejected Mr Morahan's submission that he had already been "punished" by the imposition of a costs order by the court and should therefore not be subject to further penalties, on the principle of double jeopardy. The purpose of the court's costs award was not to punish Mr Morahan for any possible breach of professional standards, the committee said.

"Rather the costs award was intended to sanction Mr Morahan for the very real disruption and inconvenience, in terms of time and money, which had been suffered by the Court and the various participants in the Court process as a result of his failure to appear."

As well as the fine of $2,500, being $1,250 for each of the two findings of unsatisfactory conduct, the committee ordered Mr Morahan to pay $1,500 costs to the New Zealand Law Society and ordered publication of his identity.

The Legal Complaints Review Officer upheld the committee's decision on review.

"Protect us for our costs" does not create obligation

[All names used in this article are fictitious]

The phrase "protect us for our costs" does not create a professional obligation to pay fees, a lawyers standards committee has said.

The committee was considering complaints from two lawyers in relation to payment of an invoice. The complaint arose after one lawyer, Staffordshire, received an urgent request from a firm, on behalf of a client, to execute certain documents.

Staffordshire completed the work and returned the documents to the firm under a cover letter addressed to the other lawyer, Monmouth. That letter stated: "The documents are released on the basis you protect us for our costs."

Staffordshire's firm subsequently issued an invoice for the work, addressed to Monmouth's firm's client. The fees were not paid.

Staffordshire complained to the Lawyers Complaints Service that Monmouth was in breach of his professional obligations by using the documents without first ensuring Staffordshire's firm's fees were paid.

In response, Monmouth also complained about Staffordshire, alleging he had failed to provide adequate information regarding the fees and acted inappropriately when the fees were not paid.

"The essential issue at hand in this matter was [Staffordshire]'s use of the phrase 'protect us for our costs'," the committee said.

"[Staffordshire] was strongly of the view that this phrase created a professional obligation on [Monmouth] to ensure that the fees rendered by [Staffordshire's firm] to [Monmouth]'s client were paid, and that [Monmouth] was obliged to ensure the fees were paid prior to using the documents provided."

Staffordshire submitted that it was common practice to place conditions on the release of documents, especially when the documents are required urgently, and it was not possible to retain them pending payment. He explained that he had provided documents to other lawyers in similar circumstances before and had never encountered any problems.

However, Monmouth submitted that it was not appropriate to hold him, or his firm, responsible for the payment of fees due by his client in the absence of a lien or an undertaking.

No precedent

The committee began its consideration by noting that there did not appear to be any legal precedent to support Staffordshire's position.

"While the standards committee did not doubt that [Staffordshire], and other practitioners, had used this practice in the course of their legal career, there was no basis in the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 or in common law to support the proposition that the phrase 'protect us for our costs' professionally obliged [Monmouth] to pay [Staffordshire's firm]'s fees.

"In light of the lack of support for this proposition, the standards committee was not prepared to conclude that the phrase created a professional obligation on the part of [Monmouth]. The words used by [Staffordshire], by their plain meaning, were not sufficient to create a condition on which the documents were to be used."

The committee was of the view that "it would be extraordinary for a practitioner to be able to unilaterally impose a professional obligation, akin to an undertaking, on a fellow practitioner simply by invoking

a particular phrase in a letter."

Ethical or moral obligation

However, although the phrase 'protect us for our costs' did not create a professional obligation akin to an undertaking, the standards committee considered that it could be characterised as creating an ethical or moral obligation.

"The standards committee was of the view that an ideal lawyer, when presented with a situation of the type that [Monmouth] was, would respond promptly and advise whether they accept the terms on which the documents were being released. This would allow the lawyer releasing the documents to take further action to secure the payment of their fees, if they wished to do so.

"Had Monmouth promptly advised Staffordshire that he did not accept any responsibility for [Staffordshire's firm's] fees, Staffordshire would not have been under the impression that the fees would be paid and may have been able to take steps to pursue the fees in the usual manner", the committee said.

However, in the circumstances, having considered the material provided, the committee determined that neither Staffordshire nor Monmouth's actions met the threshold required for disciplinary action and resolved to take no further action on either complaint.

Clarification on Calderbank offer summary

The Lawyers Complaints Service summaries in the November 2019 issue of LawTalk included an article headed "Inadequate advice about Calderbank offer". In the second column this made a one-off reference to "Mr Sutherland". "Sutherland" was one of the fictitious names first chosen for the article. However, because there are practising lawyers with that name, it was changed to "Renfrewshire" except in this instance. None of the lawyers named "Sutherland" were involved in the proceedings or had any connection to them. We regret this error and apologise if it caused embarrassment to anyone.

Failure by instructing lawyer to pay barrister's invoice

In dismissing an action for judicial review, the High Court has confirmed that Rule 10.7 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 "represents what has always been the commonly understood position in this country. Instructing solicitors cannot simply wash their hands of their obligation to a barrister because the client refuses to pay" [at 61].

This case related to a finding by a lawyers standards committee that r 10.7 is breached when an instructing lawyer fails to pay the invoice of a barrister that the lawyer has engaged on behalf of a client. In *McGuire v New Zealand Law Society* [2019] NZHC 2748, lawyer Jeremy McGuire sought judicial review of the standards committee determination decision which resulted in him being censured.

Mr McGuire represented a client (Mr W) on a relationship property matter. Mr W wanted a second opinion and so Mr McGuire asked Mr A, a barrister, to provide that opinion.

Mr A provided Mr McGuire with an estimate and via a series of emails made it clear that he wanted payment on the day the opinion would be rendered. He also clarified that he would start that opinion once he was assured the money for payment was put into Mr McGuire's trust account.

The opinion was delivered on 22 December 2017 via email along with an attached invoice.

Mr McGuire replied saying: "I look forward to your views. Your opinion needs to address these other issues." Mr McGuire did not pay the invoice, instead saying that he was disappointed with the lack of reasoning and legal sophistication and that: "Once and after all of the issues have been carefully and thoroughly considered then an opinion can be said to have been given".

Mr A wrote back that he did not accept Mr McGuire's view and asked for a yes or no answer regarding whether he would be paid or not.

Numerous emails were exchanged with a final email on 12 February 2018 by Mr A setting out the facts. Mr McGuire made a brief reply indicating that he disagreed.

On 11 April 2018, Mr A complained to the Lawyers Complaints Service that Mr McGuire had breached r 10.7 of the Rules by failing to pay the invoice and the balance of another disbursements invoice.

Standards committee decision

The standards committee upheld the complaint and determined Mr McGuire's breach amounted to unsatisfactory conduct pursuant to s 12(b) and (c) of the Lawyers and Conveyancers Act 2006. Mr McGuire was censured and ordered to pay a fine of $5,000, costs of $2,000 and to pay Mr A's fee immediately.

The standards committee accepted Mr McGuire's contention he could not release funds held on trust without authority from his client. However, the committee considered that, having instructed Mr A on behalf of his client, Mr McGuire was personally responsible for the payment of Mr A's fee in accordance with the Rules.

If Mr McGuire was unhappy with the opinion, he should have disputed the fees through the "proper professional channels". The committee said that it was unacceptable to simply refuse to pay – especially so because a barrister is unable to sue for his fees. There was no agreement between the parties that Mr McGuire's client was to be solely responsible for paying Mr A's account.

Mr McGuire sought review on the grounds that the committee erred in finding there was no agreement between the parties that Mr W would be solely responsible for paying Mr A's fee and in holding that Mr A was entitled to be paid his fee despite Mr McGuire's dissatisfaction with the opinion. He also said that the committee's determination was "bad for bias" in breach of natural justice and resulted in a miscarriage of justice.

Long-established obligation

Clark J said rule 10.7 reflects a long-established obligation. "...the importance of the obligation arises from the nature of the relationship between solicitor and barrister,

namely that a barrister cannot sue for her or his fees and must rely on the instructing solicitor for payment," (at [54]).

"The case law suggests that it will be particularly egregious for a solicitor to receive funds into a trust account for the purpose of paying a barrister or third party but fail to do so," she said (at [58]).

After examining the evidence of the arrangement between the parties, Clark J concluded that there was no explicit arrangement reached that the client would be solely responsible for the fee. Mr A was very deliberate about his fee and that he would begin the opinion once the fee was deposited into the trust account. Mr McGuire's insistence that his client's authority constituted an agreement between his client and Mr McGuire and absolved Mr McGuire from his obligation to pay Mr A under r 10.7 was misplaced. Rule 10.7 regulates the conduct of lawyers.

Rule 10.7 is clear that if a solicitor disputes a barrister's fee the solicitor must advance that through "proper professional channels". A judicial review of a standards committee decision is not the proper professional channel.

The application for judicial review was dismissed.

Threat made for improper purpose

[All names used in this article are fictitious]

Advising a lawyer that one's clients were considering making a complaint to the New Zealand Law Society, and their decision may depend on "how much longer it takes to bring matters to a close", was unsatisfactory conduct, a lawyers standards committee has determined.

The committee was considering a complaint from a lawyer, Mr Sussex, about another lawyer, Leicester.

Mr Sussex was acting for the plaintiffs in proceedings and Leicester was acting for the third and fourth defendants. In the course of the proceedings, Mr Sussex was instructed to file an amended statement of claim, in which it was pleaded that there had been fraudulent conduct on the part of Leicester's clients.

Leicester's clients considered that such allegations were baseless and an attempt by the plaintiffs to circumvent a potential limitation problem with their claim. Leicester subsequently filed, and then withdrew, an application to strike out the amended statement of claim.

The plaintiffs discontinued the action against the fourth defendant at a judicial conference. Mr Sussex and Leicester were negotiating on the plaintiffs discontinuing action against the third defendant, and the position regarding costs.

Email "a threat"

Mr Sussex complained to the Law Society that the second of two emails Leicester sent him was a threat that comprised blackmail in terms of s 237 of the Crimes Act 1961. Mr Sussex was of the view that Leicester could not use the threat of making a complaint to attempt to obtain an advantage for his clients.

The committee noted Mr Sussex's emphasis on the alleged threat amounting to blackmail, rather than being a breach of rule 2.10 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, which provides: "A lawyer must not use, or threaten to use, the complaints or disciplinary process for an improper purpose."

The committee said it was of the view it was not required to answer the question about whether the email amounted to blackmail, as it was not its role to investigate alleged criminal action. Mr Sussex "could lodge a complaint with the New Zealand Police if he wished to pursue this matter further."

Looking at rule 2.10, the committee said its view was that Leicester's email "was effectively a threat to use the complaints process to assist in negotiations and that was an improper purpose".

"While the committee accepts that the email was not advising [Mr Sussex] that a complaint would be made, it was clearly intended to influence [Mr Sussex] and his client."

Leicester's email said that his clients were considering making a complaint to the Law Society, and "their decision may depend on how much longer it takes to bring matters to a close (inclusive of resolving costs), coupled with the additional costs they are forced to incur".

The committee said that in its view Leicester's email was "intended for the improper purpose of influencing the negotiations between the lawyers' clients and to achieve a more desirable outcome for his client".

Leicester asserted he was drawing the attention of a lawyer in a collegial way to a possible breach of the rules, and that was not done for an ulterior purpose.

"In fact [Leicester] had already pointed out the fact that he believed the actions of Mr [Sussex] breached the rules by alleging fraud where there was no basis for such. His second email took that further," the committee said.

As well as finding unsatisfactory conduct by Leicester, the committee ordered Leicester to pay $250 costs.

Receiving *LawTalk* only online

An online version of *LawTalk* is available on the New Zealand Law Society's website at *www.lawsociety.org.nz/lawtalk*. This is displayed as a flip-book, a PDF, and website versions of many of the articles in each issue. A link to the latest online *LawTalk* is emailed to all practising lawyers each month on the Friday after publication.

The hardcopy *LawTalk* is automatically mailed to all New Zealand-based lawyers who hold a current practising certificate. Receipt of the hardcopy version may be cancelled by emailing *subscriptions@lawsociety.org.nz* and stating "Please cancel *LawTalk* hardcopy" with details of name, workplace and lawyer ID. The lawyer ID is needed to instruct the mailing list extraction program to remove a name and address.

LEGAL INFORMATION

Recent legal books

BY **GEOFF ADLAM**

Criminal Procedure in New Zealand, 3rd edition

BY JEREMY FINN AND DON MATHIAS

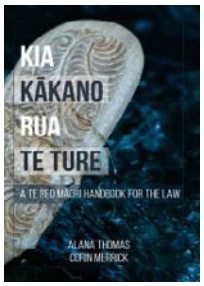
While their focus is the Criminal Procedure Act 2011, the authors give "criminal procedure" a wider meaning than in the Act. Collectively they bring over 80 years of experience in teaching and practising criminal law and this is reflected in an examination of New Zealand criminal procedure for lawyers which is concise, accessible and practical. In 17 chapters the book takes a step-by-step approach, from initiation of proceedings through to appeals. An introductory chapter considers offences under the Act, the categorisation of offences and jurisdiction. There are also chapters which look at youth justice, restorative justice and victims in the criminal justice process. The Courts Matters Act 2018, much of which came into force on 13 November 2018, has resulted in much of the rewriting from the second edition which appeared in November 2015. Although not yet in force, there is also a summary of key points of the Contempt of Court Act 2019.

Thomson Reuters New Zealand Ltd – 978–1–988591–53–7 – Paperback – 456 pages – October 2019 – $120 (excludes GST and postage).

Kia Kākano rua te ture: A te reo Māori handbook for the law

BY ALANA THOMAS AND CORIN MERRICK

This is a legal publishing first: a very practical guide to using te reo Māori in legal practice and the courts. With 124 practising lawyers (of 13,689) saying they spoke te reo in July 2019, it is clear the language is not commonly used by many in the legal profession. Lawyers Alan Thomas (Director, Kauparae Law & Consultancy) and Corin Merrick (a barrister at Mānuka Chambers) have provided a taonga for the whole legal community. Their passion for promoting wider use of te reo shines through: "The main aim of this book is to get everyone who has a role within the legal fraternity interested in using te reo Māori on a regular basis … Normalising te reo Māori will not only benefit us as practitioners, but also have a positive impact on those around us. Te reo Māori is not just a transfer of words, it is also a transfer of customs and traditions, and in turn the Māori worldview," they say. The very user-friendly design of the book, the friendly and helpful way in which the information and the topics covered is presented go a long way to provoking that interest.



The book takes readers through an introduction to basic pronunciation and grammar before providing a succinct set of guidelines for visiting a marae for court sittings. As with the whole book, the focus is on words and concepts which lawyers will encounter or want to employ. A large part of the remainder looks at te reo in the various courts. The particular processes and concepts covered in the Family, Youth, District, Māori Land, Environment and Employment Courts are all considered, as well as the Waitangi Tribunal.

Many non-te reo speakers are often hesitant about exposing their unfamiliarity with the language and the associated tikanga. One repeated theme is positive encouragement to just have a go at using te reo: "Te reo Māori is a language that can be spoken all the time, anywhere and everywhere. Give it a go!" the introduction to a chapter on te reo in the workplace says. This very helpfully groups a wide range of words and phrases by topic. The book's layout makes these very easy to find and follow, and in itself encourages the reader to give it a go: "Karawhiua!" (Give it heaps!), "Kua kēhi!" (Case closed!), "He rōia ahau" (I'm a lawyer) and "E pīrangi pōkai raihi ana ahau" (I want to eat sushi) are among the words and phrases which many readers will find themselves repeating either quietly to themselves or to colleagues. The workplace chapter also provides a valuable collection of relevant phases for an admission ceremony.

Throughout the book are many whakataukī or whaktatauākī (proverbial sayings) to provide a Māori worldview on some of the issues addressed. The authors note that these are rich in meaning and wisdom and, when understood correctly, can present valuable teachings and knowledge from the ancestors.

The book also contains 11 precedents and templates as appendices. These include cover pages in te reo for the Waitangi Tribunal and courts, headings for submissions and also a trust deed, offer of employment letter and employment agreement.

It is worth finishing with the authors' translation of the response by Chief District Court Judge Heemi Taumaunu's father, Hone Taumaunu, in answer to his son's question of how the Youth Court can help the Māori children who are in trouble. "Hone Taumaunu's whaktatauākī echoes what Māori have long stressed; that is the importance of holding fast to te reo Māori and tikanga Māori," the authors say. With *Kia Kākano rua te ture*, they have made an important step in helping this happen.

"The land that was confiscated
Cannot be returned to our children
The resources that were stolen
Cannot be returned to our children
That is not the case for the language
Yes, our language
Can be returned to our children."

LexisNexis NZ Ltd – 978–0–947514–89–1 – Paperback and e-book – 199 pages – November 2019 – $120 (excludes GST and postage).

COURTS

Court opening hours over the 2019/20 holidays

The following information on the hours of courts and tribunals has been supplied by the Ministry of Justice.

Supreme Court

The Chief Justice has determined the following:

CLOSE: 5pm, Monday, 23 December 2019.
OPEN: 9am, Monday, 6 January 2020.
EMERGENCY CONTACT: Kieron McCarron 021 688 740.

Court of Appeal

The President of the Court of Appeal has determined the following:

CLOSE: 5pm, Monday, 23 December 2019.
OPEN: 9am, Monday, 6 January 2020.
EMERGENCY CONTACT: Maryanne McKennie 027 227 7682.

High Court

As per rule 3.2 of the High Court Rules 2016, the High Court holiday period is as follows:

CLOSE: 5pm, Monday, 23 December 2019.
OPEN: 9am, Monday, 6 January 2020.
Auckland, Blenheim, Christchurch, Dunedin, Gisborne, Greymouth, Hamilton, Invercargill, Masterton, Napier, Nelson, New Plymouth, Palmerston North, Rotorua, Tauranga, Timaru, Wellington, Whanganui, Whangārei.
EMERGENCY CONTACTS: April Ng 027 516 3307 (24 December only) and Corrina MacDonald 027 204 2372 for Auckland, Hamilton, Rotorua, Tauranga, Whangārei; Jane Penney 027 509 3918 for Gisborne, Napier, New Plymouth, Whanganui, Palmerston North, Masterton, Wellington, Blenheim, Nelson; Ann Swarbrick 027 273 2679 for Greymouth, Christchurch, Timaru, Dunedin, Invercargill.

District Court

Close: 3pm, Tuesday 24 December 2019.
OPEN: 9am, Friday 3 January 2020.
Auckland, Blenheim, Christchurch, Dunedin, Gisborne, Greymouth, Hamilton, Hastings, Hutt Valley, Invercargill, Levin, Manukau, Masterton, Napier, Nelson, New Plymouth, North Shore, Palmerston North, Porirua, Rotorua, Tauranga, Timaru, Waitakere, Wellington, Whakatane, Whanganui, Whangarei.

Close: 3pm, Tuesday 24 December 2019.
OPEN: 9am, Monday 6 January 2020.
Hawera, Huntly, Kaikohe, Kaitaia, Morrinsville, Papakura, Pukekohe, Queenstown, Taupo, Thames, Tokoroa.

Close: 3pm, Tuesday 24 December 2019.
OPEN: 9am, Monday 13 January 2020.
Alexandra, Ashburton, Dannevirke, Gore,Taihape, Taumarunui, Wairoa, Westport.

The following Hearing Courts will not be open over the Christmas and New Year period, and will resume hearings as rostered in the New Year: Chatham Islands, Dargaville, Kaikoura, Marton, Oamaru, Opotiki, Ruatoria, Te Awamutu, Te Kuiti, Waihi, Waipukurau.

Urgent Family Court applications

Family Courts will provide a national service for urgent applications over the Christmas and New Year holiday period. Urgent applications will all be dealt with via the National eDuty platform. Court staff and duty judges have been allocated to deal with applications on the days in the table below.

All urgent Family Court applications are required to be submitted to the registry by 2pm (exception 12pm on 24 Dec) on the days below in order for them to be processed. Any applications received after that time will be considered the following day.

Mon	Tue	Wed	Thu	Fri
Open 23 Dec	**Open 24 Dec**	**Closed 25 Dec**	**Closed 26 Dec**	**Open 27 Dec**
	• Applications Close 12pm • All registries close 3pm			• Applications close 2pm
Open 30 Dec	**Open 31 Dec**	**Closed 1 Jan**	**Closed 2 Jan**	**Open 3 Jan**
• Applications close 2pm	• Applications close 2pm			• Larger courts reopen 9am
Open 6 Jan	**Open 7 Jan**	**Open 8 Jan**	**Open 9 Jan**	**Open 10 Jan**
• Applications close 2pm	• Applications close 2pm	• Applications close 2pm	• Applications close 2pm	• Applications close 2pm

All Employment and Environment Courts

CLOSE: 3pm, Tuesday 24 December 2019.
OPEN: 9am, Friday 3 January 2020.

Māori Land Courts

CLOSE: 3pm, Tuesday 24 December 2019.
OPEN: 10am, Friday 3 January 2020.

The Auckland Information Office (3 to 14 January, phone calls diverted to Whangārei)

CLOSE: 3pm, Tuesday 24 December 2019.
OPEN: 9am, Monday 13 January 2020.

Coronial Services

CLOSE: 3pm, Tuesday 24 December 2019.
OPEN: 9am, Friday 3 January 2020.

The National Initial Investigation Office (NIIO) will remain open 24 hours a day.

Tribunals Unit

CLOSE: 3pm, Tuesday 24 December 2019.
OPEN: 9am, Friday 3 January 2020.

Arrest Courts

Any persons arrested over this period will be brought to the nearest available court for the initial appearance before a judge, Community Magistrate or Justice of the Peace. "Arrested" includes those arrested on new charges, on warrant or for breach of bail.

If bail is sought and it is not within jurisdiction of the judicial officer presiding at the first appearance, then any remand in custody (unless there is consent otherwise) must be adjourned to the next working day. This will allow the bail application to be dealt with via AVL from the prison (or police station) to the nearest, or most convenient, court where a judge is rostered to sit.

Electronically Monitored Bail Applications over the Christmas Period

The following provides for the time frames for filing and processing of Electronically Monitored (EM) Bail applications prior to and after the Christmas break.

The Department of Corrections EM Bail Team have confirmed the dates for the filing and processing of EM Bail applications as follows:

	2019		2020		
	Applications close	**Last Hearing**	Existing applications **First Hearing**	New applications **Close for First Hearing**	New Applications **First Hearing**
Adult	6 Dec 5pm	23 Dec	6 Jan	6 Jan 5pm	20 Jan
Youth	13 Dec 5pm	23 Dec	6 Jan	6 Jan 5pm	13 Jan

2019 Application close off and last hearing date

Applications for hearing in the 2019 calendar year will need to be received by the EM Bail Team no later than 5:00pm Monday 6 December 2019 for adult applications and 5:00pm Monday 13 December 2019 for youth applications. The final date for EM Bail applications to be heard in 2019 will be Monday 23 December 2019.

2019 Applications adjourned for the New Year

The first date for hearings of any existing EM Bail applications adjourned from 2019 into the New Year will be from Monday 6 January 2020. Please ensure the EM Bail Team is advised of any such adjournments over the holiday period so arrangements can be made for potential installations of equipment as early as possible.

2020 Applications and first hearing dates

The first date for new applications filed for hearing in the New Year will be from Monday 20 January 2020 for adult applications and from Monday 13 January 2020 for youth applications. Applications for hearing on these dates will need to be received by the EM Bail Team by 5:00pm Monday 6 January 2020 (including the applications received after 9 and 16 December 2019).

If there are any queries regarding the above time frames, please don't hesitate to contact the Electronically Monitored Bail Team, on 0800EMBAIL or ✉ *embail@corrections.govt.nz*

Will Notices

Aumua, Laloaaega
Colquhoun, Leroy James
Comeford, Norman Alan
Fredericks, Mercia
Huang, Guang Pei
Kirker, Mervyn William Huntly
Kumar, Raj
Massie, Andrew Robertson
Saville, David Kearsley
Shelford, Huia Arorangi Delores
Van Wakeren, Arnold Rijk
Walker, Athol Victor
Williams, Garry Thomas

Aumua, Laloaaega

Would any lawyer holding a will for the above-named, late of 3/362 Great North Road, Glen Eden, Early Childhood Education Teacher, born on 7 January 1958, who died on 6 October 2019, 61 years of age, **please contact Lena Wong Complete Legal Limited Solicitors:**

lenaw@completelegal.co.nz
(09) 238 7004
PO Box 264, Pukekohe 2340 or DX EP77026

Colquhoun, Leroy James

Would any lawyer holding a will for the above-named, late of 46B Rimu Street, Waikanae, born on 10 January 1987, who died on 26 October 2019, **please contact Merlaina Donald, Wakefields Lawyers:**

merlaina@wakefieldslaw.com
(04) 834 1501
PO Box 8091, Wellington 6143

Comeford, Norman Alan

Would any lawyer holding a will for the above-named, late of 51 Ocean Road, Paekakariki, born 23 January 1975 and who died between 29 and 30 September 2019, **please contact Oakley Moran solicitors:**

anthea.connor@oakleymoran.co.nz
(04) 472 6657
PO Box 241, Wellington 6140

Fredericks, Mercia

Would any lawyer holding a will for the above-named, late of 16 Onedin Place Titirangi, Auckland, and formerly of Bucklands Beach and Glen Eden, Senior Registered Nurse, born on 30 January 1953 in South Africa and who died on 14 August 2019, **please contact Laurielle Fredericks:**

zecthulhuiam@gmail.com
021 022 66 069

Huang, Guang Pei

Would any lawyer holding a will for the above-named, late of 883 Manukau Road Onehunga, Cook, born on 21 December 1962, who died between 19 April 2018 and 24 April 2018, **please contact Kenny J Tao:**

tao@towerslaw.co.nz
(09) 222 3388, Fax: (09) 558 2657
PO Box 11115 Ellerslie Auckland 1542

Kirker, Mervyn William Huntly

Would any lawyer holding a will for the above-named, late of Mt Eden Auckland, born on 22 November 1923, who died on 04 May 2019, **please contact Matthew Barnett, Niemand Peebles Hoult:**

matthew@nplaw.co.nz
(07) 959 1818; Fax (07) 959 1817
PO Box 1028, Hamilton 3204

Kumar, Raj

Would any lawyer holding a will for the above-named, late of 59 Goodwood Drive, Manukau, Company Director, who died on 4 January 2019, **please contact Sanjay Sharma, of Sanjay Sharma Barrister and Solicitor:**

sanjay@sanjaysharmalaw.com
(09) 827 4412 Fax: (09) 834 0028
PO Box 104, 296, Lincoln North, Waitakere 0654

Massie, Andrew Robertson

Would any lawyer holding a will for the above-named, late of 13 Ridgewood Crescent, Birkenhead, Auckland, Retired, born on 25 February 1929, who died on Wednesday 18 September 2019, **please contact Rick Williams Associates:**

info@rickwilliams.co.nz
09 447 1837
PO Box 300-748, Albany, Auckland 0752

Saville, David Kearsley

Would any lawyer holding a will for the above-named, late of Vauxhall Road, Devonport, Retired, born on 24 September 1934 who died on 4 October 2019, **please contact Deborah Macdonald of Alan Jones Law Limited:**

debbie@ajlaw.co.nz
(09) 445 6225
PO Box 32249, Devonport, Auckland 0744

Shelford, Huia Arorangi Delores

Would any lawyer holding a will for the above-named, late of 13A Hill Road, Manurewa, Auckland, Call Centre Operator, born on 5 March 1952, who died on 27 December 2017, **please contact Henry Hoglund, To'oala Law:**

henry@tooalalaw.nz
(09) 360 3240
PO Box 46018, Herne Bay, Auckland 1147

Van Wakeren, Arnold Rijk

Would any lawyer holding a will for the above-named, late of 28 Kakapo Street, Ohura, born in Utrecht, Holland on 24 August 1963 and who died on 15 August 2019, **please contact Dean Clarke at Cambridge Law Centre Limited:**

dean@cambridgelaw.co.nz
07 827 5111
DX GA27516 Cambridge or PO Box 3, Cambridge 3450

Walker, Athol Victor

Would any lawyer holding a will for the above-named, late of 166A Otaika Road, Whangarei, born on 26 January 1962 who died on 29 August 2019, **please contact Sally McLeod of Thomson Wilson:**

sam@thomsonwilson.co.nz
(09) 430 4380
PO Box 1042, Whangarei 0140

Williams, Garry Thomas

Would any lawyer holding a will for the above-named, formerly of Waverley but latterly of Tauranga, Truck Driver born on 8 July 1955 in Paeroa who died on 13 October 2019, **please contact Michael J Toner, Solicitor:**

enquiries@tonerlaw.co.nz
(07) 577 9966 Fax (07) 577 6015
PO Box 13394, Tauranga 3141

DAVID HURD, BARRISTER

Change of contact details

From 22 October 2019 my physical/office and postal address have changed to:

Office: Rapid 74, Ophir Bridge Road, Ophir, Central Otago 9387

Postal: PO Box 103, Omakau 9352

My other contact details remain unchanged:

09 358 5350/09 352 9111

021 667 557

david@davidhurd.co.nz

Land Information New Zealand (LINZ) are undertaking research to locate the successors of Clifford Mathew Sims, the former owner of a property at 9A & B Lower Waikato Esplanade, Ngaruawahia, Waikato. The successors are:

Carolyn Combridge, Edward Stanley John Sims, Robert Bruce Sims, Gerald Clifford Sims, Christopher Paul Sims, Theresa Marie Monica Courtenay, Andrew Keith Sims, Christine Monica Weideman, Mark Anthony Sims, Lena Aiko Heddle

Would anyone knowing the contact information of any of the named successors please make contact at the details below:

Will Blaschke, The Property Group Limited, PO Box 104, Auckland, (09) 905 1408, wblaschke@propertygroup.co.nz

---

KAYES
FLETCHER
WALKER

JUNIOR CROWN PROSECUTORS

Kayes Fletcher Walker, the office of the Manukau Crown Solicitor, is looking to recruit junior prosecutors to begin in early February 2021.

The positions are suitable for recent graduates through to solicitors with 3 years PQE (but not necessarily with prosecution experience).

Successful applicants will be joining a dynamic medium-sized law firm based in South Auckland committed to providing great training and career development, with unrivalled opportunities to appear regularly in court.

To obtain an application form please visit our website **www.kfw.co.nz**.

Applications close **Wednesday 11 March 2020**, and can be sent to office@kfw.co.nz

---

TAKE A NEW DIRECTION FOR 2020 AND CHANGE YOUR FUTURE

I am taking early retirement at the 31 March 2020. I have a well-established sole-practitioner Legal Practice in the Central North Island for sale with the major areas of practice being:

- Residential conveyancing
- Small commercial conveyancing
- Business sales and purchases
- Trusts
- Wills and Enduring Powers of Attorney
- Estates

It would suit a young, enthusiastic, dedicated young lawyer/s looking to relocate or a smaller/medium local practice wanting to expand. Wonderful clients who are used to personalised attention and a steady workflow with room for expansion if wanted. Experienced and loyal PA and part-time Legal Executive who may wish to stay on if current wage structure remains in place.

I want a fair and reasonable price and a smooth and amicable settlement. If you are interested in exploring a new work/life balance for yourself or expanding your small/medium law firm with a ready-made client base in a small, progressive and beautiful town, contact below for discussion.

C/- 027 244 2510 or 07 378 4349

Almao Douch

Office of the Crown Solicitor at Hamilton

Almao Douch is expanding its diverse and progressive team of lawyers following the appointment of a new Crown Solicitor.

We are a well-established Hamilton firm with a strong Crown identity. Our team of expert litigators undertake challenging and publicly important work to exacting standards.

We are looking for skilled communicators who excel in the law, demonstrate a genuine interest in people, have a strong sense of justice and an unwavering commitment to doing the right thing.

Ours is a highly collaborative culture with a clear team focus. We recognise the importance of looking after our people and providing opportunities for them to develop and succeed.

As well as seeking applications from established trial lawyers, we also welcome applications from diligent and dynamic lawyers with other courtroom experience, who are interested in undertaking Crown prosecutions, regulatory work and asset recovery actions.

Please email your CV and cover letter through to our office manager, Sue Brice, at sb@almaodouch.co.nz

Applications close 10 December 2019.

CPD *Calendar*

PROGRAMME	PRESENTERS	CONTENT	WHERE	WHEN
CIVIL LITIGATION AND EMPLOYMENT				
EVIDENCE AND TRIAL PREPARATION *3 CPD hours*	*Chris Patterson*	This practical workshop covers the core skills of evidence, proof and factual analysis (EPF), as well as approaches to investigations, the development of case theory and how to manage the paperwork associated with any case. A must for all litigators. *Please note: the workshop takes place on a Saturday morning and is limited to 25 participants – register soon!*	Dunedin Christchurch Wellington Auckland	1 Feb 15 Feb 22 Feb 7 Mar
UPDATE ON CONTRACT *2.5 CPD hours* *1.5 CPD hours*	*Paul David QC*	This update will cover developments in contract law since March 2018 in areas such as contract formation, interpretation, cancellation and the assessment of damages. Decisions from the New Zealand courts and relevant decisions from the other common law jurisdictions as well as legislative changes in other statues affecting contract law will be considered.	Dunedin Christchurch Wellington Webinar Hamilton Auckland	17 Mar 18 Mar 19 Mar 19 Mar 24 Mar 25 Mar
AGREEMENT FOR SALE & PURCHASE – VENDOR WARRANTIES *1.5 CPD hours*	*Barbara McDermott* *Gill Whinray*	Practitioners and legal executives can add real value for their clients by providing proactive and practical advice to both vendors and purchasers regarding the scope and application of the vendor warranties in the Agreement for Sale and Purchase – prior to the signing of the agreement and when potential breaches arise, before or on settlement.	Webinar	11 Mar
COMPANY, COMMERCIAL AND TAX				
AMALGAMATIONS – GETTING THE APPLICATION RIGHT WEBINAR *1.5 CPD hours*	*David Josland* *Calantha Juneja*	This webinar will outline the key common errors that the New Zealand Companies Office in Auckland are encountering and consider some effective ways to avoid your applications being rejected. It will provide practical tips to assist you in reviewing your documentation before submission and supply compliant wording for you to update your short-form amalgamation templates for future use.	Webinar	11 Feb
CRIMINAL				
BAIL APPLICATIONS – THE BASICS *1.5 CPD hours*	*Janine Bonifant* *Edana Sparks*	One of the first questions that your clients are likely to ask you is whether or not they are likely to get bail when charged with an offence. When considering a bail application, you will need to have a good understanding of what the defendant's expectations are, know how to interpret an opposition to bail, the associated documents and the restrictions on bail in certain case.	Webinar	4 Dec
DUTY LAWYER TRAINING PROGRAMME *11* CPD hours*	*Local Presenters*	Duty lawyers are critical to the smooth running of a District Court list. Here is a way to gain more of the knowledge and skills you need to join this important group. This workshop is made up of several parts. **CPD hours may vary, see website*	Various	Feb-Oct
FAMILY				
REGISTRAR EARLES – LETTERS OF ADMINISTRATION & HOT TOPICS *1 CPD hours*	*Registrar John Earles*	Applications for a grant of letters of administration both with the will annexed, and on intestacy, still cause problems and consequent delays. Registrar Earles will explore the reasons for each type of application and who is entitled to apply for a grant of letters of administration. He will follow with guidance regarding the completion of the relevant forms that are required in each circumstance. He will also discuss the Status of Children Act 1969 inquiries.	Webinar	3 Dec
ESTATE ADMINISTRATION: THE CHALLENGES FACED PRE AND POST-DEATH *1.5 CPD hours*	*Kim James* *Ingrid Taylor*	The ramifications of dying either intestate or with a poorly drafted will are expensive and stressful for those left to deal with it. This webinar will help ensure that you are able to provide your clients with effective advice in the practice areas of wills, trusts and estate administration.	Webinar	5 Dec
LAWYER FOR CHILD *18.5 CPD hours*	*Hana Ellis* *Wendy Kelly* *April Trenberth* *Jason Wren*	This workshop has been designed to ensure participants have the opportunity to develop the full range of skills, knowledge and attitudes required to carry out the role of Lawyer for Child effectively.	Wellington	25-27 Mar

PROGRAMME	PRESENTERS	CONTENT	WHERE	WHEN
IN-HOUSE				
CPD TOP-UP DAY IN-HOUSE & GOVERNMENT *7 + 3 CPD hours*	*Chair: Janes Meares*	Designed for the busy in-house and government practitioner to "top-up" your years' CPD. A one-day programme offering 7 hours face-to-face CPD and a bonus 3 hours of online CPD for you to complete when and where it suits you. Offered in Wellington and by live web stream.	Wellington Live Web Stream	12 Feb 12 Feb
OTHER PRACTICE AREAS				
THE ART OF HAPPINESS *6.5 CPD hours*	*Jonathan Robinson*	Stress is commonplace in today's modern world and impacts on our feelings of happiness. The field of positive psychology provides effective methods and ideas for helping people to be happier, healthier, and better at what they do. This workshop will show you how to: use simple methods to improve your own and your co-worker's level of happiness and productivity; identify the key behaviours that get in the way of happiness and productivity; and reduce your sick days, enjoy life more, and handle stress more effectively.	Christchurch Wellington Auckland	19 Mar 23 Mar 26 Mar
SPEAKING WITH IMPACT – TALKING SO THAT PEOPLE LISTEN *6.5 CPD hours*	*Jonathan Robinson*	The importance of being an effective speaker with the ability to get your ideas across to either a single person, or an audience, cannot be over-emphasised and is a major advantage to becoming successful in your career. This workshop will teach you how to organise and present a good speech as well as teaching you ways to overcome your nervousness and stress.	Christchurch Wellington Auckland	20 Mar 24 Mar 27 Mar
PRACTICE AND PROFESSIONAL SKILLS				
CPD TOP-UP DAY GENERAL PACTITIONER *7 + 3 CPD hours*	*Various*	Designed for the busy general practitioner to "top-up" your years' CPD. A one-day programme offering 7 hours face-to-face CPD and a bonus 3 hours of online CPD for you to complete when and where it suits you. Offered in Christchurch, Wellington, Auckland and by live web stream.	Christchurch Wellington Live Web Stream Auckland	11 Feb 12 Feb 12 Feb 13 Feb
STEPPING UP – FOUNDATION FOR PRACTISING ON OWN ACCOUNT *18.5 CPD hours*	*Director: Warwick Deuchrass* The Law Foundation New Zealand	All lawyers wishing to practise on their own account whether alone, in partnership, in an incorporated practice or as a barrister, will be required to complete this course.	Auckland 1 Christchurch Auckland 2 Wellington Auckland 3	13-15 Feb 14-16 May 23-25 Jul 17-19 Sep 5-7 Nov
TRUST ACCOUNT ADMINISTRATORS *4 CPD hours*	*Philip Strang* *Melanie Ashall*	How do you keep a trust account in good order? This practical training is for new trust accounting staff, legal executives, legal secretaries and office managers.	Invercargill Wellington Palmerston North Tauranga Auckland 1 Auckland 2 Christchurch	17 Mar 18 Mar 19 Mar 31 Mar 1 Apr 2 Apr 7 Apr
TRUST ACCOUNT SUPERVISOR TRAINING PROGRAMME *7.5 CPD hours*	*Philip Strang* *Melanie Ashall*	Under the Financial Assurance Scheme all practices operating a trust account must appoint a qualified trust account supervisor. A candidate must be a lawyer and must pass the NZLS trust account supervisor assessments, which take place during a full day programme. The training consists of self-study learning material (approx. 40-50 hours) to help you prepare for the assessments.	Auckland 1 Hamilton Wellington Auckland 2 Christchurch	16 Apr 14 Jul 22 Sep 3 Nov 10 Nov

Save Precious Time!

EasyReference – *papers at you fingertips*

Did you know there are hundreds of NZLS CLE conference papers that you can have instant access to?

Research made easy – how you benefit

- 100's of papers to choose from
- Written by leaders in the field
- All practice areas included
- Searchable PDFs
- Instantly accessible and downloadable
- Saving you precious time

Check EasyReference out at www.lawyerseducation.co.nz and see how it can help with your research.

NZLS CLE Ltd
CONTINUING LEGAL EDUCATION
NEW ZEALAND LAW SOCIETY

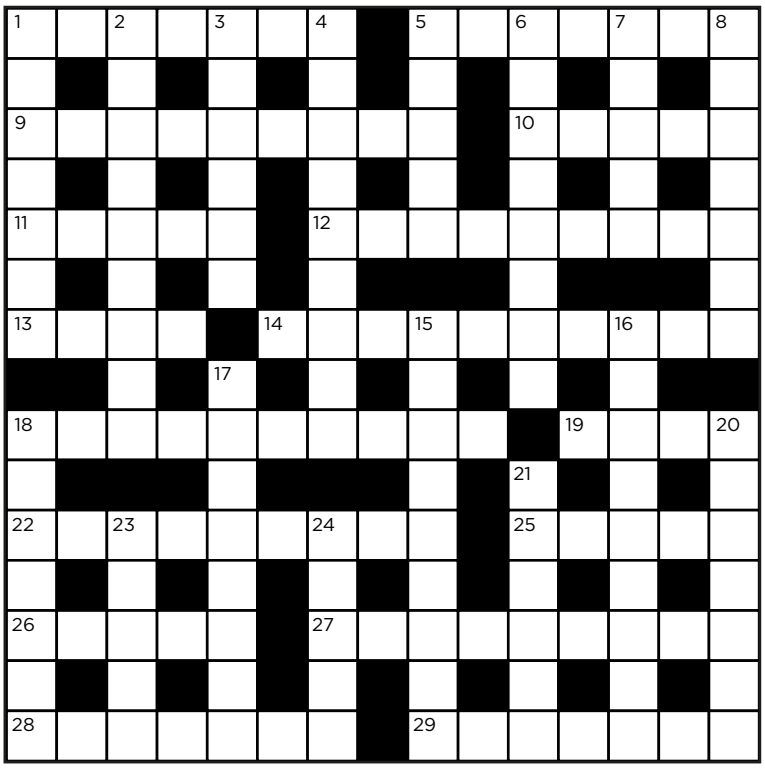
NZLS EST 1869

www.lawyerseducation.co.nz

LIFESTYLE

A New Zealand Legal Crossword

SET BY **MĀYĀ**

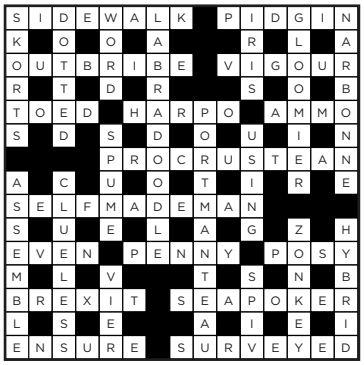


Across

1 Upset daily fine over 14, so to speak (5,2)
5 X pipped board? (3–4)
9 Kieran Read, say, sniffing, say, and begging off (9)
10 See 5 Down
11 Thought Left was perfect? (5)
12 He's taken in before 12 (5,4)
13 On course to find the King of the Swingers (4)
14 Use ABC of clues to get a member of the pack that includes four 5s (3,2,5)
18 Team children aren't so important (4,6)
19/17 Nothing to steal, as Lu revealed to 14, so to speak (4,8)
22 What suspicious spouse might do to get a winning position (9)
25 German sub in Arabian city wrote: "We must love one another or die" (5)
26 Bit player in the sex trade? (5)
27 Divorcée and casual worker rock, in an unplanned sort of way (9)
28 Class determined to arrange letters (7)
29 Churn cored (sic) bananas to make squash (7)

Down

1 In charge of the church roof? (7)
2 Princess charmed and drove away (9)
3/21 Pardon me, all right? Wrong 14, so to speak (6,6)
4 Entrance in Sligo beguiled rulers (9)
5/10 Court order holding, say, backwards 'oods to be 14, so to speak (5,5)
6 Bawl out in Head's support for orange, perhaps (3,5)
7 Potato skin put around trendy picture (5)
8 Once in a while, O.T.T. sellers take us in, causing conflicts (7)
15 Missives from 'ome not right – they're made by cracking cooks (9)
16 At uni with Hill – an emotional rollercoaster? (2,3,4)
17 See 19 Across
18 Thus a bird of prey, losing tail, becomes most ill... (7)
20 ...doth he know? (7)
21 See 3
23 Greens: what you're told to do with them... (3,2)
24 ...prevent one? (5)



Solution to November 2019 crossword

Across
1. Sidewalk, **5.** Pidgin, **9.** Outbribe, **10.** Vigour, **11.** Toed, **12.** Harpo, **14.** Ammo, **17.** Procrustean, **20.** Self Made Man, **23.** Even, **24.** Penny, **25.** Posy, **28.** Brexit, **29.** Sea Poker, **30.** Ensure, **31.** Surveyed.

Down
1. Skorts, **2.** Dotted, **3.** Word, **4.** Labradoodle, **6.** Iris, **7.** Gloomier, **8.** Narbonne, **13.** Portmanteau, **15.** Spume, **16.** Using, **18.** Assemble, **19.** Clueless, **21.** Zonkey, **22.** Hybrid, **26.** Vier, **27.** Spiv

LIFESTYLE

Fever pitch

The tournament uniting footballing lawyers from around the world

BY **CRAIG STEPHEN**

THE WORLD CUP FOR LAWYERS IS CELEBRATING ITS 20TH edition in mid-2020, with organisers hoping that more countries, such as New Zealand, can get teams together to compete in a tournament that prides itself on mixing football with fun.

The tournament was first held in Marrakech in 1983 and will be returning to the inland Moroccan city from 30 May to 7 June 2020.

Tournament co-founder Vincent Pinatel, a lawyer based in Marseille, says the inspiration for the inaugural competition came simply from the popularity of the game among the legal profession in Europe.

"My friend, Pierre Lusinchi, and I had an idea of a world football cup while we were watching a game on TV in 1982. Indeed, as a lawyer passionate about football, I knew that several of my colleague lawyers were also crazy about football and I thought 'let's try to organise an event which will make them feel as if they were professionals with the objective to play against lawyers from all around the world'," says Mr Pinatel.

His colleague Mr Lusinchi also remains heavily involved in the competition.

While there was modest interest in the initial tournament, it was enough to suggest further contests could be on the cards.

"For the first edition in Marrakech, we managed to gather 14 teams which was not a lot, but it definitely launched the event and throughout the years it has kept on growing to reach 140 teams in 2018, ie, more than 3,000 lawyers from everywhere," says Mr Pinatel.

"The event gathers lawyers from Indonesia to Brazil, from Nepal to Argentina, from Mongolia to Denmark but also from small countries such as Burundi, for example, and this is very important for us."

Regional events

With Mundiavocat occurring every two years, there was a gap that has been filled, since 2015, by regional events – Eurolawyers, Asialawyers, Americalawyers, Africalawyers and a Francophone one.

And Mr Pinatel says it is not just enthusiastic Sunday league players who take to the pitch; there have been some classy players on the field over the years, including former professionals.

"We actually had a few players who became lawyers after a football professional career such as Guglielmo Stendardo who played for Lazio and Atalanta and who is now a lawyer from the Roma Bar Association and let's say it, you notice he was a professional when you see it on the pitch."

Naturally, he notes, there have been some outstanding highlights from the 19 events that have taken place so far.

"I'm proud of having created, with Pierre Lusinchi, an event that still exists after more than 35 years. Beyond pride, I have one amazing and unforgettable memory and that was when in Marrakech in 1983 the Harti Stadium was crowded as thousands of spectators came to watch the opening game. Can you imagine? You are a lawyer passionate about football and thousands of people come to watch you play? It was just as if they were all pros playing the real World Cup.

Can NZ join the party?

Mr Pinatel says all nations are eligible to compete at Mundiavocat and he is hopeful that practitioners from New Zealand can muster up at least one team to become the latest nation to join the party.

The 2018 edition featured 140 teams from 37 countries. Each team plays four to six matches and the matches last a 'mere' 40 to 60 minutes, depending on the category.

Mundiavocat is an open tournament with six separate competitions – classic, master (over 35), legend (over 45), super legend (over 55), and 5-a-side for men and women (no age limit).

There are many lawyers here who play football or have done so, and in *LawTalk* 911, October 2017, we created an imaginary team of practitioners who had played for New Zealand.

In all, Italy has the most competition titles with eight, double that of Brazil, with Argentina on three. ■

LIFESTYLE

Complicated sport's appeal to lawyers

Cricket World Cup makes debut in New Zealand

BY **CRAIG STEPHEN**

In-house lawyer Matt Pemberton loves cricket for a number of reasons, one of which is that the rules are "quite complicated" and therefore the sport appeals to lawyers.

Pemberton will be part of the New Zealand team preparing for the forthcoming Lawyers Cricket World Cup in Hamilton over the summer. This will feature 16 teams from Pakistan, India, Sri Lanka, England, Australia, the West Indies and Bangladesh. Organisers expect it will attract about 300 participants.

Pemberton discovered cricket at the 1992 Cricket World Cup and has been playing on-off since.

"I love the game, the stats, and the banter with fellow enthusiasts. For me one of the things I really enjoy about being a lawyer is connecting with like-minded interesting people; and what better way of doing that than through a shared love of cricket. I think cricket and law go quite well together in terms of being a game where integrity is a core value," he says.

Pemberton, who specialises in environmental law at the Ministry for the Environment, made his debut for the New Zealand lawyers' side in January this year against a team of Australian practitioners in Hamilton. Those two limited over games were for the Holroyd Cup, which was won by the visitors.

New Zealand captain, Scott Donaldson, a Senior Associate at AWS Legal in Queenstown, says hosting the tournament in New Zealand has its logistical challenges for some teams but enthusiasm and determination has overcome those.

"Obviously it is a massive commitment for players from countries like Sri Lanka and Bangladesh to come to New Zealand. It reflects their passion for cricket and the level of enthusiasm for this tournament," he says.

"The theme of the tournament is friendship. The main purpose is to share the love of cricket and the law. The tournament will include multiple dinners and events as well as a sports law conference. Building relationships is a major focus."

The seventh edition of the Cup is being held at multiple grounds in Hamilton from 29 December to 9 January.

▲ Matt Pemberton cuts to the mountain boundary

The 16 teams will be split into two pools with each team playing seven round robin matches ahead of the semi-finals and finals.

The Lawyer's Cricket World Cup was instituted by legal practitioners to promote the rule of law throughout the Commonwealth, by using cricket as an opportunity to meet regularly at different locations and to interact with legal practitioner friends from elsewhere.

It debuted in Hyderabad, Pakistan in 2008 and has since been held in Cambridge in England, Barbados, Delhi, Brisbane and Colombo in Sri Lanka. ■

LIFESTYLE

Lake Charles, Louisiana

Lovely in every way and quirky too

BY **JOHN BISHOP**

Take a beautiful national park complete with nature trails, wildlife, including alligators and pink cranes, add a beach, some casinos, plenty of local history, some great local food and a rum distillery and you have Lake Charles in southwest Louisiana.

Lake Charles is about 2-3 hours drive west of New Orleans and about the same distance east from Houston, Texas. It's a town of about 100,000 people with its own port, airport and rail connections as well as the interstate highway.

I had the opportunity to spend 48 hours there breaking up my journey from New Orleans to Houston and was entranced by the variety and the beauty. It's not like the rest of Louisiana as there was never any planation economy here; hence no slaves and no residue of that terrible system.

Geographically it is more like Texas: low-lying farming and cattle country, now sustained by an active petro-chemicals industry. That, along with tourism and recreation, are the major industries.

The locals are self-reliant and while the area was devastated, first by Katrina and then by two more major hurricanes, people have picked themselves up and carried on. Even now lots of RVs are used as homes, although some are for transient labour in the oil industry.

The locals are an enterprising lot. One story lovingly told by local historian and raconteur Adley Cormier is of how, in 1840, some intrepid inhabitants of Lake Charles, tired of making the long trek to the town of Marion 262 miles north – a four-hour journey even on today's roads – went to the town and removed the courthouse and floated it down the river to Lake Charles.

In those days people had to go to the courthouse to vote, to register land and to make complaints. Lake Charles was much bigger than Marion and the locals were fed up with the trip. So, Sam Kirby and Jacob Ryan (who was the Sheriff in Lake Charles) went up to Marion, rolled the building onto a barge and floated it down the river.

They then wrote to officials in Baton Rouge, the state capital, and told them what they had done. Nothing happened. The courthouse remained in Lake Charles but was burned down in the great fire of 1910 which ravaged much of the town.

Water casinos

Another bizarre twist concerns the local casinos. Under state law, any gambling house must be a minimum of one foot away from land and be on water.

It's a hangover from the days when gamblers were taken out to sea beyond the reach of the authorities on land to drink, gamble and party. It was common practice in seaside states like California, New Jersey and Florida both before and after the Prohibition era.

When federal law allowed local indigenous tribes to run casinos on their reservations there was pressure to allow gambling in the state more generally.

The "over water" provision supposedly protects people from the evils of gambling. "It isn't logical," says Adley. "In fact, it's ridiculous, but it's the law."

At the L'Auberge casino, the gaming room is over water. From outside, that part of the building is quite visibly different from the rest of the complex. It can be detached from the rest of the resort complex and towed away.

At the Sabine-Neches Waterway, a large area of protected swamp and marsh land about 30km outside Lake Charles, look for air bubbles in the creeks and canals. That's a sign that alligators are lurking just below the surface. Their fearsome faces break the surface and the big eyes stare at you.

Visitors can walk, ride or drive around the wide pathways to see alligators, turtles, bunnies and abundant birdlife. At the wildlife recovery centre are baby alligators; orphans, the lost and the injured who are nursed back to health and then released.

At Holly Beach where the brown-coloured surf roars in, the houses are on stilts reminiscent of the Australian Federation style. People come here for the colourful shells which are constantly washed up by the tidal actions from the Gulf of Mexico.

Cajun cuisine

And of course, the food is legendary. At T Boys Cajun Grill, a nondescript redbrick building at an intersection of two long flat roads, I enjoy some seafood gumbo and a fish po'boy. Food in the South is always taken seriously, and lunch is usually a substantial sit-down affair.

Crawfish poppers are a feature: jalapeno peppers stuffed with crawfish, breaded and deep fried to make a delicious snack.

Likewise, at Momma Retta's in downtown Lake Charles, I am eating meatloaf and mashed potatoes with good brown gravy with some black eyed peas on the side plus cornbread.

A slice of soft chocolate sponge sweetly iced is included with all servings. The place is full. It's good quality, modestly priced Southern food. Not fancy, just tasty and filling.

A speciality of the area is boudin sausage. Green and white onions are minced and added to cooked rice. Pork is minced and added along with pork brine, the pork fat imparting a rich flavour.

Some varieties of boudin use liver; others have hot spices. They are widely eaten for breakfast, at a barbecue or as a snack. The 11 larger boudin makers are organised into a trail where visitors can see the manufacturing – still mostly hand done – and to sample the various wares.

Land crabs are prolific and breed easily. The daily allowable catch is

▲ Mardi Gras costumes

▲ Waterway in the Sabine National Park

five dozen per person. They are thrown straight onto a barbecue or boiled up with potato, onion, garlic and spices and then cracked open and eaten. Crawfish, a creature about the size of a large prawn, get the same treatment.

Also in the area is a rum distillery which makes a range of fine rums sold locally and across North America and in some foreign markets. The rums are soft and appealing, a long way from the harsh, biting dark navy rums which need a strong mixer to make them palatable.

These are quaffing drinks, cocktail mixers, and at the top of the range, they compete with malt whiskies and fine bourbons and ryes for the attention of discerning palates.

Rum is made from molasses, sugar and water to which is then added yeast and the alcohols start to ferment.

After 30 hours the mixture is 9% ABV. It is then distilled into 1,000 gallon tubs where it's boiled off for five hours. The volume is reduced to just a quarter of the original, but alcohol content is quadrupled.

Now just 250 gallons go into pot stills. White rum takes a month to settle down; dark rums between 30 months and six years. The spirit is then aged in oak barrels which have previously had other spirits in them: bourbon, wine, sherry, XO brandy.

Total production from the Bayou Rum Centre is 45,000 – 55,000 cases a year.

God's percentage – the amount lost through vaporisation – varies with age; up to 19% can be lost in five years.

The market is mainly 28-38-year-olds. "Rum hasn't yet had its day in the sun," says master distiller Jeff Murphy. Rum, he says, can compete with any other spirit for complexity of flavour and taste.

They make a white rum used in cocktails, a spiced rum often drunk with a mixer, and two liqueur rums, one flavoured with satsuma mandarins, the other with coffee, both typically served over ice or straight up at the end of a meal.

Fat Tuesday

Mardi Gras – literally Fat Tuesday – started as a crazy day of over-indulgence in medieval times before the lean times of self-sacrifice during Lent which begins the very next day on Ash Wednesday.

It is now a massive charity event not just in New Orleans, the best-known home of Mardi Gras, but throughout Louisiana. The very best costumes are preserved and held on display at the Mardi Gras Museum in Lake Charles.

Outside of New Orleans, Mardi Gras was always more family oriented. No voodoo elements are involved which again reflects the absence of slave culture. Children were included in the balls and parades where daughters were presented in a manner akin to a debutante outing.

Nowadays the events are massive fundraisers. Groups of between 50 and 200 people known as "Krewes" select a theme for their costumes and make very elaborate outfits and masks and collect money for their various causes.

Themes for a Krewe may be anything but nothing overtly political and no sports teams: the circus, wildlife, exotic locations, the seasons, movies, children's activities are all popular.

The highest honour is to be selected as the King and Queen of the Mardi Gras, and selection is often based less on the costume than for the couple's service to the community.

"It's Rotary with sequins," says Adley Cormier, the local historian who is also a tour guide.

Currently there are 76 Krewes taking part annually and costumes can cost between eight and ten thousand dollars each. ■

John Bishop was hosted by the Lake Charles Convention and Visitors Bureau.

TAIL END

Ten countries where lawyers are under attack

Egypt

The Law Society of England and Wales has submitted information to the UN Human Rights Council that an increasingly authoritarian government in Egypt is systematically undermining the rule of law, attacking legal process, lawyers and human rights defenders. It says lawyers are routinely subjected to harassment, arrest and prosecution.

Indonesia

Jakarta-based human rights lawyer Veronica Koman has been named as a criminal suspect by Indonesian police and accused of the crime of "incitement". Ms Koman has moved to Australia, where she has been awarded the Sir Ronald Wilson Human Rights Award. She is being targeted by Indonesia for her advocacy on behalf of West Papuan clients and for circulating information about recent events in West Papua on social media. Resource-rich West Papua is ruled by Indonesia, but has a growing independence movement.

China

Chinese human rights lawyer Yu Wensheng was detained in Beijing in January 2018 in front of his young son after he wrote an open letter calling for constitutional reforms, including multi-candidate elections. He was later charged with "inciting subversion of state power" but has vanished. His wife Xu Yan was told in April 2018 that he was being held in Xuzhou City Detention Centre but after some 20 trips there she has failed to obtain any information. Yu's government-appointed lawyer told her that he had been put on trial in May 2019, but no-one knows if he has been sentenced or where he is being held.

Pakistan

The 10th annual Day of the Endangered Lawyer on 24 January 2020 will focus on Pakistan. This year Pakistani lawyers have reported the murder of advocate Mahr Muhammad Yasin Sahu in May, and murderous attacks on seven other advocates. Pakistani lawyers have repeatedly taken strike action, with national strikes on 13 and 27 July, and 8 and 28 August.

Colombia

Human rights lawyer Germán Romero Sánchez has received death threats – the latest on 3 October. He has also been followed and had a laptop with information about corrupt officials stolen. Several lawyer rights organisations, including Lawyers for Lawyers, Lawyers Rights Watch Canada, Colombian Carvana and Obseratoire International des Avocats, have jointly called on the Colombian government to insist that the State Prosecutor's Office effectively investigates the threats and robbery and takes all necessary measures to protect Mr Romero Sánchez.

Philippines

The Integrated Bar of the Philippines says over 30 members of the Philippine Bar have been murdered since July 2016. An international fact-finding delegation of lawyers visited the Philippines in March 2019. The day before it got there, attorney Rex Jasper Lopoz was murdered. The delegation's report found that severe human rights violations are being conducted against lawyers and other legal professionals.

The Netherlands

Two Dutch lawyers have been attacked in recent months, with one murdered. Derk Wiersum, 44, was shot dead while with his wife outside their home in Amsterdam

Notable Quotes

“Ashburton's that kind of place where you can come to work, you can pop home at lunchtime, unpack the dishwasher, pop in to see your GP, see a friend on your way home and still be back behind the desk with 10 minutes to spare.”

— Arrowsmith Law director Greg Martin after his firm announced it was offering an all-expenses paid private pilot's licence for a new lawyer recruit.

“A fully diverse judiciary is important to the quality of the substantive law. This is because the path that judges have walked through life shapes how they will and can develop the law.”

— Chief Justice Helen Winkelmann, delivering the annual Dame Silvia Cartwright Address.

“My husband just helps the disadvantaged and marginalised – and you locked him up for two years.”

— Xu Yan, the wife of Chinese human rights lawyer Yu Wensheng after vainly trying to obtain information on his whereabouts from officials at the Xuzhou Intermediate People's Court. Yu was detained in Beijing in January 2018 after writing an open letter calling for constitutional reforms.

on 18 September. Mr Wiersum was representing a key witness – a suspect turned informant – in an organised crime trial. The Dutch lawyers' journal *Advocatenblad* reported at the end of October that 55% of lawyers in the Netherlands said they sometimes feel unsafe and 4% regularly worried about their safety. In early November another Dutch lawyer, Philippe Schol, 43, was seriously wounded after being shot in broad daylight in the German town of Gronau, near the border with the Netherlands. Unknown assailants opened fire on Mr Schol, who had reportedly been repeatedly threatened. The victim lives in Germany but works in the Dutch border town of Enschede.

Saudi Arabia

Lawyers Rights Watch Canada has called for the immediate suspension of Saudi Arabia from the UN Human Rights Council. This follows the continued detention of human rights advocate Samar Badawi, who has been a prominent advocate for women's rights and also sought the release of several imprisoned human rights defenders. Since her arrest on 30 July 2018 her whereabouts have been unknown, although she reportedly appeared in a secret session before the Special Criminal Court in June 2019.

Iran

In March human rights lawyer and women's rights defender Nasrin Soloudeh was sentenced to 33 years and six months in prison and 148 lashes in connection with her human rights work. She had been arrested at her home on 13 June 2018. She will be required to serve 17 years. By June 2019, 1,188,381 people had signed an Amnesty International petition calling on Iran to stop attacks on human rights lawyers and defenders. In July human rights lawyer Amirsalar Davoudi was sentenced to 29 years and 3 months in prison and 111 lashes on charges resulting from his human rights work. He was interrogated in detention without a lawyer present and was convicted and sentenced in his absence. Under Iran's sentencing guidelines, he is required to serve 15 years of this sentence.

Turkey

On 16 October, the Istanbul Regional Court of Justice 2nd Penal Chamber rejected the appeals and confirmed the sentences of up to 18 years' imprisonment imposed in March on 20 lawyers who are members of the Contemporary Lawyers' Association. Lawyers Rights Watch Canada says the convictions and sentences are contrary to international human rights law, contrary to Turkey's constitution and contrary to basic principles of fairness and justice. There is strong evidence that the lawyers, who were sentenced for knowingly aiding or belonging to a terrorist organisation, were simply representing people accused of those offences. ■

“We don't have a shortage of lawyers, we have a shortage of price points that people can afford.”

— Otago University Legal Issues Centre director Bridgette Toy-Cronin comments on news that the number of self-represented civil litigants continues to rise.

“I think the research that came out today shows the conviction rate for sexual violence is concerningly low. The fact that it is at 11% shows I think that the justice system isn't working properly.”

— Wellington barrister Ian Murray comments to TVNZ after the release of statistics showing that for every 100 reports of sexual violence made to police, 31 lead to someone being charged for an offence, 11 result in a conviction and six lead to a prison sentence.

“I remain concerned that if the civil courts get further and further out of reach, then more and more people have no means to enforce their rights and become prey to society's powerful interests.”

— Justice Minister Andrew Little also expresses his concern.

“You seem like a very, very bad person. Just a bad human being. And I hope you come to regret your actions in the future, but you probably won't. And that's sad.”

— Tesla CEO Elon Musk attacks lawyer Randall Baron during a deposition hearing which is part of a 2016 lawsuit filed by Tesla shareholders who allege that members of Tesla's board, including Mr Musk at the time, acted in their own best interests rather than those of Tesla's investors in approving the acquisition of solar panel company SolarCity.

Clarity
consulting group

Welcome to the team...

Olivia Murphy

We are thrilled to announce that Olivia Murphy is joining the team at Clarity Consulting Group as a Senior Recruitment Consultant. Olivia brings valuable legal and recruitment experience and expertise from her past roles as a Consultant - Legal for a large global recruitment agency and a Solicitor for both Inland Revenue and the Financial Markets Authority. Olivia will work closely with the Managing Director in developing long-term business relationships with new clients and delivering and implementing recruitment campaigns to current clients, locally and globally. Welcome Olivia!

Morgan Coats

We are delighted to welcome Morgan Coats to the Clarity Consulting Group team as a Senior Consultant. She joins us with years of experience in both legal practice and in the HR/recruitment industry. Morgan will work closely with the Managing Director on setting and implementing the strategic pathway on a regional and global basis. Welcome Morgan!

Current Vacancies

Mergers & Acquisitions / Private Equity Associate – Budapest
An intriguing role in a beautiful city at a Top 10 Global Elite law firm offering a highly competitive remuneration package.

Junior Derivatives and Structured Finance Associate – Hong Kong
Opportunity for a lawyer with Chinese language skills to develop their career at a Magic Circle firm in a vibrant urban centre.

TMT Associate – London
Magic Circle firm seeking a top-calibre lawyer with expertise in technology, media, and telecommunications.

Litigation Lawyers – Perth
The highest-ranked international law firm across all Legal 500 directories, this Magic Circle firm is looking to add to its Litigation and Arbitration team.

Corporate Associate – Jersey
Join an award-winning corporate team at this leading offshore firm with a client base including sovereign wealth funds, multinational corporations, and global financial institutions.

Dispute Resolution Associate & Senior Associate – Cayman Islands
Work with a team recognised in the Chambers Global Directory and the Legal 500 dealing with multibillion dollar matters in an island paradise.

Property/Construction Lawyer – Auckland
Top-tier local firm offering excellent career development prospects and the opportunity to work on significant and high-value construction matters.

Senior Employment Lawyer – Wellington
National top-tier firm offering competitive salary and benefits in a Tier-1 Labour and Employment team.

Apply now

Clarity Consulting Group is the specialist legal recruitment agency regularly retained to identify excellent candidates for domestic and global client organisations. http://www.claritynz.com

Clarity Consulting Group can confirm that for the majority of these roles, an excellent total remuneration package is on offer, which comfortably sits at the top end of each respective market.