LawTalk
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Looking for transformational opportunities

Chief Justice Dame Helen Winkelmann and Law Society President Tiana Epati discuss the COVID-19 lockdown and the courts

New Zealand Law Society
Te Kāhui Ture o Aotearoa

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FORMAT OF THIS ISSUE

Actions taken because of the COVID-19 pandemic have resulted in this being the second consecutive issue of LawTalk which is not published in hardcopy. Instead, it is available online and has been distributed by email and through the Law Society's website. This issue retains the design and layout of the hardcopy version and we hope that readers will find it as informative and useful to the practice of law as our past issues.

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From the Law Society: The art of adaptation

As this issue of *LawTalk* goes live, the COVID-19 Alert Level has been reduced to three.

While this is positive news, we are far from a return to normal with many restrictions still in place. This is another test of the flexibility and adaptability the profession has shown since Level 4 was announced on 25 March. It requires us to continue to rethink the way we do our mahi, and how we can continue to provide access to justice despite constraints on how we can deliver this.

But firstly, I want to acknowledge and thank the outgoing members of our Board: Andrew Logan and Tim Jones for their guidance – and indeed their flexibility and adaptability – over the past four years, particularly during this uniquely challenging time. Tim and Andrew will be staying on for the next six months as observers to assist with Board continuity and transition. In December, David Dunbar stepped in as Wellington observer after Nerissa Barber finished and I thank both of them for their input during their time with the Board. I also want to welcome our new members: Frazer Barton (South Island Vice-President), Arti Chand (Wellington Vice-President) and Jacque Lethbridge (Auckland Vice-President) who I look forward to working with as we navigate our path through COVID-19 and beyond.

The entire profession has been adapting rapidly and there are many questions and issues that will continue to arise around the pandemic. More than 13,000 of you have signed up for our free webinars covering some of the key issues around working under COVID-19. Produced with the support of NZLS CLE, the first three, Working Effectively from Home, Property Matters and Remote witnessing of Documents are now available to watch online.

I was delighted when the Chief Justice, Dame Helen Winkelmann, and five other Heads of Bench agreed to my invitation to take part in a special webinar on 17 April and respond directly to your questions. More than 2200 members of the profession logged in on the day.

We recognise the urgent need for on-going guidance, and we will have more webinars to come.

There's no doubt the past six weeks have been challenging and not everyone has welcomed the restrictions on how we operate. But let's not lose sight of the bigger picture. Firstly, these restrictions have meant that to date, no-one has been infected with COVID-19 as a result of their involvement with the courts. That goal remains as we shift to dealing with more court business.

Secondly, as a profession we share one overarching goal – enabling access to justice. Throughout Alert Level 3 and beyond, we need to continue to adapt so we can stay connected with the community we serve – while also prioritising the health of both the profession and the community.

An increasingly pressing issue now is the sheer number of cases to work through and we need to work on our recovery plan as a priority. This 'backlog' involves individual people and there is a human cost to the delays.

We as a profession, have learnt and will continue to learn from this experience. Once restrictions are lifted, there's no question that we need a return to kanohi ki te kanohi: it is integral to our model of justice, which has people at its

centre. However, increasing the use of electronic filing and retaining the use of remote technology, where this is appropriate, improves access to the courts and reduces costs. There could well be positive innovations that COVID-19 has fast-tracked.

So, can we retain some good from this extraordinary time? The Chief Justice was asked this question during our recent webinar and I had the opportunity to ask her this again in a further interview which is included in this edition of *LawTalk*. But I will end with her first response at the webinar: "What we want to end up with is a system of justice that takes the good of the old and the new, that retains the values of openness and fairness and respect for human dignity [so] that we arrive at a system of justice which is best designed to provide all with access to the protection of the law in our Courts".

For the most up-to-date information on the operation of the courts, go to *www.courtsofnz.govt.nz* ■

Tiana Epati
President, New Zealand Law Society | Te Kāhui Ture o Aotearoa

A message from the Secretary for Justice, Andrew Kibblewhite

Kia ora tatou,

I hope you and the ones who matter most to you are safe and well in these uncertain times.

As I write this, the Prime Minister has just announced that Alert Level 4 will continue until midnight on Monday 27 April, with Alert Level 3 running for at least two weeks after that date, so we are well into considerations of what impact this will have on the justice system

Given the changing nature of things, I want to make my comments here as broad as possible. The past weeks have been challenging, to say the least, but I thank the Heads of Bench for their leadership, the Law Society and legal profession for their patience and of course the ministry itself, all whom have navigated these unsettled waters. Making such disruptive changes to the justice system in a very short space of time is like asking the Titanic to turn on a dime – but I feel that together we have made some significant achievements in keeping essential justice services operating, while ensuring public safety.

The health and safety of all court participants, the judiciary, media and our staff has been paramount since day one. The cleaning regime we have implemented at court buildings across the country has been comprehensive, and I hope it's given you all the sense that we are looking out for you and doing our best to keep everyone safe inside our buildings. No doubt for those of you who attended court you noticed the proliferation of PPE in our sites up and down New Zealand.

One of the key challenges has been equipping staff with the technology they need to continue their work from their home office – or kitchen table! There are limits to this in our paper-based world. We've had to take a good long look at work prioritisation here at National Office to ensure our frontline essential service staff – our case managers and registry staff – had everything they need to continue delivering the highest priority proceedings. Like you, we have all found ourselves discovering any number of new technologies as our work and socialising has gone to Zoom and our lives ever more online.

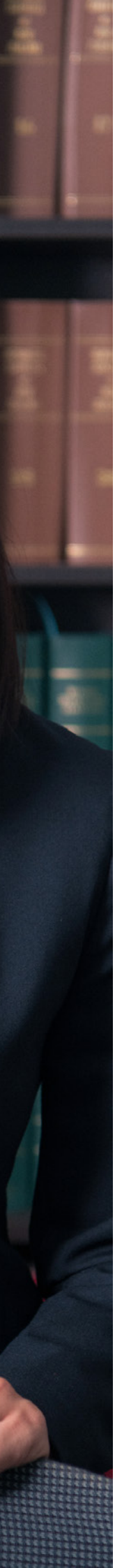
The extensive use of virtual meeting rooms for hearings, along with other technical and non-technical developments has given us a taste of what things could look like when we emerge from COVID-19. Working closely with the judiciary, we will be looking, where possible, to keep measures that have improved accessibility and efficiency for the justice system.

I want to say thank you to the legal profession for your patience and understanding over the past weeks too. As I said, the challenges are significant and the repercussions for the justice system will be felt for a long time. The backlog of individual's cases before the courts is growing and, as Chief District Court Judge Taumaunu has noted, this is a burden that impacts on people's lives. A key focus for us going forward will be to work in close partnership with the judiciary to progress and resolve those active cases as quickly as we can.

Things will certainly look different on the other side of this. I have no doubt it will take a lot of hard work from all involved in the justice sector to get things moving apace again, and I thank you in advance for the important part the legal profession will play in this. ■

Kia hora te marino, kia whakapapa pounamu te moana.
May the calm be widespread and the ocean glisten like greenstone to show us the way.

Andrew Kibblewhite



The courts and the lockdown

Looking for transformational opportunities

Never before have New Zealand's courts been disrupted to the extent that has occurred as a result of the COVID 19 pandemic. Strong relationships and constant communication have been critical to the courts' response and since 13 March the Chief Justice has been writing to the profession on a weekly basis.

On 17 April the Chief Justice, Dame Helen Winkelmann, and five other Heads of Bench agreed to Law Society President Tiana Epati's invitation to take part in a special webinar and respond directly to the profession's questions. More than 2200 members of the profession logged in on the day.

In this edition of *LawTalk* the Chief Justice and the President pick up some of the threads of that webinar and discuss what transformational opportunities might arise from these extraordinary times.

Ms Epati:

Tēnā koe, Chief Justice. It was great to talk to you recently on the webinar *Courts at Level 4 and Beyond*. We had a lot of great questions. But I want to go back to something you said right at the end which was that it has been really valuable getting the views of the profession and getting views of people who are having to access and use the courts. As everyone knows, the Law Society, together with the NZBA, CBA, ADLS, and more recently, Te Hunga Rōia Māori and the Pacific Lawyers Association, have been providing you with some collated feedback from the profession on specific issues. We also extended an invitation to the newly formed Defence Lawyers Association to join our regular meetings. Can I ask, how else have you been obtaining a picture of what is and isn't working in the courts at the coalface?

Winkelmann CJ:

Tēnā koe, Tiana. Yes, you're right, it's important to get information from a variety of sources and to evaluate it and to respond to it where a response is called for.

The Chief Judge of the District Court and I have found it useful to go to the courthouses and to see for ourselves how they are operating, to see for ourselves what is happening. We have talked to lawyers, registry personnel, and to the judiciary who are working there during the lockdown. This gives us good feedback – it's direct, it's from people who have experienced working in the lockdown and can tell us what's going on. It enables us to make changes where they need to be made.

We hear quite a lot of feedback. Sometimes it conflicts with what we're seeing on the ground. So that eyewitness observation is really important to us.

Ideally, we would like to be able to consult the profession in advance of rolling out new plans. That has been a challenge to consult in advance of rolling out different plans for different alert levels because of the complexity of what we are planning for, the short amount of time we have had to plan, and because the plans have to have built into them the ability to deal with uncertainty. For instance, we don't know how long we're going to be at Level 3, we don't know how long we're going to be at Level 2, we have little notice in advance as to the exact nature of restrictions at any level.

The Chief Judge of the District Court and I will be visiting courts in Auckland this week, and we will be joined by Justice Forrie Miller on one day. We are making these visits to see how Level 3 is operating. Although we set out our plans in the protocols, we have to be prepared to respond to what we see on the ground and the feedback we get.

Ms Epati:

So there's been a lot of discussion about this as an opportunity to redesign some of our court processes and procedures. Is there room for a more Aotearoa way of doing things which draws on our multicultural community and bicultural foundations?

Winkelmann CJ:

The first point I'd make is that this way that we're planning for this lockdown and the various alert levels is in itself an Aotearoa way of doing things. The judiciary is working collaboratively with the profession. We have sought out many voices. You in particular, have played a critical role in channelling to us a democracy of voices and so it's not an entirely topdown kind of planning process. That to me is a very Aotearoa way of operating.

I think you may know that we had plans, before the COVID19 alert, to build links into the community, to support bail, sentencing, and rehabilitation processes. That remains the mediumterm priority for the courts. That will build on this nation's bicultural foundation, using the strength of iwi and the broader community to deliver better outcomes for all in criminal justice.

COVID-19 stands in the way of that to some extent because it requires people to interact over phones or video connections. The conception of justice being communitylinked relies upon courthouses situated in communities. It relies upon facetoface interactions.

We're also looking in the medium term to reform civil process, a project underway in the Rules Committee (at *https://courtsofnz.govt.nz/about-the-judiciary/rules-committee/access-to-civil-justice-consultation/*). It launched a major consultation process for the District Court and the High Court. We asked people to bring us their ideas, however radical, as to how we can improve access to justice; how we can improve both the procedural and substantive content of justice so that all people, including those on limited means, the vulnerable, the marginalised, can seek justice from our courts. That process was to have had a consultation period ending May. It's now been extended to September.

What has happened in the last five weeks has shown us that things we believe cannot be changed, that are immutable, can be changed overnight. Radical change can happen, and happen quickly. I believe these experiences have increased the appetite of the profession and the judiciary for change. I have been approached by quite a few practitioners with innovative ideas about how we can take some of what we're doing in the civil arena under COVID-19 and use it to improve access to justice.

Ms Epati:

That leads me into my next question. I've read a lot of articles now that all predict this huge surge in civil work primarily for the High Court postCOVID and there are all sorts of suggestions about how mediation can flatten the curve, and other suggestions. So overseas, we've seen a range of litigation emerge, from leases to insurance claims, coverage disputes, construction, disrupted supply chains, and more. Are you seeing the same sorts of trends in Aotearoa?

Winkelmann CJ:

We have not seen a significant upswing in any category of work, as a result of the pandemic or emergency.

Ms Epati:

I think first of all we have to understand whether all these predictions, are we even seeing that here?

Winkelmann CJ:

We're not.

Ms Epati:

We're not, so I think that's a really important point to make because everyone's been proceeding on the assumption we're just going to be like overseas. We may not.

The next question is that some lawyers have suggested (as a way of reducing the cases) there was room now for greater judicial persuasion and possibly stronger types of costs sanctions in cases which were prime for mediations and yet go through the whole lengthy court process.

Winkelmann CJ:

The courts have always encouraged people to mediate in appropriate cases but on the other hand, we don't sanction people for exercising their legal rights. By that I mean we do not impose cost consequences for a failure to mediate. We keep a close eye on what goes on in other jurisdictions and I am aware that some jurisdictions require mediation. That approach has however been criticised as creating a barrier to access to justice. It's just another cost that then becomes associated with the court process.

Ms Epati:

So moving to the criminal jurisdiction, again, lots of looking at what's happening overseas, concern amongst defence lawyers about consideration being given to reducing the number of jurors in jury trials, providing increased discounts for guilty pleas. This was a question

that came through the webinar, it was one of the ones we couldn't get to, reducing the number of trials and effectively forcing remote hearings on counsel and clients. I suppose conversely, the Crown and victims' rights advocates will be concerned about lots of successful applications for stay based on delay. So are you able to just let us know, what is the judiciary thinking of in terms of the criminal jurisdiction?

Winkelmann CJ:

We are not considering radical change to jury trials. I am aware of the proposals and discussion in overseas jurisdictions. We are watching their progress and possible implementation with interest.

Given the steps that have been taken in New Zealand to achieve elimination of the virus, we believe that we're in a different environment to those other jurisdictions,

We are however assessing how jury trials can be carried out under Level 2 because of the possibility that COVID-19 and its associated risks and restrictions will be with us for a period of time. We are considering practical issues involving summonsing, empanelling, and managing jurors to enable physical distancing. Some measures might require rule and legislative change, which is beyond the power of the judiciary. And none of this is going to occur overnight.

Ms Epati:

The recent publication of protocols for Level 3 was, as you know, met with wide concern about health and safety for criminal lawyers and in fact all court participants. I don't think criminal lawyers were actually expecting the amount of court work announced to be permitted. The impression was that this was essentially business as usual without jury trials.

One of the primary concerns sat around this inconsistency between essentially what the Prime Minister was telling New Zealand about stay at home, there will be really little difference with Level 4, and what appeared to be an increased workload that was coming through the courts. I wonder if you could just take us through the process for the determination of things like protocols and the decision to begin work again on substantive hearings like judgealone trials.

Winkelmann CJ:

A great deal of planning goes into the setting of each protocol. The protocols are set by each court having regard to the public health indications from government in connection with the Level alert.

At Level 3, s 7(l) of the latest Health Order makes it clear that people can travel to courts (at *http://www.legislation.govt.nz/regulation/public/2020/0069/latest/LMS339029.html*). Courts are a category A "business' for the purpose of that Order, which entitles travel between regions in some circumstances.

These provisions recognise that the courts are neither required nor able to work in an entirely contactless environment on the front line. When we make plans for the courts, we have to weigh the very vital role that courts play in supporting the rule of law. While we strive to avoid attendance in person of counsel and defendants, and while we put in place physical distancing and remote technology, on some occasions in person attendance will be required.

We have to bear in mind that there are community safety issues that the courts deal with beyond public health. For instance, in the area of family violence we have to be able to control the bail status of people adequately so that victims and the community remain safe.

I am aware that some concern centred on the District Court protocols and a sense that there would be a return to business as usual at Level 3. That is not what the protocol provides.

As the protocols for all the courts make clear, the work that the courts can do at the moment is limited by the very real constraints created by the need for physical distancing, stringent hygiene, and limited staff numbers Those constraints mean that some regional courts will continue to operate as if we were still at Level 4. Nevertheless, we are now beginning to step up the work the courts will do and that is possible because of the preparation that has gone on in the last five weeks in terms of planning with the registries, and also the adoption of remote technology.

We can keep numbers in courthouses to very low

numbers but only with the assistance of defence counsel. They need to avail themselves of the remote technology that is available, they need to seek to have their client's attendance excused where attendance is not necessary.

There are also very detailed arrangements within the courthouse to maintain physical distancing and necessary hygiene.

Ms Epati:

When these protocols are put together, I understand you work very carefully with the Ministry to know that when you put a protocol in place, the measures that will sit underneath it, all that extra detail that you don't want to bog down a letter or a set of protocols with, the provision of PPE, cleaning protocols, the security personnel, the extra private security, all that extra stuff that we got from Ministry of Justice representatives when we raise it …

Winkelmann CJ:

The judiciary are completely aware of the need, the public health imperatives of the moment, and we do work extremely closely with the ministry to make sure that the courthouses are safe places. If there is any issue with how we are operating in that regard, we have and will respond to it. It is simply not possible to capture within the protocols the extent of the arrangements we are putting in place to operate safely in this environment. That would result in lengthy documents which would not assist the profession at all.

Ms Epati:

So I want to go back to the more general question around the balance to be struck between kanohi ki te kanohi, which is obviously integral to our model of justice, which has people at its centre, with the increasing use of electronic filing, remote technology, and all the advances that we've made during COVID19. Where do you think the balance will ultimately be struck between keeping a peoplecentred approach and some of the new tech learning?

Winkelmann CJ:

I think the balance will be struck around the interests of justice. Tech is something the courts should use. It facilitates access both to procedural and substantive justice in the sense that it facilitates access to the courts but also enables a just outcome. The judiciary has a good sense of where tech should and should not be used. The use of a phone call or a video call can minimise costs and it can conquer distance, but we know that it can hamper communication, especially with those who are already struggling with communication because of linguistic difficulties, who have cognitive disorders, or because of learning disorders.

We're also mindful in the civil arena as to whether a digital hearing is appropriate for the particular hearing. Is it too long, is it complex, does it have crossexamination? Underlying all of it is a concern that we maintain a public and dignified system of justice. We must have a system of justice in which the public can see how justice is administered. And when I say dignified, I mean a system of justice in which we afford everybody who comes before us human dignity. So as you say, Tiana, it's a kanohi ki te kanohi system of justice.

Ms Epati:

Could we end up with a hybrid system where some

participants are online and some are in the courtroom?

Winkelmann CJ:

I distinguish between a virtual and a remote participation hearing. Virtual hearings are hearing in which no one is in the courtroom, where everybody's online. Another way of describing this is a distributed hearing. These are really only suited to short setpiece things. I think the experience we've had with virtual hearings has been quite frustrating. That has been exacerbated no doubt by the huge demands on the telecommunications system generally. But the notion of a distributed hearing is not something I see as having a significant role in the long term in our system of justice.

Remote participation hearings are likely to continue in this system and in the long term. Remote hearings are when the judge and some of the other participants are in the courtroom, but some are joining in via AVL or other means. The use of the courthouse as the centre of the hearing means less disruption due to technology and allows the judge to have proper control of the hearing. You lose some of that control when you have this distributed hearing model.

Even in the case of remote participation in the civil area, it is still has to be addressed on a case by case basis, as the particular issues in a hearing, the particular type of hearing, may not be suited for the proposed remote participation.

At the same, in the long term, I think there will be greater use of remote hearings in the civil arena as the experiences of the last five weeks have forced us all to become more familiar with the technology.

In the criminal jurisdiction there are limitations, which I believe are appropriate, in the Courts (Remote Participation) Act. The effect of these limitations is that courts can only deal on a remote participation basis with criminal procedural matters and not criminal substantive matters without the defendant's consent (at *www.legislation.govt.nz/act/public/2010/0094/latest/DLM2600761.html*).

In the past, defendants have appeared remotely in their early appearances. Part of what we discussed earlier about our mediumterm vision for justice, about becoming more communityconnected, is that those initial appearances are important appearances and they should be in person. In the longer term, we are working towards those initial appearances also being in person. We want them to count in the sense of enabling whanau and community support for the defendant at all stages of the court process. This is difficult to achieve when the defendant is in a police or prison cell away from the courthouse.

Ms Epati:

So I'll finish up with the last question. I'm really conscious that this has been a challenging time for you and I can say as President of the Law Society, I think the profession forget that we're in COVID as well. There's this wonderful churn of activity and protocols coming out and it's almost at a point where there's this kind of idea that we're not subject to any of the challenges whatsoever either, that people like yourself and I are somehow exempt from having to work from home and having to deal with bubbles and remote technology and all of this, and this is, for you, I think, it's doubly hard because you're constantly having to balance what are very weighty public considerations in relation to the courts in particular on top of your job as Chief Justice of the Supreme Court. So I would imagine you're still having to get judgments out, corral your rōpū. So I just want to finish by asking how have you been through this period?

Winkelmann CJ:

It has been a once in a lifetime experience – I hope. My bubble is six working adults: three of my children, one of my children's partner, so the household is very busy and full. There's competition for working space. There's competition for bandwidth on the WiFi too.

There are competing priorities between being Chief Justice of the Supreme Court, and all that entails, and Chief Justice of the judiciary. It is the latter role that has been consuming most of my time over the last weeks. I have focused on ensuring that the courts respond in a way which is coherent for the profession and for other court users. It is important that people can easily understand how all of the courts are operating in this difficult environment.

I have found it helpful in responding to COVID19 to have a framework of principles I use as my touchstone in terms of the constitutional role of the courts and the very important values that underpin how our courts operate. I have also found it helpful to seek advice from my colleagues, who are very knowledgeable, to seek to work collaboratively with the other Heads of Bench, and also to work collaboratively with the profession, and in particular, professional organisations. The profession and its leaders have been so helpful in feeding information to us about the experience of lawyers in our courts, the experience of lawyers generally under these lockdown conditions, and that really has helped us with our response.

Ms Epati:

Have you had a day off?

Winkelmann CJ:

Not yet.

Ms Epati:

That's hard. It's every day for you, it's every waking moment, taking it all into account. Thank you for taking the time to talk to me Chief Justice.

Winkelmann CJ:

Thank you very much, Tiana. ■

NEW ZEALAND LAW SOCIETY | TE KĀHUI TURE O AOTEAROA

COVID-19 crisis requires commitment to fundamental legal system values

Responding to the COVID-19 crisis requires a commitment to the fundamental values that underpin New Zealand's legal system, New Zealand Law Society | Te Kāhui Ture o Aotearoa President Tiana Epati has said.

On 4 April Ms Epati wrote to the Chair of the Epidemic Response Select Committee, Simon Bridges, offering the Law Society's assistance in considering the legal measures needed to meet the COVID-19 pandemic.

She said the Law Society had called together legal experts from its Rule of Law, Human Rights and Privacy, and Public and Administrative Law committees to discuss how the Law Society might be able to help the Epidemic Response Committee and the Government deal with the pandemic.

"Like everybody else in New Zealand, lawyers and the Law Society recognise the danger COVID-19 poses to New Zealanders and the complexity of dealing with this unprecedented state of affairs. Responding to the crisis requires a commitment to the fundamental values that underpin our legal system.

"There is a general acceptance that in times like this, the first duty of government is the protection of its people, and governments might need to use the law in ways we do not normally accept."

This does not mean the rule of law is any less important, she said. In many ways the rule of law is more important now than ever before.

"New Zealanders must accept restrictions in order to defeat COVID-19. However, clarity about the constraints on our usual freedoms of movement and association and on commerce, and clarity about the legal basis for these constraints, is central to ensuring compliance and ongoing public confidence and support."

Important to identify legal foundations

The Law Society considers it important to identify the legal foundations for the various responses by the Government to the epidemic, Ms Epati said.

"The most conspicuous example is the public confusion that resulted from government communications that are now legally impermissible – that is, contrary to law – and activities that, though lawful, are undesirable and discouraged."

Both types of communications from the Government are helpful and necessary, she says – just as in more normal times, not every behaviour needs or can have a criminal or other regulatory response.

"But the law could be clear, clearly enforceable, and able to be easily accessed and understood by all to whom it applies. We anticipate that some of the confusion may be addressed by the most recent order dated 3 April 2020 made under section 70 of the Health Act 1956."

Public access to key documents

She said the Law Society also welcomed the publication of key legislation, orders and other documents on the COVID-19 website. This could be improved further by creating an explicit link between particular practical instructions or directions and the legal basis on which they are made.

"Legal prohibitions should be explicitly identified, as should the consequences of default. All the legal instruments, policy papers and explanations of their legal foundations should be published as soon as they are available, so that New Zealanders can clearly see the justifications for what is being done and the statutory powers being relied upon.

"Recognising that the realities of the current crisis have prevented the normal policy and law-making process, the Law Society believes as time goes on that draft instruments and policy papers should be made available to enable New Zealanders to comment on proposed measures that affect them or in which they are otherwise interested," Tiana Epati said.

"It is particularly important that the values and processes set out in the Legislation Guidelines are maintained as much as possible. People affected should be consulted where feasible. Decisions that affect peoples' rights should be reviewable in some way. Where there are constraints on rights and interests usually recognised by law, sunset clauses are desirable to prompt re-examination of the need for ongoing restrictions."

Scrutiny of legislative instruments

Ms Epati said if the Henry VIII powers in the Epidemic Preparedness Act 2006 are used, Parliament needs to be able to exercise its disallowance power even if it cannot meet as it usually might. Any future statute contemplating more extensive Henry VIII powers should be carefully tailored to provide for public consultation where possible and should be subject to approval or disallowance through the parliamentary process.

Some thought should be given to establishing a role for the Epidemic Response select committee in the process, as well as the Regulations Review Committee, she suggests. Re-convening Parliament also needed to be considered if that could be done in a safe way, before the end of the currently notified Level-4 period, and certainly if it was extended. ■

Proposed barrister AML/CFT reporting requirements opposed

Requiring AML/CFT reporting by barristers would impose an unnecessary and duplicative compliance burden that is disproportionate to any risk, the New Zealand Law Society | Te Kāhui Ture o Aotearoa has told the Ministry of Justice's AML/CFT Exemptions Team.

Commenting on the ministry's January 2020 draft class exemption notice for barristers, the Law Society agrees with the New Zealand Bar Association's view that the proposed draft exemption notice does not engage with the fundamental issue of who the 'customer' is for AML purposes, in the context of the unique relationship between a barrister and their instructing solicitor.

"Under the intervention rule the customer is in almost all cases the instructing solicitor, not the individual or entity. Accordingly, AML obligations in relation to the underlying client should be recognised as resting on the instructing solicitor only," the Law Society says.

The Law Society says its view has not changed from its submission of 13 March 2019 that barrister reporting would be an unnecessary and duplicative burden.

"This duplication is also potentially a consumer issue. Many lawyers will be unable to absorb the compliance costs involved in both instructing solicitor and barrister attending to AML requirements (for example, for enhanced due diligence (EDD)) and are likely to have to pass a portion onto consumers."

The Law Society says it continues to support the preferred approach it set out in its March 2019 submission. Essentially, under its preferred option the requirement to undertake EDD and suspicious activity reporting should rest on instructing solicitors rather than barristers. Information obtained should be available to the barrister on request.

It says this reflects the realities of legal practice and would support the practical operation of the Act. The Law Society also endorses a NZBA request for a meeting with representatives of the ministry, the Department of Internal Affairs, the Law Society and the NZBA to discuss and resolve matters. ■

Effects of COVID-19 on visas and visa applications

The convenor of the Law Society's Immigration and Refugee Law Committee, Mark Williams, wrote to the Head of Immigration New Zealand, Greg Patchell, on 7 April to note lawyer concerns about a number of operational issues arising from the COVID-19 pandemic.

Mr Williams said the committee was very conscious of the enormous pressure and workload on Immigration New Zealand, and it appreciated the updates and announcements it had provided to the legal profession. However, he said there were some operational issues which were likely to present barriers to access to justice.

Deportation and detention of individuals: It would be helpful for INZ to clarify whether deportations scheduled for the period covered by the Epidemic Preparedness (Epidemic Management-COVID-19) Notice 2020 had been postponed or cancelled. Clarification about directions for detained individuals was also sought.

Individuals in New Zealand unlawfully: People holding interim visas which expired before 2 April were requested by INZ to apply for interim visas. Clarification was sought of their status and how complaints from "unlawful" individuals were to be processed.

Time frames: The committee suggested extension of timeframes for a number of applications and certificate validities.

Document and filing requirements: Clarification of the policy for acceptance of uncertified copies of key documents was sought. ■

"Unconscionable" conduct threshold questioned

In a submission to the Economic Development, Science and Innovation Committee on the Fair Trading Amendment Bill, the Law Society expressed its concern that more certainty is needed for the threshold at which conduct is deemed 'unconscionable'.

The bill introduces a prohibition against 'unconscionable conduct' into the Fair Trading Act 1986. The Law Society notes that there is currently no statutory prohibition in New Zealand against 'unconscionable' conduct, but the concept of unconscionability has developed in case law and has been applied where the courts have considered it inequitable to allow a party to enforce contractual rights against another party.

It says in the regulatory analysis supporting the bill, three essential features justifying such intervention are that:

- the weaker party has a qualifying disability (eg, age, infirmity, difficulty understanding English);
- the stronger party has knowledge (actual or constructive) of this disability; and
- the stronger party took advantage of this disability to extract a benefit from a transaction.

The Law Society's submission notes that the bill is based on Australian legislation and conduct can be found to be unconscionable "even if there is no conscious targeting of a vulnerable party".

"The Law Society questions whether this is justified. For a statutory prohibition backed by serious criminal consequences, we consider that some element of culpability – ie, that the trader knew, or ought to have known, that the person was vulnerable and took advantage of that vulnerability – should be required."

It says the Legislation Guidelines state in relation to the creation of criminal offences that offences must be defined clearly so that people know what is and what is not prohibited. Therefore, it is necessary to consider exactly what conduct is prohibited by a criminal offence.

"It is notable that the alternative option of prohibiting 'oppressive conduct' was preferred by officials. The reasons for this are persuasive … The Law Society recommends that the committee consider this alternative option and obtain further advice from officials," it says. ■

▲ Sian Wingate

ILANZ election results

The In-house Lawyers Association of New Zealand (ILANZ), has elected office holders for the 2020/2022 period. **Sian Wingate** was elected President and **Grant Pritchard** Vice President. The General Committee members are:

- **Sian Atkinson**, Te Wananga o Aotearoa, Te Awamutu
- **Jodie Flowerday**, University of Canterbury, Christchurch
- **Linda Frew**, NZ Forest Research Institute Ltd (Scion), Rotorua
- **Benjamin Jacobs**, Xero, Auckland
- **Anitesh Ram Govind**, Auckland Council, Auckland
- **Lyn Wain**, Inland Revenue Department, Christchurch
- **Frieda Winstanley**, New Plymouth District Council, New Plymouth. ■

Practical suggestions for Residential Tenancy Bill changes

The Law Society has suggested a number of changes that could be made to the Residential Tenancies Amendment Bill. In a submission to the Social Services and Community Committee, it says it does not comment on the policy objectives of the bill but on the practical workability of some amendments and drafting issues.

Its suggestions include:

- A longer lead-in period for the bill to come into force than six months, particularly given the significant additional and new penalties and infringement fines.
- Strengthening the provision stating that landlords "must not invite or encourage" bids for rent, to add the terms "pressure or cajole".
- Including leases in the list of examples given in the section on proposed "minor changes" to premises.
- Specifying a maximum period in which landlords can prohibit fibre connection if they plan to carry out extensive changes to the premises which the installation would impede.
- Setting a clear timeframe for informing tenants (instead of "as soon as practicable") if the premises are put on the market.
- Defining the term "harassment" in new section 55A which enables a landlord to apply to the Tribunal for an order terminating a tenancy on the basis of "anti-social behaviour".
- Clarifying the meaning of "purports" in new section 60AA, which relates to the landlord acting to terminate a tenancy without grounds. ■

Truncated bill submission time criticised

The Law Society has criticised the short time period allowed for submissions to the Health Committee on the Smokefree Environments and Regulated Products (Vaping) Amendment Bill.

In a submission, it says while the bill was introduced on 24 February 2020, it did not receive its first reading until 11 March 2020 at which point it was referred to the Health Committee with submissions due by 1 April 2020, providing only a three-week submission period for public input.

"The Law Society has previously expressed concerns as to truncated submission timeframes, both in submissions on bills and in recent submissions to the Standing Orders Committee during the 2017 review of Standing Orders and the 2020 review," it says.

The submission notes that the Standing Orders Committee's 2017 Report endorsed the Law Society's observations and indicated desirable time frames for closing dates for submissions. These included generally, a minimum of six weeks, with a lesser "but still realistic" period permissible in exceptional circumstances, and "longer is desirable for large or complex bills". Sufficient time must be allowed for proper drafting and consideration of amendments and commentaries.

"The Law Society is unable to see why the period for public submissions has been restricted to three weeks. It cannot fairly be described as so urgent as to be exceptional and to justify a period shorter than six weeks," it says.

Commenting on the bill itself, the Law Society says it agrees with Attorney-General's Report to the House of Representatives pursuant to section 7 of the Bill of Rights, that the restrictions in the bill on packaging, advertising and promoting vaping products are inconsistent with the right to freedom of expression.

It accepts, as does the Attorney-General, that on the current state of the evidence some restrictions around vaping of the general type set out in the bill are appropriate.

"However, the Law Society endorses the Attorney-General's conclusion that, on the available evidence, the limits on freedom of expression identified in the report do not meet the standard of being 'demonstrably justified' as set out in section 5 of the Bill of Rights." ■

Bill provides chance to provide for fair compensation

The Greater Christchurch Regeneration Amendment Bill 2020 is an opportunity to amend the Greater Christchurch Regeneration Act 2016 to provide for fair compensation for the public taking of private property, the Law Society has stated in a submission on the bill to the Governance and Administration Committee.

The Law Society says it considers there is a continuing concern about the need for fair compensation. It recommends including a provision which amends the open-ended ministerial discretion to determine compensation in section 114 of the Act.

"Fair compensation for the public taking of private property is a fundamental constitutional principle. The justification for giving the Minister an open-ended discretion to determine compensation is not clear," it says.

"The Law Society considers that the bill should amend section 114(3) by repealing the proviso in section 114(3) that the Minister 'is not limited to determining the amount of compensation on that basis alone'. This would mean that the two matters in section 114(4) which the Minister must have regard to are mandatory, and other considerations would be irrelevant.

"If it were intended that section 114(3) would give the Minister power to award an amount of compensation higher than the current market value and under Part 5 of the Public Works Act 1981, then it is submitted this should be expressly made clear." ■

PEOPLE

On the Move

Justice Susan Thomas appointed Chief High Court Judge

Justice Susan Thomas has been appointed Chief High Court Judge. She replaces Justice Geoffrey Venning who has resigned from the position but will remain a Judge of the High Court, based in Auckland. Justice Venning's resignation takes effect on 31 May 2020.

Justice Thomas graduated with a BA and LLB(Hons) from Auckland University in 1982 and practised as a solicitor with the Auckland firm of Holmden Horrocks before relocating to London. She was admitted as a solicitor in England and Wales, and spent almost 10 years as in-house counsel and as a solicitor and partner in a legal firm in London.

On her return to New Zealand in 1995 Justice Thomas joined MinterEllisonRuddWatts as a senior associate, and was admitted to the partnership the following year. She was appointed a District Court Judge in 2005. During her time as a District Court Judge she was involved in solution-focused judging and in 2012 started a Special Circumstances Court in Wellington to focus on the most challenged and marginalised offenders.

Justice Thomas was appointed to the High Court in 2014, sitting for three years in Auckland before relocating to Wellington where she is now based.

Chief Justice Helen Winkelmann says Justice Thomas will bring to the role of Chief High Court Judge broad knowledge of the court system as a whole and of the wider social context in which it operates.

New Zealand Law Society | Te Kāhui Ture o Aotearoa President Tiana Epati says Justice Thomas' time as a District Court Judge will add to the depth of her experience as a member of the judiciary in two of the busiest courts in Aotearoa.

"In her time as a lawyer she worked in private practice here and abroad and also as an in-house lawyer. Her work in establishing the Special Circumstances Court in Wellington to take a non-adversarial and inclusive approach to homeless offenders demonstrates we have someone who will bring practical experience, insight and compassion to the role."

Tributes to Justice Venning

Attorney-General David Parker has paid tribute to **Justice Venning**, who he says has stewarded the High Court very capably over the last five years.

"On behalf of the Government, I thank him for his service to the judiciary and community as a Head of Bench."

Chief Justice Helen Winkelmann says Justice Venning's calm, measured leadership and superb administrative abilities characterised his five years of service in the role. She says Justice Venning is an outstanding judge, and during his time as Chief High Court Judge he has decided some of New Zealand's most important and challenging cases.

She says that after carrying the additional and heavy administrative and leadership responsibilities that come with the role of Chief High Court Judge for five years, Justice Venning has decided to take this step to refocus his energies on judging.

"Justice Venning's effective leadership of the High Court, and his obvious intellectual strengths as a judge have earned him the respect and confidence of the High Court Bench and of the profession. I am pleased that the judge will be able to continue to serve his community through his on-going work as a High Court judge."

Law Society | Te Kāhui Ture President Tiana Epati has noted Justice Venning's 25 years on the High Court Bench.

"His contribution to our justice system and to our highest court of first instance is applauded. As our country battles COVID-19, his leadership of that court has been visible and authoritative. It is pleasing that he will remain a member of the High Court judiciary after his retirement as Chief High Court Judge," she says.

Dani Lee Gardiner appointed Associate Judge of High Court

Auckland barrister and solicitor **Dani Lee Gardiner** has been appointed an Associate Judge of the High Court. Since 2018 she has been General Counsel, heading Auckland Council's in-house legal, risk and insurance department. She will sit in Auckland.

Associate Judge Gardiner was admitted as a barrister and solicitor in October 1995 after graduating LLB(Hons) from the University of Otago. She began legal practice with Phillips Fox as a solicitor and worked there until 1997 when she moved to London and practised as a senior solicitor with Herbert Smith Freehills.

Returning to New Zealand at the end of 2001, she worked as a senior solicitor

with Chapman Tripp until December 2008. Associate Judge Gardiner completed an LLM with first class honours in Public Law at the University of Auckland in 2012 and worked as a Principal at Chen Palmer from February 2013 to December 2014. She began work in the Auckland Council legal team in 2015 as Manager, Public Law and was appointed General Counsel in November 2018.

More Acting District Court Judges appointed

The appointment of five more Acting District Court Judges was gazetted in March. This followed the appointment of six Acting District Court Judges earlier in the month.

Laurence John Ryan, retired District Court Judge, has been appointed an Acting District Court Judge and also to exercise the jurisdiction of the Family Court for a term of two years commencing on 18 August 2020.

Christopher John Field, retired District Court Judge, has been appointed an Acting District Court Judge and also to exercise the jurisdiction of the District Court under section 354(3) of the Criminal Procedure Act 2011 for a term of two years commencing on 7 July 2020.

Craig James Thompson, retired District Court Judge, has been appointed an Acting District Court Judge and also to exercise the jurisdiction of the District Court under section 354(3) of the Criminal Procedure Act 2011 for a term of two years commencing on 25 October 2020.

Alexander James Twaddle, retired District Court Judge, has been appointed an Acting District Court Judge and also to exercise the jurisdiction of the Family Court for a term of one year commencing on 22 December 2020.

Carolyn Henwood, retired District Court Judge, has been appointed an Acting District Court Judge for a term of one year commencing on 20 September 2020.

New appointments to Waitangi Tribunal

Susy Frankel and Paul Hamer have been appointed to the Waitangi Tribunal for three-year terms. Basil Morrison has been reappointed to the Tribunal for a three-year term.

Susy Frankel is a Professor of Law and the Chair of Intellectual Property and International Trade Law at Victoria University of Wellington. She has worked for many years in the realm of intellectual property, including the protection of mātauranga Māori (traditional knowledge).

Paul Hamer is an historian and is a Research Associate at Victoria University of Wellington. He is currently employed as a Principal Advisor in Māori Strategy and Partnerships at the Department of Corrections. Paul has extensive experience in the public sector, having worked for both the Tribunal and Te Puni Kōkiri in various roles. He is also an expert on Māori migration to Australia.

Coroners and Relief Coroners Appointed

The appointment of a four coroners and eight relief coroners has been announced. The full-time coroners replace the loss of four existing coroners who have retired, been appointed District Court Judges and moved into other roles. The focus of the relief coroners will be to provide support as duty coroners and help to reduce the backlog of cases. Chief Coroner Judge Deborah Marshall has welcomed the appointments of the eight relief coroners. The positions, on approval from the Attorney-General, were funded as part of Budget 2019. As part of this, the government pledged $7.5 million to fund eight part-time coroners, and the support staff needed to fulfil the role. The relief coroners are appointed for five-year terms.

Matthew Bates has been appointed a coroner in Hamilton from 9 April 2020 after acting as a relief coroner since September 2019. He was admitted as a barrister and solicitor in 1996 and worked with Evans Bailey in Hamilton until 2002 when he became a barrister sole until 2016 when he joined the Tauranga Public Defence Service. He has also been a District Inspector for Mental Health and a District Inspector for Intellectual Disability.

Donna Marie Llewell has been appointed a coroner in Rotorua from 9 April 2020. Ms Llewell was admitted in 1995 and has worked in a variety of legal roles in Vanuatu and Bougainville and in New Zealand, including at the Crown Law Office and Te Papa Atawhai, Department of Conservation. At her appointment she had been in-house counsel for the Bay of Plenty Regional Council from August 2016. She is a competent speaker of te reo Māori and her iwi is Ngā Puhi.

Robin Andrew Kay has been appointed a coroner in Palmerston North from 29 April 2020. Mr Kay was admitted in 2010 after working for 20 years as a mental health nurse. After admission he worked for Lane Neave and at his appointment had been working for Christchurch firm White Fox & Jones since August 2016 as part of its dispute resolution team.

Bruce James Hesketh has been appointed a coroner in Rotorua from 11 May 2020. Admitted in June 1995, Mr Hesketh is of Ngai Tahu descent. He was a police officer, rising to the rank of Detective Sergeant before completing a law degree. He worked in private practice, before joining the Public Defence Service and was Deputy Public Defender in Wellington from 2015-16. In April 2018 Mr Hesketh became a partner of the newly-established Tauranga firm Adams Hesketh.

Janet Elizabeth Anderson-Bidois has been appointed a relief coroner in Auckland. Ms Anderson-Bidois was admitted in September 1993. After spending 14 years as a senior medico-legal adviser at Waitemata and Counties Manukau District Health Boards, she became Chief Legal Adviser at the Human Rights Commission. She leads a team responsible for reporting to United Nations committees and monitors New Zealand's compliance with international human rights treaties.

Louella Dunn has been appointed a relief coroner in Hamilton. Ms Dunn was admitted in November 1989 and is the Acting Crown Solicitor at the Hamilton Crown Solicitor's Office. From 1997 to 2018 she was a partner in Almao Douch. Ms Dunn is a highly experienced trial lawyer and has prior experience with coronial hearings.

Allie Cunninghame has been appointed a relief coroner in Dunedin. She is an expert on New Zealand's health and safety law and has worked with the Legal Issues Centre as Professional Practice Fellow for the past 10 years. Ms Cunninghame has been an associate with Anderson Lloyd in

Dunedin since 2008.

Mark Wilton has been appointed a relief coroner in Wellington. He was admitted in September 1993 and worked as a criminal and civil litigator before moving to the Police Prosecution Service in late 2003 as the Taranaki rural prosecutor based in Hāwera. Since then, he has been National Legal Counsel for the Police Prosecution Service. Mr Wilton has served a term as New Zealand Law Society Vice-President (Wellington).

Heather McKenzie has been appointed a relief coroner in Auckland. Admitted in June 2007, Dr McKenzie has been a Crown Prosecutor in Christchurch for 10 years and is an associate at Raymond Donnelly & Co. She holds a doctorate in Asian Studies, a Bachelor of Arts in Japanese and French and a Bachelor of Laws – all from the University of Canterbury. She has also written texts on health and safety law and proceeds of crime.

Mary-Anne Borrowdale has been appointed a relief coroner in Wellington. She was admitted in October 1995 and has been General Counsel (Competition and Consumer) for the Commerce Commission since 2010. Before this, she worked in the Commission's enforcement and litigation areas and has two decades' experience in commercial and criminal litigation.

Heidi Wrigley has been appointed a relief coroner in Rotorua. Admitted in June 2002 she started her career as a High Court Judges' Clerk. From 2004 to 2016 she was a Senior Crown Prosecutor in Tauranga before contracting to do prosecution work for the Crown Solicitors in Tauranga and Rotorua. She was also Associate Crown Counsel at Crown Law in 2009.

Alison Mills has been appointed a relief coroner in Whangārei. She was admitted in September 2003 and is a barrister currently working with Simon Mount QC at Bankside Chambers. She has also been a Senior Crown Counsel at the Crown Law Office in Rarotonga and an in-house Senior Legal Advisor to the Medical Council. She is an intermediate speaker of te reo Māori.

Andrew Simmonds retires from Simmonds Stewart

Andrew Simmonds retired from technology business law firm Simmonds Stewart at the end of March 2020. Andrew co-founded Simmonds Stewart with CEO Victoria Stewart in 2006. For a large amount of that time, Andrew was managing partner but moved in 2016 to marketing and digital strategy lead for the firm. After taking a break, Andrew plans to put his business and entrepreneurial skills to use, including as a tech company board adviser and director.

Alistair Robertson returns to MinterEllisonRuddWatts

Alistair Robertson has returned to MinterEllisonRuddWatts as a Special Counsel in the financial services team. He has experience in financial services and banking regulation, managed funds, regulatory investigations and inquiries, and conduct and culture related matters. Alistair was most recently Head of Compliance at ANZ Bank.

New Dean of Law appointed at University of Waikato

Professor Alpana Roy has joined the University of Waikato as Dean, Te Piringa Faculty of Law. Professor Roy recently completed a term as Associate Dean (Research) at the School of Law, Western Sydney University. Before this she was Head of the School's Campbelltown Campus.

Professor Roy has held academic positions at the University of Queensland, the University of Technology Sydney, the University of Sydney and Charles Sturt University. She has also practised as a solicitor, barrister and senior legal consultant in intellectual property. She has also established an international reputation for research in intellectual property law.

Professor Roy has a PhD in Intellectual Property Law from the University of Sydney, a Master of Arts (Journalism) from the University of Technology Sydney, a LLB(Hons) from the University of Sydney and a BA (Social Science) from the University of Technology Sydney. She was admitted to practise as a solicitor in New South Wales in 1999, to the New South Wales Bar as a barrister in 2008.

Partner and Associate appointed at AWS Legal

Invercargill-based estates, trusts and private client specialist **Shauna Nicol** has been appointed a partner at AWS Legal. Shauna has practised in Invercargill since she was admitted to the bar in 2009 and joined AWS legal in 2017. She has a varied background and also spent many years as a family law specialist. Shauna has a keen interest in trust law and has presented locally on the coming changes in the Trusts Act 2019.

Tim Lindsay has become an Associate at AWS Legal, based in the Invercargill office. Tim graduated from the University of Otago in 2016 with an LLB and a BA majoring in political

science. He specialises in business, IP, property and corporate law. Tim is involved in the New Zealand Lawyers' Cricket team and appears on stage for Invercargill Musical Theatre and Repertory Invercargill.

John Swan retires and closes practice

After 46 years of public practice in Wellington, **John Swan** has retired with effect from the 31 March 2020. After working as a law clerk at Davies McKay & Co from 1972 until his graduation with an LLB and admission in 1974, John became a partner in the firm (now Kensington Swan) until 1978. His career included partnerships at Perry Castle and Morrison Morpeth and he was a founding partner with Gilbert Swan in January 1994, practising with the firm until 2005 when he became principal with Swan Legal Ltd until his retirement.

Nick Russell joins Harbour Chambers

After 15 years at Chen Palmer, **Nick Russell** has retired from the partnership and has practised as a barrister at Harbour Chambers in Wellington from 1 April. Nick specialises in judicial review, public law, civil litigation and media law/defamation. He also advises on regulatory matters including health, competition and overseas investment.

Buddle Findlay announces new National Chair

Jennifer Caldwell has been appointed Buddle Findlay's new National Chair, effective from 1 April. A partner since 2000, she specialises in resource management, environmental and local government law, with extensive experience as a strategic adviser and specialist litigator in the Environment Court, High Court and higher courts. Jennifer has a diverse background working in-house and in private practice, both offshore and in New Zealand.

One promotion and addition at Wynn Williams

Wynn Williams has announced a recent promotion and a new addition to its national legal team.

Michelle Mehlhopt has been promoted to Special Counsel in Wynn Williams' resource management team. Michelle specialises in resource management, environmental and local government law. She has expertise in a wide range of areas, including district and regional planning, resource consents, biosecurity, enforcement and local government strategy and advisory work.

Cecil Hanafin has joined Wynn Williams as a Senior Associate in the dispute resolution team. Cecil is an experienced litigation and disputes lawyer in the civil litigation field. She has a strong focus on insolvency work including personal property claims, security enforcement, and advising companies facing insolvency and corporate distress generally.

New CEO and General Counsel for Deerstalkers' Association

Chapman Tripp Lawyer **Gwyn Thurlow** has been appointed CEO and General Counsel of the New Zealand Deerstalkers' Association. Gwyn has wide corporate legal experience and holds both a LLB and a BCom majoring in Management and Marketing. Currently a member of Chapman Tripp's banking and finance team, he previously worked for international accounting firm KPMG.

Two appointments to Council of Legal Education

Two lawyers have been appointed to the New Zealand Council of Legal Education.

Natalie Coates, a partner of Kahui Legal, has been appointed for a three-year term from 27 March 2020 to 26 March 2023.

Maia Wikaira, a director of Whaia Legal, has been appointed for a six-month term from 27 March 2020 to 28 September 2020.

Stewart Germann elected CLAN President

Auckland lawyer and notary public **Stewart Germann** has been elected President of the Common Law Association of Notaries. A presidential term is two years for CLAN. The organisation represents notaries public internationally but principally those practising under the common law. Stewart succeeds Leo Mangan of Ireland who has been President for the last two years. Stewart is also President of the New Zealand Society of Notaries Inc.

Promotions at Greenwood Roche

James Riddoch has joined the Greenwood Roche partnership. Before joining the firm in 2013, James spent 11 years practising in London where he was recommended by the UK Legal 500 for his work in the social housing sector. James has developed a strong construction practice. He is based in Christchurch but his practice has a national reach.

Jimmy Tait-Jamieson has been appointed Senior Associate. He undertakes a wide range of property, infrastructure and development work for both public and private sector clients. Jimmy particularly enjoys advising on project structuring and assisting with legislative and regulatory issues

Laura Shields has been appointed

Senior Associate. She practises in all aspects of commercial property with a focus on infrastructure, acquisitions and disposals, and large-scale property development. Laura principally advises on Crown land matters and has experience in Treaty settlement negotiations and implementation.

Lana Christensen has been appointed Senior Associate. She advises on commercial and commercial property transactions, including the acquisition, subdivision and disposal of land, and has experience in a variety of commercial and commercial property transactions and banking and financing.

Rachel Murdoch has been appointed Senior Associate. Rachel advises on resource management issues, with a particular focus on urban development and regeneration projects. She has experience in environmental due diligence, plan development and consenting.

Renee de Lisle has been appointed Senior Associate. She practises in all aspects of property law, with a focus on development projects, social housing and urban regeneration projects, large-scale property acquisitions and disposals and commercial leasing.

Sam Green has been appointed Senior Associate. He advises on a broad range of corporate, commercial and commercial property matters with a focus on large scale property development, acquisitions and disposals, construction, infrastructure and major commercial contracting.

Greenwood Roche has also announced the appointment of five Associates. **Amelia Alden** advises on resource management law, **Anna Hickmott** and **Miriam Black** specialise in commercial property transactions, and **Rowan Barbalich** and **Tanya Young** work in the national construction practice.

ASA announces Nanette Moreau as Complaints Appeal Board Chairperson

Qualified lawyer and mediator **Nanette Moreau** has been appointed Chairperson of the Advertising Standards Complaints Appeal Board, effective 1 April. Until her retirement in February 2020, she was Commissioner and Chief Executive of Utilities Disputes.

McWilliam Rennie appoints Senior Associate

Helen Tyree has become a Senior Associate at Wellington boutique family law firm McWilliam Rennie. Helen graduated from Otago University in 2000 with a Bachelor of Laws and from Brunel University of London in 2003 with a Master of Law in Child Law and Policy (with distinction). Before joining McWilliam Rennie in 2014, Helen worked in a number of Taranaki firms specialising in family law. She acts for children in the Family Court and also undertakes appointments as lawyer for subject persons under the Protection of Personal and Property Rights Act 1988.

Caleb Hensman promoted to partner at Russell McVeagh

Caleb Hensman has joined the Russell McVeagh partnership. Caleb started at the firm as a solicitor in 2011, and following a stint overseas, progressed to the role of senior solicitor in June 2015 and senior associate in December 2017. Caleb recently advised Goodman Property Trust and GIC (of Singapore) on the $635 million sale of the VXV Precinct in Wynyard Quarter, Auckland International Airport on its development of Foodstuffs' North Island head office and distribution centre, and Cedar Pacific on the acquisition and development of a number of student accommodation facilities in Auckland.

TODD & WALKER Law announces two new principals

TODD & WALKER Law has promoted two lawyers to Principal, effective from 1 April.

Peter Sygrove advises on all aspects of property law including retail and commercial leasing, buying and selling real estate, due diligence investigations of commercial property portfolios, residential development, subdivisions and construction. Peter has an in-depth knowledge of the Overseas Investment Act 2005.

Louise Denton is a criminal defence expert. An experienced litigator she has appeared in numerous District Court cases, High Court appeals and Parole Board hearings. She also leads the firm's family law work and will head the firm's family law and relationship property team.

Joshua Aird joins Lindsay

Joshua Aird has joined specialist litigation firm Lindsay as an Associate. Joshua has returned to New Zealand after two years as a litigation solicitor at Herbert Smith Freehills in Sydney. After his admission in June 2016, Joshua was a litigation and tax solicitor at Russell McVeagh. He has a wide-ranging commercial litigation and regulatory defence practice.

Four promotions at Hudson Gavin Martin

Technology, Media and IP firm Hudson Gavin Martin has announced four promotions.

Sarah-Jane Lawson has been promoted to Special Counsel. Sarah-Jane has extensive experience in corporate and commercial law, including business sales and purchases, restructuring, joint ventures, capital raising, shareholder agreements and a range of commercial agreements.

Andrew Dentice has been promoted to Principal. As a technology lawyer, Andrew focuses on data, platforms and "as a Service" business models, particularly Fintech. He regularly helps technology clients navigate complex legal issues to execute their business strategy – whether providers or customers, incumbents or challengers.

Toby Cartwright has been promoted to Senior Associate. Toby's main areas of practice are technology, intellectual property, commercial and corporate law. Toby has broad experience in advising on various technology, intellectual property and other commercial arrangements, data protection and privacy, consumer law and corporate transactions.

Lisa Paz has been promoted to Senior Associate. Lisa specialises in technology, media and telecommunications. Lisa has broad in-house and private practice experience advising on the commercialisation of technology (including IoT and big data analytics), sponsorship and marketing deals, content and tech procurement, and commercial arrangements for telecommunications providers.

Sarah Moore joins Morris Legal

Sarah Moore has joined Morris Legal as a Senior Associate. Before joining the firm she worked as a senior associate in the dispute resolution team at MinterEllisonRuddWatts in Auckland. Her experience includes resolving disputes concerning high value family-owned businesses and acting for clients with assets in multiple jurisdictions. Sarah has LLB(Hons) and BMus(Hons) degrees from the University of Melbourne and has represented clients in relationship property, trust and estate litigation in New Zealand and Australia.

PROFILE

South Auckland's Mormon defence lawyer

Panama Le'au'anae

BY **TEUILA FUATAI**

Panama Le'au'anae sums up more than 30 years of work as a criminal and family lawyer: "Some of the cases that I've dealt with are really the worst types of human behaviour".

Measured and resolute, the comment is not intended to be unkind or disparaging. Rather, it is one part of Mr Le'au'anae's explanation for his chosen career path.

The veteran South Auckland barrister has defended hundreds of sexual abuse and serious assault charges over the years. There have also been three murder trials, New Zealand's first slavery charge and more recently, the highly publicised child sex offender case of Auckland school rugby coach Alosio Taimo.

It is a collection which pits him as one of the most experienced defence advocates in Manukau. He is also the current head of the South Auckland Bar Association. However, as he recounts some of his more memorable cases, it is an entirely different aspect of his life which becomes the initial focus of our interview.

The church and the law

Mr Le'au'anae is a devout member of the Church of Jesus Christ of Latter-day Saints. As his career as a legal advocate has grown, so too has his leadership and community service roles in his church ministry.

The ability to reconcile the two has been essential to his perseverance and success in both, he says.

"My religious background is extremely important for me because it really determines how I deal with my clients," Mr Le'au'anae says.

"I don't support criminal behaviour. That would be the last thing I would be a disciple of, but at the same time, somebody needs to be their advocate. Somebody has to find some good, or some touchpoint in their background which has led to their offending."

The foundation provided by his faith is essential to that, particularly in cases which involve serious criminal charges. Often, it means addressing his clients, and the courtroom, in a less

conventional way.

"I've done a lot of sexual cases, and I've actually been successful in a large number of them," Mr Le'au'anae says.

"Overall, I've been more successful than not in my criminal jury trials, and I'm pleased with how that's turned out. It's probably not the thing to do, but sometimes I indicate in my submission that from a personal perspective, I also find the behaviour quite abhorrent and despicable.

"I am also very apologetic, not just on behalf of my clients, but also in my own views. I try to convey that what has happened is something my client – usually a 'he' – will have to live with for the rest of his life," he says.

"That goes back to my religious background – I don't condone that type of behaviour. But that doesn't detract from being a thorough advocate."

'Glorified mail boy'

The fair-minded and honest approach shines through in Mr Le'au'anae's description of his early years of practice. The first in his family to attend university, Mr Le'au'anae says it took a while to establish himself as a court lawyer after he graduated from the University of Auckland in 1981.

"First of all, I wasn't one of those smart cookies – I scraped through university," he says.

"And then I worked for a year in the Lands and Deeds department. I was a glorified mail boy and my job was to collect the mail in the morning and give it to the District Land Registrar. I couldn't get on to any of the teams which did actual legal work. After a while, I thought: 'I didn't end up going to university to be a mail boy'."

His first break came via a job opportunity as a legal adviser with the Development Bank of Western Sāmoa (DBWS). At the time, it meant a three-and-a-half-year stint in Sāmoa for Mr Le'au'anae, his wife and their two young boys. The job also led to a part-time role in the Attorney General's office, which was Mr Le'au'anae's first foray into criminal work.

"It really was a blessing in disguise," he says of his family's time in Sāmoa.

"Although my parents are Sāmoan, I had lived in New Zealand my whole life and couldn't speak Sāmoan. It was while I worked in Sāmoa that I learnt to speak Sāmoan. I also managed to get seconded to the A-G's office while I was up there, and I would carry out criminal prosecutions. It's where I got my first taste of criminal work."

When he returned to Auckland, he found a job with a small firm in Queen Street. His arrival coincided with the departure of another lawyer from the firm to return to Sāmoa.

"That's how I got my start here. But if I hadn't had the job with DBWS, I probably wouldn't have been able to get a job.

"I worked for two firms for three years and then I went out on my own and hung out my shingle," Mr Le'au'anae says.

From general practitioner to barrister

His first office was in the central city. As his practice expanded, he opened a second one in South Auckland. At its height, Mr Le'au'anae employed four lawyers and provided conveyancing, immigration, family and criminal legal services. Among his past staff members is current District Court Judge Margaret Rogers.

"I managed to hire one of the lawyers from Masterton. She came up and ran the K' Road office. She is now a judge but that's how she ended up in Auckland," he says proudly.

Mr Le'au'anae also talks about the small number of Pasifika lawyers in Auckland during the early years of his practice, and the eventual shift of his entire business to Manukau.

"Back then, there were very few lawyers of ethnic background. There was probably one Tongan, and two Sāmoan law firms, and a few out on their own. Really, it was a very small group of us of Pasifika background that had law firms," he says.

"Eventually, it wasn't financially viable to run two offices and I wasn't getting a lot of work through the K Road office. By then, a lot of my clients were in South Auckland, so I closed the town office and practised principally from Ōtāhuhu."

The move to his current location at Friendship House Chambers in Manukau in 2005 is marked by one of the more challenging incidents in his career and personal life. While it led to a more definitive focus on criminal jury trials and family law, it is not the path he wanted.

"I had a very sad thing that happened – I had someone close to me who defrauded some money from me. It meant I had to go from being a general practitioner to being a barrister. I had to deal with that issue and that's why I ended up specialising in criminal and family law. I've been a barrister ever since," he says.

Unfortunately, as lawyers and judges, we are at the bottom of the cliff. We can't prevent the things that are happening, but we can try and make it a lot more palatable and a lot more compassionate

Understanding South Auckland

It is a legal career with unique highs and lows, steadied by Mr Le'au'anae's beliefs and passion for legal advocacy. As we near the end of the interview, I ask whether he has considered switching sides to be a prosecutor. Mr Le'au'anae's answer is grounded in where he believes his skills are needed most, particularly regarding Pasifika communities and South Auckland.

"You see, as soon as you mention South Auckland – that conjures up a very bad connotation of the people that live out here," he says.

"And that's really sad, because there are some very good people and very good lawyers who advocate for their clients and go out of their way to look after some very marginalised and vulnerable people and children.

"Some of them have horrendous backgrounds, for one reason or another. Unfortunately, as lawyers and judges, we are at the bottom of the cliff. We can't prevent the things that are happening, but we can try and make it a lot more palatable and a lot more compassionate."

His ongoing dedication to defence advocacy stems from that, and the experience he has built over the years working with clients of Sāmoan descent.

"I used to mainly see Sāmoan clients," Mr Le'au'anae says. "Now, there's more of a range, but still a lot of Pasifika. Having that [cultural background] in common, and being able to speak Sāmoan is so important. It makes a huge difference.

"I've never thought about being a prosecutor because there's plenty of those out there. But experienced Sāmoan defence lawyers, or even Pasifika defence lawyers with the level of experience I have – there's so few of us around to advocate for our people." ■

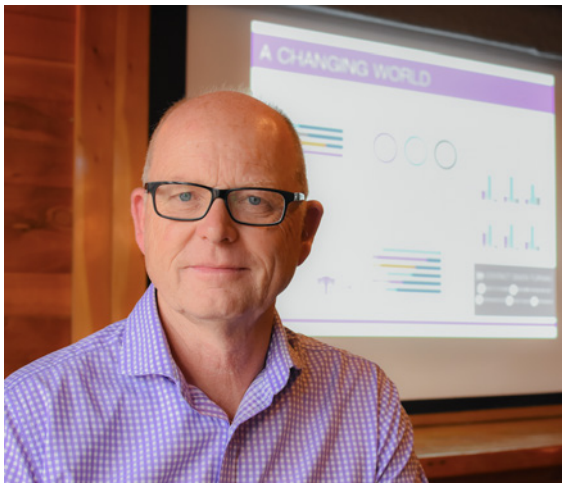
Teuila Fuatai ✉ *teuila.fuatai@gmail.com* is an Auckland-based journalist.

PROFILE

The Innovators

Simon Tupman

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



Tell us about yourself

I started out as a litigation lawyer in London specialising in criminal defence. After five years, I became dissatisfied with my working life and so, after gaining a post-graduate degree in business administration, I ventured into the field of business consulting. After emigrating to New Zealand in 1992, I worked with Auckland law firm Hesketh Henry for two years as their first ever Marketing Manager before deciding to work for myself. Since then, I have been mentoring lawyers and law firms internationally. I live in Ohakune.

What does legal innovation mean to you?

Innovation is more than improvement. It is about being inventive and creating valuable new ways of delivering legal services. Innovation is fostered by the culture of an organisation. The culture of law firms (and the legal sector) is generally conservative, hence, relative to other industries and professions, I would suggest that many law firms would be in the 'late majority' or even 'laggards', to use Everett Rogers' definition.

What role does technology play in innovation?

Technology is a valuable tool that lawyers can use to make innovation happen. It has the potential to bring about much needed changes the legal system and also to improve the accessibility and affordability of legal services.

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

At the time of writing, New Zealand is in the midst of a COVID-19 lockdown. As a result, legal organisations are facing some unprecedented pressures. In the short term, there is the need to simply keep operating and to safeguard cash flow. In the longer term, organisations will have to be more inventive, collaborative, tech-savvy and customer-centric if they are to have a future. Transition will be swift; there will be added pressure on organisations to adopt a fresh approach to leadership; people from all corners of the organisation will be encouraged to step up and lead, irrespective of their tenure or title.

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

Automation is redefining how many legal services are being delivered. Consequently, many traditional roles are being eliminated; conversely new role are being created thereby introducing new skill sets into legal organisations. Market dynamics, not the regulator, will determine the shape of the legal services industry and an array of technological platforms will work to help organisations deliver legal services much more effectively.

What opportunities has legal innovation brought to you?

I have been able to achieve better results working with organisations who already have an innovative mindset and culture, who are receptive to new ideas and who don't like to stand still.

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

COVID-19 has exposed many legal organisations who may have been less than innovative in the past and who now find themselves particularly vulnerable. Leaders of those organisations now have no choice but to change the mindset of their culture. Innovation starts with uninhibited thinking that challenges the status quo. Look around, both outside and inside your organisation for trends, ideas and solutions. Be totally transparent about the reality of your situation and involve all your stakeholders in finding new ideas and solutions. Start by asking them these three questions:

❶ 'What do we need to do as an organisation to survive and thrive in future?'

❷ 'What do we need to keep, let go of, add to, or change?'

❸ 'How can we better serve our clients in future?'

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

Legal professionals play a significant role in society by helping people and businesses get ahead in life. We are now living in the age of the 'Fourth Industrial Revolution', – a digital revolution that is transforming the way we work and live. Lawyers are very much a part of this world so they had better adapt or face the consequences! ■

Andrew King *andrew@lawfest.nz* is the organiser of LawFest *www.lawfest.nz*, and the founder of the LegalTech Hub *legaltech.nz*.

PROFILE

From the Bat Cave to the Environmental Bar

Jenna Silcock, Senior Associate, Buddle Findlay

BY **ANGHARAD O'FLYNN**

Law was something that Jenna Silcock accidentally fell into.

A self-acknowledged lover of good arguments, Jenna avoided maths and sciences during her time at Christchurch's Marian College, sticking more to English and history-related subjects.

"Law fits well with my personality and love of learning – and affinity for classic clothes and fabulous shoes. It probably came as no surprise to people who know me that law was something I would enjoy, given my love of talking and a good argument."

The second lawyer in her family, Jenna has been with Buddle Findlay's environment, resource management and local government team since 2008 – when she started as a summer clerk.

"My uncle was a lawyer in Whangārei but I only had the chance to meet him a few times in my life. My family have been very supportive and encouraging throughout my career and the many, many hours in the library and our home study (affectionately known as 'the bat cave' for its lack of natural light), during my university years."

With a Bachelor of Arts majoring in history and geography Jenna's geography degree complements her RMA practice.

"[The BA] gave me a really good grounding particularly in planning. I studied history because it is something I have always found interesting and I believe everyone can learn so much from an understanding of the past."

Why did you choose to work in environment, resource management, and local government law?

"I focused on environmental and resource management law because they fitted well with my interest in geography.

"When I left High School, my geography teacher suggested a career in resource management as a planner or consultant. So, while I went down the law path, his words of wisdom led me to focus on environmental law and resource management.

"One of the things that attracted me to environmental law and resource management is the interaction with other professional disciplines and the opportunities to learn about things I would have never dreamed of. It really brings out my inner nerd!

"Resource management is a particularly challenging area of law that deals with a wide array of issues and is inherently future focused. Since joining Buddle Findlay I have been involved in some really interesting projects that have continued to hold my interest in these practice areas; including one of the first direct referrals under the Resource Management Act 1991 for a wind farm, infrastructure projects, acting for the Crown on the Christchurch Replacement Plan and various declaration proceedings.

"Resource Management is an area of law where you get opportunities to appear in court and 'get on your feet' early in your legal career. My local government practice sits well alongside the RM practice area and has been a natural evolution of my interest in that area.

"I also work with our wider litigation team on a range of civil litigation matters ranging from banking and finance, judicial review to construction. My civil litigation practice that has lead me to have appearances in the Court of Appeal."

Resource Management is an area of law where you get opportunities to appear in court and 'get on your feet' early in your legal career

What is it like appearing in the Environment Court, High Court and Court of Appeal?

"Appearing in court was the main

attraction to litigation.

"I have always enjoyed public speaking and the challenge of thinking on my feet. I have been lucky enough to appear before Council hearing panels, the Environment Court, District Court, High Court, Court of Appeal and the Independent Hearings Panel on the Christchurch Replacement Plan during my career.

"I have appeared in hearings with, and alongside, experienced barristers and solicitors and Queen's Counsel and before distinguished Judges. I still get excited and nervous by every appearance and take every one as a learning opportunity. Appearances provide an invaluable opportunity to learn by example and put your skills into practice."

After finishing your law studies, did you find the profession matched the expectations you had while in Uni?

"I was lucky enough to spend two summers as a summer clerk with Buddle Findlay so I had a pretty good understanding of what my job would entail before I started working.

"One thing I did not fully appreciate was how no two days would be the same and how many surprises there can be in a day!

"It is one of the things I love most about my job now but when I was finding my feet it was difficult for the 'planner' – aka control freak – in me to get my head around. My job is what I had always hoped my career would be – interesting, challenging and above all enjoyable.

"I can honestly say, despite the sometimes unrelenting nature of the work and long hours at a desk, there have been very few days I have not wanted to go to work. I cannot remember the last time but I am sure I would be lying if I said never!"

Is there anything you wish you had been taught in law school that wasn't covered?

"One of the things law school does not prepare students particularly well for is the art of writing for clients or the court. While it comes later in profs, I think there is real benefit in teaching and fostering these writing skills in law school. I believe this could help bridge the gap many students experience between law school and legal practice."

Are there any issues currently facing lawyers and/or the legal system as a whole that you'd like to highlight?

"While it is not something new, I believe one of the key issues practitioners have to grapple with is managing work life balance (which is itself a misnomer).

"To me, the challenge is being responsive and providing the best service for our clients without being attached to a device 24/7.

"Technology has greatly improved working life in many respects – I have thankfully only sent one fax in my working life – and I have the ability to work from anywhere but it has its downsides too.

"Technology should be something we can use to be more productive and efficient and improve the service we provide while allowing us to have quality time outside of the office. The issue is a really personal one which will mean something different to every practitioner. However, I see it as being fundamentally important to career satisfaction, retaining outstanding lawyers and improving the mental and physical health of members of the profession."

Can you tell me about anyone who inspires you?

"At this stage in my career and my life, I feel particularly inspired by women in the profession.

"I have been incredibly lucky in my career to have worked alongside some fiercely intelligent, professional, approachable and supportive women, and men, who have successful careers and continue to prioritise their families, friends and interests.

"My current partners, Justice Dunningham and Laura O'Gorman, are great examples in my mind of women in the profession. There are so many other women who provide inspiration. Some that come to mind are Dame Silvia Cartwright and Ruth Bader Ginsburg (RBG).

"I was lucky enough to meet Dame Silvia in my role as Head Girl at Marian College in 2005 and I still have a very clear picture of her elegance, intellect and presence.

"I watched *On the Basis of Sex* on the plane on the way home from China last year, with my five month old son in my lap. RBG's tenacity, dedication, energy and passion was so well portrayed and made me excited about coming back to work and continuing my career in a new stage in my life."

Who are three people, dead or alive, you would like to have a conversation with?

"The first person is very easy – it would be my Dad. He was an amazing role model for me and took great interest in my studies. He loved to talk about my assignments and did an amazing job with proof reading. Sadly, he did not get to see me finish my degree or graduate so I would love to spend an evening with him chatting about law, my career and life.

"Secondly, I would also love to meet Michelle Obama. I received her book as a gift on my first Mother's Day and, by all accounts, her life has been fascinating. The drive and motivation behind her career progression and 'changes of lane' left a real impression on me and it is something I would love to dig a little deeper into. She will have some fascinating stories about the White House, politics and life.

"Thirdly, and this may seem a bit left field, but my final pick would be Freddie Mercury. I love Queen and Freddie was such a character in every sense of the word. He also lived in an interesting time in history in terms of societal change and attitudes, acceptance and awareness of global issues. I would love to chat to Freddie and listen to "Bohemian Rhapsody", "Fat Bottom Girls" and "Killer Queen" beside my Dad." ■

Angharad O'Flynn a.oflynn@icloud.com is a Wellington-based journalist.

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**

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PRACTICE

COVID-19

What Are the Lasting Impacts?

BY **DAMIAN FUNNELL**

Damian Funnell

Well, that happened. Or is still happening. As I type this we're halfway through the stage 4 lockdown and it's looking promising that restrictions are going to lift, at least somewhat, after the initial five week period.

It all happened so fast. Literally one day we were marvelling about how we'd closed our borders and the next we learned we were going to be confined to our homes for five weeks on a kind of benevolent house arrest. And thank goodness for that – at time of writing we're only just starting to see the huge numbers of infections and deaths in countries that were slower to implement such restrictions, or that lacked the fortitude to go to go the full monty like we did here.

We can but hope that we as a country recover as rapidly as we essentially ground to a halt. Regardless of how long this recovery takes it is clear that COVID-19 has changed the world forever. In this article we look at some of these changes and what they will mean to us going forward.

Dinosaurs pushed closer to oblivion

Dying industries have been pushed closer to the abyss, if not into it completely. I'm not saying this is necessarily a good thing (not in all cases, anyway), but industries like travel agencies, print media and various types of brick and mortar retail, which have been on the slow march toward oblivion for decades, got a huge push from COVID-19.

In many cases this 'clearing of the weeds' will lead to promising new innovations and business models emerging from the scorched earth. Although it's gut wrenching to watch careers ended forever by such a tectonic shift, it is exciting to see what the green shoots will look like.

In the tech industry a lot of these dinosaurs are corporate IT departments who continue to build data centres full of metal. Those who steadfastly refuse to move to the cloud, despite the demonstrable benefits (in most cases) of doing so. The tide went out on these particular dinosaurs as a result of COVID-19 and they were left floundering on the beach. Those of us who live on the cloud barely noticed, but many corporates were royally screwed.

Some companies didn't even have a method for staff to work from home *at all* and they were rightly punished for it.

Bricks and mortar will never be the same

We were already moving toward online shopping, but COVID-19 has pushed this migration forward, possibly by years. We've been forced to shop online and now that we're there there's little incentive to go back to the malls. Thousands of retailers around New Zealand hurriedly put up online stores so they could continue to trade during the various levels of lockdown, changing not just consumer behaviour but that of the retailers also.

Online shopping will remain a much larger percentage of our overall retail spend as a result.

This is exceedingly bad news for the likes of Westfield and Kiwi Property, who have just spent billions on new or improved shopping centres. It's going to be that much harder to attract people into them now that we're that much more comfortable shopping online.

The travel industry will be reshaped forever

Borders will reopen and tourism will recover, but business travel (the most lucrative for the industry) will never be the same now that we've realised how effectively we can operate without necessarily being there in person. Particularly now that many of us are likely to be reticent about international travel for a while.

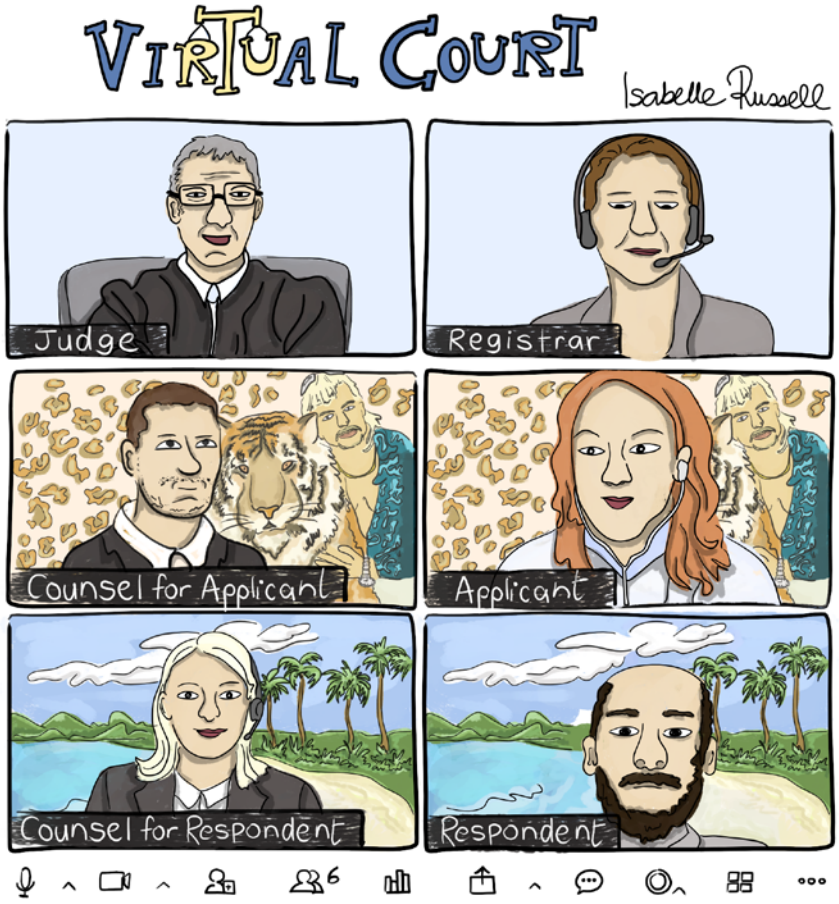
I spoke to one customer who previously spent half of every year overseas on business travel, mainly to attend meetings. He told me that, despite more than 40 years in business, he didn't realise it was possible to negotiate deals and resolve complex problems without being there in person. He's clearly never going to travel as much as he used to and he couldn't be happier about it.

There will be a permanent reduction in business travel (as a percentage of overall travel), which will force the entire industry to reshape itself. This is very good for the likes of Airbnb and Uber, which are online-native and cater predominantly to consumers, but very bad for Air NZ (and other airlines that rely heavily on business travel), hotel chains and, you guessed it, travel agents.

We've changed the ways we work

This is particularly true in law, where many of our law firm clients previously swore black and blue that their people couldn't work effectively from home. How would they be supervised? What if they slack off? Me? I couldn't possibly work from home... *I'm* far too important to the running of the firm!

Most have now discovered that people who have the option to work from home are, on average, happier and more productive than those who don't. Study after study has shown that this is particularly true for women and



Firstly, I'll deal with the competing interlocutory applications to determine the Zoom background for this hearing.

millennials, both very important demographics to the legal fraternity.

Although there are some firms with progressive work from home policies, the industry in general has been slow to move in this direction. COVID-19 will change this for many and this is a good thing. The benefits of allowing your people to work from home are well understood and consistently proven. For some it took an event like COVID-19 before they got the memo.

Maybe, just maybe, we'll trust science again

One of the most amazing things about the internet and social media is that it has given all of us a voice. For the first time in human history all of us have the ability to get our views across. To make ourselves heard.

This is incredible, but it's also created an environment where, in the eyes of many, everyone's opinion carries the same value, even when that opinion is ill-informed. This has been a boon for anti-vaxxers, climate change deniers, 5G conspiracy theorists and all manner of, um, people who value their own opinion over that of experts, even in the face of reliable, repeatable scientific observation.

Hopefully anti-vaxxers will finally be silenced now that they've seen what the world looks like with a novel virus that has no vaccine.

Hopefully it will help us, as a society, re-learn the value of science over opinion and anecdote. Hopefully it will remind us that 'research' means more than using Google to find articles that are compatible with your beliefs. It will remind us that scientific research is valuable and that sound research should be respected

Scientists and leaders in the field (such as Bill Gates who delivered a scaringly accurate TED Talk about the dangers of a global pandemic in 1995), have been warning us and our leaders about the dangers of a global pandemic for decades. We've ignored this advice because, up until now, pandemics haven't affected us much or, when we were affected, the outcome wasn't really that bad.

Anecdote told us that there was nothing to worry about. Karen on Facebook told us that it's vaccines and big pharma, rather than disease, that we should worry about. This scared *a lot* of people into not getting their kids vaccinated.

Look how that worked out in Sāmoa, where 83 people, mostly children, died during the 2019 measles epidemic. That's 83 people who died of a completely preventable and eradicable disease where there was a safe and effective vaccine.

In the case of COVID-19, the research showed it was a matter of 'when' and not 'if' a global pandemic would wreak havoc on the world, but we ignored it and most of humanity has paid a price. The cost, in both human life and in global productivity, has been incalculable.

This time around we were actually very lucky. I don't want to minimise the terrible damage that COVID-19 has and continues to inflict on many of us, but it certainly could have been much, much worse. Although COVID-19 is quite infectious and can be difficult to detect in some cases, its mortality rate is relatively low. It's terrifying to think of what would have happened if the mortality rate had been even twice as high.

COVID-19 was hopefully the tremor that will shake us awake. The warning of the devastation that a much larger and more catastrophic earthquake will wreak upon us if we don't improve our preparedness for such a pandemic now.

Maybe now we'll start to trust science over opinion and anecdote. Maybe now we'll start demanding that our leaders do more to prepare for, and to protect us from, the dangers of pandemics, pollution, global warming and a laundry list of other things that actually do (or will) threaten our happiness and wellbeing.

Or is that expecting too much? '5G tho!' says Karen on Facebook. ■

Damian Funnell ✉ *damian.funnell@choicetechnology.co.nz* is founder of an IT services company and 🖵 *panaceahq.com*, a cloud software company. He has a lot of experience in advising lawyers and law firms on the use of technology.

PRACTICE

Can we apply the Stockdale Paradox to today's crisis?

BY **PAUL SILLS**

Paradox


Paul Sills

Niels Bohr the Danish physicist and quantum theorist (Nobel Prize in physics in 1922) said "How wonderful that we have met with a paradox. Now we have some hope of making progress." (Ruth Moore, *Niels Bohr: The Man, His Science and the World They Changed*, 1966, page 196).

The *Oxford Dictionary* defines a paradox as: "A statement or proposition which on the face of it seems self-contradictory, absurd, or at variance with common sense, though, on investigation or when explained, it may prove to be well-founded (or, according to some, though it is essentially true)."

Paradoxes are everywhere – life itself is a paradox, as quantum mechanics has shown us. Light is a great example and an excellent metaphor for life. Light behaves like a wave *and* particle – sometimes it passes through glass, sometimes it bounces off. The world of conflict resolution is perhaps unsurprisingly full of paradoxes. We want participants in a mediation to remain calm as they deal with frustration over the pace of progress or feelings of being overwhelmed by direct confrontation with the other party.

The COVID-19 pandemic and resulting financial crisis brings the Stockdale Paradox to our (closed, for now) doors, together with some hope of making progress.

Admiral Jim Stockdale

Admiral Jim Stockdale gained prominence when he was interviewed by Jim Collins for his book *Good to Great* (Random House, 2001). Stockdale had been the highest-ranking United States military officer held at the infamous "Hanoi Hilton" for 7½ years between 1965 and 1973. During this time, Stockdale was tortured over 20 times and had no idea if or when he would be released or see his family again.

Stockdale refused to give in to his situation or his captors. Instead he did everything he could to increase the number of prisoners who would survive their own ordeal. He hid intelligence information in letters that he wrote to his wife and put in place rules amongst the prisoners for how to deal with torture and when to reveal certain information at various stages of the torture process. He also created a communication system so that the prisoners could stay in contact, even when they were in solitary confinement.

At one stage, Stockdale beat and cut himself so that he was disfigured and could not be used for propaganda.

So how could Stockdale survive longer than most, putting his life at risk over and over to spirit out essential information and to keep his fellow prisoners focused on staying alive?

The Stockdale Paradox

Stockdale summed it up when he said: "You must never confuse faith that you will prevail in the end – which you can never afford to lose – with the discipline to confront the most brutal facts of your current reality, whatever they might be."

As Stockdale said in his interview with Jim Collins, it was those who had a false sense of optimism that didn't make it through. The ones who thought they would be out by Christmas or Easter "died of a broken heart" when Christmas or Easter came and went.

Viktor Frankl, psychotherapist and holocaust survivor, wrote in his book *Man's Search for Meaning* (Boston Press, 2006) that prisoners within Nazi concentration camps usually died around Christmas time. He believed that they had such strong hopes they would be out by Christmas that they simply died of hopelessness when that didn't turn out to be true.

The Stockdale paradox contains both a pessimistic (realistic) and optimistic component. That you must retain faith that you will prevail regardless of the difficulties is optimistic. This can serve all of us in the current crisis that we face. This faith can be applied to any part of our life at any time. Whether it is the health risks associated with the virus, losing our job during the periods of high unemployment that are likely to follow or struggling to keep your business open – faith that you will prevail in the long-term is essential.

However, we must all equally confront the brutal facts of our current reality – and for many of us the facts are indeed brutal. This is the pessimistic side of the paradox – but I prefer to think of it in terms of being realistic. It is essential because we need a starting point – a reference point from where we can start our

journey to the point where we will have prevailed. To be of use to us, any starting point needs a solid foundation and it needs to be based in our current reality – however bad that may seem and however much we do not want to confront the detail. But we need to. We cannot lie or deceive ourselves as to how bad things are at the moment and we need to be brutally honest – to ourselves and to others.

A realist and an optimist

What gives the Stockdale Paradox its strength is that Stockdale was both a realist and an optimist at the same time. That is the paradox. We need to be optimistic about the future while also being realistic about the present.

Optimism takes us forward to a better future. Realism grounds us in the current situation and makes us focus on what lies ahead of us. It helps us to prepare and face whatever obstacles we will be confronted with.

Stockdale became a professor of Stoicism later in life and said this to his students at Stanford University: "The optimist that says everything will be alright and does nothing is the same as the pessimist that says nothing will be alright and gives up."

It was the teachings of the Stoics (Seneca, Epictetus and Marcus Aurelius) that prepared Stockdale for his ordeal. As he was parachuting into enemy territory having been shot down, he said to himself that he was entering the world of Epictetus.

Epictetus was born a slave and in early life became crippled – possibly from a beating from his master. Once freed from slavery he became one of Rome's greatest Stoic philosophers. He was one of the original Stoic teachers and many of his lessons were recorded by a diligent student. He told his classes that they lived in an uncertain and hostile world (sound familiar?) but that they alone were responsible for their happiness – as each of them was free to choose and to judge.

As Epictetus told his students – the keys to this paradox, and the key to having power over our intentions and our attitude was:

"Even in a world that feels out of control, take responsibility for something."

In the midst of pain, suffering and uncertainty, Stockdale found ways to exercise responsibility during 7½ years as a prisoner of war. He lost control of many things – freedom of movement, the food he ate and the integrity of his body. Yet he still believed that he held more power over his suffering than his captors did. He never lost faith.

What we can do

We all need to ask ourselves during this difficult time "What can I take responsibility for?"

To survive our current situation and endure any hardship that may follow, we must focus on two things:

1. We must maintain a clear focus on our reality – no matter how awful and no matter how harsh. Do not sugarcoat the facts. Resilient people do not lie to themselves or others – they face the facts squarely, whatever they may be.
2. The paradoxical part is that, at the very same time, we must find a way to hold on to hope. Faith at times like this is essential. ■

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PRACTICE

Nurturing your clients

Give them your best service

BY **ADRIENNE OLSEN**

Adrienne Olsen

As we emerge from the COVID-19 lockdown, business for many law firms will have changed markedly. Clients' needs are likely to have changed and/or the way they run their businesses. Some of you will have new clients who have created new business as a result of the lockdown. And, sadly, many of you will have clients whose businesses may be under considerable stress and may ultimately go under.

As we recalibrate our businesses in the coming months, the change in the business climate gives you all excellent opportunities to continue to nurture your clients, and to be more proactive and strategic in your contact with them. More than ever, communicating with your clients will be the key to not only keeping your own business going but it will also lead to a more engaging relationship with your clients.

Develop a strategy

Like everything, you'll get the best results if you have a strategy. Many firms will already have client development strategies, that will (or should) include the most important component of client service protocols; now is a good time to revisit those plans and, if need be, adapt them to the post-COVID business climate.

Draft your plan with all the appropriate people in your firm – not just legal staff. Your PAs, for example, may often be a client's first point of contact in your firm and they should be included as part of your team – their input will be invaluable.

Defining what is client service

Your client strategy should look closely at how you and everyone in your firm defines 'client service'. What levels of service do your clients expect from you? Do your clients expect to be satisfied with the manner in which you do business? Yes, at a minimum. Or would you prefer your clients to be 'surprised and delighted' by the way you work with them?

Client service is providing a legal and business solution to your client's problem/situation by their deadline and in line with your cost estimate. Doing this you'll have a satisfied client. But will they be surprised and delighted? Your firm's goal should be to provide excellent client service.

Establishing a culture of excellent client service

To ensure your firm gives stellar client service – to all your clients, not just your key clients – you will need to have a culture of excellent client service. Establishing what that is for your particular clients is something that is unique to your firm. Large corporate clients may have different expectations than an SME, a farming enterprise or for personal clients. Clients from different backgrounds and cultures may have quite different assumptions on the level of service, and the manner in which it is delivered, that they would expect from the people in your firm.

It is not necessarily well understood that many clients don't judge your firm's service solely by its legal expertise (technical competency). It's the delivery of service, and the way in which it is given, that makes a difference. It's often the small things that add up to what a client thinks is excellent service. These things can range from contacting a client to confirm that the piece of work will be with them by tomorrow's deadline, offering additional advice that is outside their instructions to you, and having a de-brief with your client after a large matter is completed.

You will already know, to some extent, your clients' expectations of the way in which you deliver service to them. The best way, however, is to ask them. When you find out what your particular clients want from your firm, you can not only put together a set of tailored client service protocols unique to your firm, but also you can meet your individual clients' requirements by having personalised protocols for them.

Taking the client journey

One of the most straightforward ways to start thinking more about the way in which your firm delivers its service is to turn things around and think like a client and their

experiences of dealing with your firm. It's called 'taking the client journey'.

These days, your client contact can be a mix of online, phone calls and, of course, face-to-face.

Walk into your firm, figuratively speaking, and see how your receptionist greets you. Is it warm and welcoming, or more perfunctory?

Look at how your people meet your clients: Is the meeting room well set up? Are water and tea/coffee offered? Are your staff members well briefed on the matter/s before the meeting begins? Do they have all the files/resources that are needed to answer any queries? Have they anticipated possible left-field queries from your client and are they prepared with appropriate responses?

When closing up the meeting, have all parties agreed to the next steps and the timeframe? Make sure your clients are escorted to the lift or front door with a polite farewell – and a smile! Contacting your client soon afterwards to thank them for coming in, listing the next steps and timeframe is a good way to ensure no one has misunderstood an instruction or a deadline.

For email contact and voicemails, a number of firms have guidelines around the maximum response time to each – usually a half day. Although you're not meeting face-to-face necessarily, the points above about the manner in which you look after your clients are still highly relevant to remote contact.

This behaviour may be second nature in your business, but it is surprising how many organisations miss the boat on some of these most basic of courtesies and experiences for their clients. All these points (and many more) should be an integral part of your firm's client service and is a major component of how clients will judge your firm.

Going the extra mile

A couple of years ago I was working on a project with a South Island client. It had just completed a significant matter involving complex rural property transactions and ownership structure changes.

The matter was completed on time and was within the firm's cost estimate; their client was satisfied.

I happened to be talking with that client a week after the matter was finalised. In passing, he mentioned (rather plaintively, I thought) that he was disappointed that his lawyer had not been in contact post-transaction to check that everything had gone smoothly at his end (not just the legal stuff) and all was well.

I immediately gave this feedback to the firm's managing partner. He was astonished to hear this, but quickly realised what the firm needed to do to turn satisfied clients into delighted clients.

The D-words

Whilst many people in business run comprehensive reminder and deadline diaries, these two words – Diaries and Deadlines – can be the downfall of a number of professionals.

In feedback programmes we have run for law firms, these two words stand out as being the most troublsome for many lawyers. Overlooking deadlines and/or not activating something on a specific day are some of the most irritating things for a client when a matter (usually not transactional) is underway.

On-boarding

When you welcome new staff to your firm, all of them (not just legal staff) should be introduced to the expectations around your client service culture and to understand your service protocols. This should be an integral component of your on-boarding process.

Excellent client service is key

Having a client service strategy and making sure it's part of everyday working life of everyone in your firm will help you considerably as you tackle post-COVID-19 life. Even though business, and the way we do it, may be quite different, the basics of looking after and nurturing your clients will remain just as important, if not more so.

Your clients are, after all, not only one of your firm's greatest assets but also your greatest advocates. ■

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PRACTICE

Pondering career paths after the experience of lockdown

BY **ANDREW DE BOYETT** AND **JILL PITCHES**

MANY LAWYERS MAY BE REFLECTING on their experience of the lockdown and what it has been like to work remotely, pondering the future, and thinking about their work situation and where they are going with their careers. Part of that thinking may be around what is most important in terms of having the career and the work-life balance they want. With that in mind, in this article we talk to lawyers about their experiences of working in multi-lawyer private practice law firms, working as in-house lawyers, and explore a career path that is growing in popularity – flexible in-house lawyers.

Andrew de Boyett

Jill Pitches

Working in a multi-lawyer private practice law firm

According to the Law Society's most recent *Snapshot of the Legal Profession*, 58% of all lawyers work in multi-lawyer law firms (*LawTalk* 926, March 2019). Firm sizes vary dramatically, with 15 firms employing one quarter of all lawyers who work in multi-lawyer firms, but most other firms are much smaller with an average of 6.4 lawyers per firm.

Multi-lawyer law firms are great places to receive training, work with teams of lawyers, gain exposure to a wide range of issues and clients, focus on specialist areas of the law, and develop skills and experience to become a leading lawyer in an area of practice.

Millie McCulloch, a Dunedin-based lawyer, worked at a small New Zealand law firm and a mid-size Australian law firm earlier in her career. "Working in a firm is a really great training ground to get you set up with the fundamentals of being a lawyer and advising clients. Being able to service a range of clients at one time ensures that you see a wide range of issues, and you become proficient in providing wide ranging advice," she says.

Louise Unger, an Auckland-based lawyer who is now working for LOD, worked at several large New Zealand law firms earlier in her career, and notes, "I loved the environment and my work and learnt a heap about being a good lawyer."

The pace of work, the culture, and the organisational structure at many law firms is not for everyone. Some lawyers find that a focus on billable hours (often involving working long hours), the need to build a client base and retain them, always being on the outside/only advising on specific aspects of clients' business, and the hierarchical nature of many law firms (including a feeling that they are competing with others to progress) doesn't work for them.

Samantha Naidoo, a Wellington-based lawyer, worked at several small New Zealand law firms earlier in her career. "The focus was very much the billable hours and being in the office, which was not particularly responsive to a working mum like me," she says.

Sheree Jaggard, an Auckland-based lawyer, worked at a large New Zealand law firm earlier in her career, and notes, "I was dipping in and out of things and never saw what happened for clients the whole way through. It's rare for a client to update you as to how it all went after your involvement ends".

Working in-house

According to the *Snapshot of the Legal Profession*, in-house lawyers now make up 23.5% of the New Zealand legal profession. In the last five years, there has been a 30% increase in in-house lawyers, compared with an increase of 15% in all New Zealand lawyers. Central government employs just over half (with district health boards included in this), followed by the corporate sector. There are several exceptions, but generally New Zealand's in-house lawyers work in small teams – an average of 3.3 in-house lawyers per location.

Many lawyers choose to work in in-house teams in order to be closer to business decision-making, and to be part of a more commercial operating structure in general. Millie McCulloch moved from private practice and has worked in-house for several public and private sector organisations. "In-house legal work was very well suited to me as I really enjoyed getting to know the in-depth workings of the businesses I worked for. The level of advice that you can provide as a lawyer in-house is very different to that of a private practice lawyer from the outside looking in. It is great to be embedded in the business and see the day to day impact your advice has on the way a business operates," she says.

After moving from private practice Louise Unger worked in-house for a large financial institution. She notes, "I felt I had more freedom to be useful and help the organisation achieve their goals compared to the work I did in private practice. I could advise from the perspective of my knowledge of the company and with

▲ Millie McCulloch

▲ Louise Unger

▲ Samantha Naidoo

a commercial lens rather than just on the narrow legal aspects of a project."

Jason Mitchell, an Auckland-based lawyer who is now working for LOD, worked in-house for a large financial institution earlier in his career. "When you're in-house, you develop strong relationships with stakeholders across the business. You have to speak their language and work with them to help them achieve their goals rather than telling them what they can (or can't) do," he says.

As in-house legal is usually a cost centre there isn't a focus on getting work in and billable hours, and there is often more flexibility with working hours than in private practice firms. Samantha Naidoo moved from private practice and has worked in-house for several public and private sector organisations. "I was able to go in-house part time to manage the children while they were young," she says. Louise Unger notes, "Being in-house gave me more flexibility to how my working life worked with my personal life. Although there was often pressure in my in-house role, I found it easier to manage expectations and balance workloads than was often the case in private practice. You don't have to worry about where the next job is coming from and I found that legal teams are more willing to share work and ideas than I experienced at times in private practice."

While in-house has a lot of advantages for lawyers, the nature of the work can depend on how legal is regarded throughout the organisation. As a cost centre there can be resourcing challenges, and there can be limitations on career progression. Says Samantha Naidoo, "In some organisations in-house lawyers are seen and treated purely as service providers rather than as colleagues that are part of the organisation looking to achieve the same goals – the focus is more on how quickly you can turn work around rather than other measures of contribution or success. In well-resourced teams you can achieve lots, but if you are not well resourced it can be a difficult environment." Jason Mitchell says it can be more challenging to progress your career. "You're a cost centre in a business and they're not just going to create a senior role for you because you've done a great job. I saw this play on the minds of some of my colleagues," he notes.

Working as a flexible in-house lawyer

The *Snapshot of the Legal Profession* does not report on the number of flexible in-house lawyers in the New Zealand legal profession. We believe the numbers are spread across the law firm, in-house and unknown categories. If we take into account the number of flexible lawyers in the LOD network, the lawyers who are in the networks of other alternative legal providers and recruitment agencies, and lawyers working on their own account, we think that flexible in-house lawyers make up around 3% of the New Zealand legal profession (ie, around 400 lawyers).

In recent years an increasing number of in-house lawyers have wanted to control their own workload, working environment and work-life balance. Cloud-based software, videoconferencing and other technologies have allowed lawyers to work remotely and plug into in-house legal departments as if they were working in the office despite being actually located elsewhere. At the same time, more organisations have wanted other options to support and complement their in-house teams and external law firms. Thus a new career path has emerged for experienced in-house lawyers – flexible contracting. These lawyers can work on their own account, be employed by recruitment agencies, or they can be employed by alternative legal services providers such as LOD.

Flexible practice allows in-house

lawyers to work the hours they want, from where they want, and when they want. They can work physically in an organisation's offices or they can work remotely. It provides a route for those looking to pause, evaluate, and assess where they're at in their careers, and determine what comes next while still earning income and sharpening their skills. It also provides a route for those who have reached the end of a stage in their careers but still want to stay immersed in the practice of law.

Julie Chuor, a Wellington-based lawyer, previously worked in-house for several public and private sector organisations, and is now working as a LOD flexible lawyer for a Government department. She sums up what being a flexible in-house lawyer is like: "You feel like you have more of a life!"

Samantha Naidoo, Sheree Jaggard and Millie McCulloch are also now working as LOD flexible lawyers – Samantha is working for a Government department, and Sheree and Millie are working for well-known New Zealand businesses. "I can plan my work around my life, rather than the other way around. I currently choose to work a four day week but if the client needs me I will do five days," Samantha Naidoo says. Millie McCulloch adds, "Flexible practice fits perfectly with my family situation and allows me to live regionally, working remotely doing the type of legal work I love with large New Zealand businesses – work that I would not have been able to secure in a traditional role locally."

Working flexibly does not mean that the work is less challenging or interesting. Samantha Naidoo notes, "Flexible contracting is an opportunity to diversify and broaden my experience working with different kinds of organisations, and to use my transferable skills." Sheree Jaggard adds, "Something I have enjoyed the most with flexible working is that I'm not tied to a particular industry. New industries keep you evolving, learning and on your toes."

Millie McCulloch agrees: "It provides the opportunity to work for a variety of clients (like private practice), while still being embedded in the business and understanding your clients' needs deeply (like traditional in-house practice)."

Flexible in-house lawyers face the same issues as many other contract workers – uncertainty and potential gaps between assignments, and there are some organisations/people who struggle with the idea of part-time and remote workers.

Notes Millie McCulloch: "There is an element of uncertainty that sits in the background. Once a role ends, there is not necessarily a guarantee that you will immediately be picked up by another client. But some people may also consider this a benefit as it allows for a few extra holidays over the course of the year!"

"There may be a perception that part-time workers who are not seen at their desks every day are perceived as being not as available and not working as hard. However, I think that perception is falling away as flexible and remote working arrangements become more common," Julie Chuor adds. With flexible and remote working arrangements being the norm during lockdown, that perception has in all probability been removed.

▲ Sheree Jaggard

▲ Jason Mitchell

▲ Julie Chuor

Choosing the right career path

At the beginning of this article we said that part of the thinking about lawyers' work situations and where they are going with their careers may be around what is most important in terms of having the career and the work-life balance they want.

Samantha Naidoo has worked in multi-lawyer private practice law firms, as an in-house lawyer, and as flexible in-house lawyer. She advises, "Do not be too fixed as to what your idea of a legal career is. There is more than one way. There are a range of options and you sometimes have to think outside the box and work out what's best for you. Be brave and don't think you have to stick to a particular path just because it might suit someone else. Try different options, especially if where you are at is not that fulfilling. There is nothing to lose in trying something different to see if it is a more rewarding career path."

With Samantha's advice in mind we leave readers with a very appropriate Māori whakatauākī – Ko ia kāhore nei i rapu, tē kitea (one who does not seek, will not find). ■

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PRACTICE

Salary stumble

Low pay among young legal professionals and its impacts

BY **CRAIG STEPHEN**

Salary levels for junior lawyers continues to be hot topic for the profession and legal community with claims some lawyers are being paid below the minimum wage.

There are also suggestions that low remuneration for lawyers in the first few years of their careers is forcing some to leave law because they can't make ends meet and the prospect of partnership seems unattainable.

Legal salary surveys are carried out in New Zealand by several organisations. The Australasian Legal Practice Management Association (ALPMA) and McLeod Duminy's latest survey closed on 14 February and results were released last month. Results are provided free of charge to participants, but non-participants must purchase the information. This means that all but high-level details are not publicly available. The survey provides average salaries for over 55 legal, management and administrative roles in law firms, broken down by location and firm size.

The New Zealand Law Society | Te Kāhui Ture o Aotearoa and Niche Consulting Group's legal salary survey of 2018 (available on the Law Society website) showed that nationally the mean salary for those in their first year in the profession and working in small-sized private practice was $50,000, with the mean salary in the South Island lower, at $47,000.

For medium-sized firms (5-20 lawyers) the mean was slightly lower nationally at $49,000; but rose to $54,000 for large firms.

The salaries for those with two years' experience rose from $58,000 to $64,000 in the same three groups; and for three years it rose from between $62,000 and $79,000 across New Zealand.

But even for those with four years' experience working in small and medium-sized firms, there are staff who in 2018 were earning $40,000 or less.

The figures for in-house show better rates – between a mean of $61,000 and $70,000 across corporate/commercial, central government and local government, but a modest $46,000 for first-year lawyers in not-for profit/other.

The survey found that lawyers in their first decade in the profession tend to work full-time, with the proportion working part-time rising steeply after 10 years' PQE.

Living and minimum wage rates

The Living Wage for 2019 was $21.15 per hour, equating to $43,992 per year on a full-time week. The minimum wage rose to $18.90 on 1 April, which is $39,312 per year.

Furthermore, a survey conducted by the Aotearoa Legal Workers' Union (ALWU) and released last November shows that 50% of respondents (young and new legal professionals) who were working at large law firms reported working for an effective hourly wage of less than the minimum wage when their fortnightly salary was divided by the number of hours that they had worked.

That figure improved to 42% when medium-sized and small firms were taken into account.

Other findings of the survey included that almost all respondents reported consistently working overtime, and bonuses for junior legal workers are "opaque, rare and of low value", especially when compared with the hours legal workers are required to work to get them.

A more recent survey, conducted by NZ LAW Ltd and released in 2019, found similar results in terms of annual salaries. In that survey, the lowest full-time equivalent salary rate for a junior solicitor was $39,000, with the median salary being $49,272. The actual salary median amounted to $46,750 per annum. Other non-salary benefits for junior lawyers were on top of these base rates.

Better rates in other professions

In *LawTalk* 932, September 2019, Kirsty Spears, the director of McLeod Duminy Careers said the legal profession is generally very conservative and starting salaries are "surprisingly low". Graduates are paid $40-$50,000 per annum "if they are lucky", she said.

"Other professions such as accounting or engineering pay a lot more. Law firms compare themselves to other law firms, when they should be comparing themselves to other industries. If you are not paying enough, or are not flexible enough, or not offering attractive benefits then this is a risk.

"I have had a lot of conversations

▲ Mark Henderson

▲ Andrew Poole

▲ Morgan Evans

with law firms who seem to be happy to be 'in the market'. But as they set their own 'market' this means that salaries and benefits are often not very exciting. Only a handful of firms compare the salaries they offer to other professions outside the law, but there is no real shift or change in that overall."

'Driving people out of the industry'

The Co-President of the ALWU, Morgan Evans, says the salaries of junior lawyers are often too low. "For example, the amount that junior lawyers earn per hour is nowhere near commensurate to their charge-out rates."

The New Zealand Law Society Niche Survey shows that the charge-out rate for those with less than one year experience is $190 on average; for two years it is $236, and rises to peak at $363 per hours for those with nine years' PQE.

"At large firms, the charge out rates start out at about $150 to $200 per hour but by your fourth year it is significantly higher," he says.

"In contrast, when their fortnightly salary payments are divided by the hours they are working, ALWU's survey shows that many junior lawyers are working close to or below the minimum wage. Clearly it isn't fair to junior lawyers to be paying them less than $17.70 an hour for an hour of work that earns their employer ten times that amount."

He says the union is making headway in improving the lot of young and new professionals by using Minimum Wage Act compliance to start a conversation about accurate time recording and compensation for hours worked.

"In our initial conversations with firms we raised the issue of potential minimum wage breaches. We explained that, in order to comply with the Minimum Wage Act and regulations, at the very least you need to pay employees a fortnightly salary that, if divided by the number of hours they have worked in that fortnight, is greater than the minimum wage.

"Following on from those conversations, we've launched a minimum wage best practice policy and asked large firms to provide us with a plan for compliance by 1 April. In our view, the 'best practice' way to ensure minimum wage compliance is to have a system that records all of the hours that employees are working and to pay them overtime for hours worked over and above their contracted hours. That said, wholesale salary increases would also go a long way toward addressing the issue."

Mr Evans says most of the firms they have talked to have asked their accounts departments to go back, in some cases as far back as six years, to check their time and wage records to see whether any employee had earned less than the minimum wage over that period of time.

"Where they have identified breaches of the Minimum Wage Act, firms have paid top-ups to staff and they are now monitoring hours worked and paying top-ups on an ongoing basis. However, those top-ups only ensure that employees are paid the minimum wage for each hour they work – a wage that they could be getting working in a fast-food restaurant."

Mr Evans also takes issue with the 'work hard now, reap the benefits later' mantra.

"What you're seeing is, yes, if you stick around long enough you will have the chance to earn decent money but actually you're getting paid a pittance in your first few years in the profession after five or even six years of study. These are people who are earning their firm five or six times what they are actually getting paid – even after write-offs.

"That's driving people out of the industry. We are aware of many talented people who have left the profession because of the long hours and low wages."

Good programmes and cultures

Mark Henderson, a partner at Corcoran French and the board chair of NZ LAW, an association of independent legal practices, when asked if the average salaries for those in the first five years of working in the profession reflect the worth of such employees, answered "generally yes".

But he says that pay is not the only element to creating a good work environment.

"The transition from university to work in firms and in-house is in most cases a steep learning curve. It can take time for junior solicitors to learn the necessary skills to be good lawyers," he says.

"In saying that, those employers who employ junior solicitors, need to ensure that they have good programmes and cultures in place to support their advancement both in career and in terms of remuneration.

"While we at NZ LAW agree that level of remuneration is important, it is however only one component. Ensuring that junior solicitors are

mentored and supported well in their first years of employment is also critical," Mr Henderson says.

"Flexibility in terms of work location, hours, and technology are some of the things now needed. Junior solicitors also need to know that they work in firms that have a positive culture and where their wellbeing is prized and looked after. When there are periods during which lawyers need to work longer hours, then certainly that should be recognised by their employers. These are all harder areas to get right than just annual remuneration, but are the areas that New Zealand legal employers need to devote their attention to."

Mr Henderson added that he found the results of the ALWU survey "grim reading" and that working for less than the minimum wage when total hours worked is taken into consideration was "not acceptable".

"Our work as lawyers often involves urgent and stressful work and longer hours. It is necessary to monitor this for our junior lawyers, and ensure that suitable measures are in place to recognise that when they do so. Paying money to staff based on hours is not a complete answer.

"Providing time in lieu, being flexible about time away from the office or away from work more generally, recognising hard work, and ensuring that there is transparency as to how all this will occur before it does are more likely to ensure lawyer job satisfaction and will be more realistic for how law firms operate. Those type of incentives also allow junior lawyers to be able to properly engage in their social lives outside of work and help our communities."

Mr Henderson pointed out that NZ LAW has a large range of initiatives to help junior lawyers and other young legal professionals including:

- a full training and conference programme that includes learning conferences for junior solicitors, senior solicitors, legal executives, and general conferences;
- access to question and answer online forums to assist staff in their work;
- special interest groups, for example, in trust law which is "especially popular, and helps all of our lawyers with the specialised knowledge and precedents required for trusts";
- and a women in law special interest group that raises and discusses issues relevant to how women practise law.

A supportive working environment

Andrew Poole, Chief Executive at MinterEllisonRuddWatts says the firm aims to ensure its younger staff members are remunerated for their hard work.

"We acknowledge the importance of a supportive working environment for our staff, and work hard to create a culture that supports everyone to be their best.

"Looking at the ALWU survey, the summaries of salaries and conditions in the report are broadly correct, however our firm's third year salary is in a higher range. Having just completed our annual salary review, the information reported is now out of date.

"Like all businesses, we operate in a competitive environment, and aim to attract, develop and retain graduates and lawyers who can best serve our clients' business needs. There are times when work outside of core hours is required to meet these needs, however we have programmes in place to recognise and reward our people for their efforts and to support their wellbeing – both professional and personal."

Australia

In Australia, the situation appears to be moving quicker, and as of last month, law firms are required to log the number of hours worked by graduate lawyers and paralegals to ensure young staff are being appropriately remunerated.

The rules, which have been approved by the Fair Work Commission, require firms to conduct annual pay reconciliations and advise lawyers of maximum hours they can work under salary before they are entitled to overtime or penalty rates

"Due to the nature of legal work, with duties to the court and obligations to clients, lawyers, including graduates, can experience periods of high pressure or stress and long work hours," says Law Council of Australia President Pauline Wright.

"It is important that these lawyers are properly and appropriately remunerated for the work which they perform and that their health and safety is monitored and supported. The health and wellbeing of lawyers is a key focus of the Law Council.

"The Law Council is currently working with its members to investigate whether adjustments to the Legal Services Award could address any underpayment or wage level issues of early career admitted lawyers early in their careers." ■

PRACTISING WELL

What's keeping you up at night?

BY **RAEWYN NG**

Raewyn Ng

People who have trouble with getting to sleep or getting enough sleep, are tempted to venture into the world of sleep solutions and sleep tracking. It's a $430 billion global market and like any other aspect of the wellness market, there's dozens of devices, products and supplements out there purported to help you get a better night's sleep.

If you want to track your sleep, you can take your pick from a range of smart watches and specific sleep trackers like the Oura Ring or a smart bed or mattress that gives you a score on how well you are sleeping. In pre-COVID-19 days when gyms were open, people in Europe and the United States could go to a gym sleep class where you can tuck into bed for a 45-minute nap or you could book an escape to an exotic location for a sleep retreat – like a yoga retreat, except sleeping.

Obsession with sleep, and the tracking of sleep, is on the rise – in 2017 a case report in the *Journal of Clinical Sleep Medicine* gave it a name. Like orthorexia, the unhealthy preoccupation with healthy eating, they termed it *orthosomnia* to describe the phenomena of being so obsessed with getting the perfect sleep, overloading on sleep-related information and setting unrealistic expectations of achieving the ideal set of sleep data that it causes anxiety and stress, making some cases of insomnia worse.

It's easy to see why you might start to get fixated with sleep tracking. If you're sleep deprived, fatigued and dealing with sleep problems, it seems like a logical first step to get a sleep tracking device or wearable technology to measure what's going on. But just because you're now collecting data on our sleep, it doesn't mean there's going to be an improvement over time without taking some deliberate actions.

There's also anecdotal evidence of people who have not had sleep issues in the first place becoming obsessed with the metrics of their wearable technology and developing a perception that because the data isn't perfect something must be wrong even though they wake up feeling refreshed.

This is not to say that sleep tracking is a bad thing as it can be very helpful for identifying recurring patterns of sleep quality and inform better decision-making and behavioural changes. For example, you may notice your sleep quality is worse after several glasses of wine and this could help you to make lifestyle adjustments that improve the sleep you get.

Keep in mind that wearable tracking technology does have limitations when it comes to accuracy – the results rely on things like movement and heart rate compared to more specialised sleep tracking equipment that measures brainwaves, eye movement, muscle tension and breathing to extrapolate data.

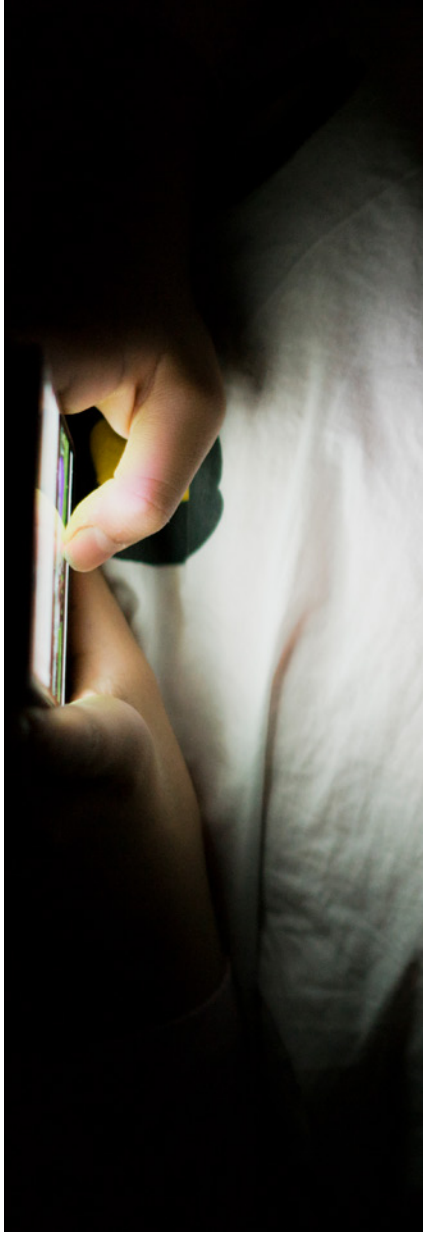
The importance of sleep

Sleep is as critical to us as food or water, and the ideal amount of sleep for each person varies, but the US National Sleep Foundation Review in 2015 recommended that most adults generally need between seven and nine hours per night (although anywhere from six to 11 hours could be appropriate).

Aside from sleeping to alleviate tiredness, there's a whole lot of other reasons why we need good sleep. Sleep affects almost every organ and system in the body – from heart, brain and lung function to metabolism, immune function and mood. It helps to maintain, repair and clean out neural or brain tissue, helping us to learn and create new memories, improving our concentration, productivity and performance.

Without adequate sleep our risk of developing issues like high blood pressure, cardiovascular disease, diabetes and depression increases.

From a weight loss perspective, sleep deficiency is linked with an increased risk in obesity and it plays out in several ways. A tired brain is more susceptible to bad decision-making and low impulse control – it's easier to give in to more cake, chocolate or wine when fatigued, just as it's easier to skip that gym session. Lack of sleep can disrupt hormone balance and influence your drive to eat – it increases ghrelin production (the hormone that makes you feel hungry) and decreases leptin (the hormone that tells you to stop eating because you're full). The stress hormone cortisol also rises with lack of sleep, causing more fat storage for energy conservation and within just four days of inadequate sleep, insulin sensitivity can drop by more than



30%, increasing diabetes risk and your ability to store fat.

Circadian rhythm

One of the reasons sleep is disrupted for so many people is that our modern lives are so disconnected with our circadian rhythm. Our circadian rhythm is our body's internal daily clock that controls almost all the functions in our body – from sleep/wake cycles to metabolic, immune and reproductive systems. All body functions are set to increase and decrease their function at different times through the days and months according to our circadian rhythms.

These rhythms are reset or adjusted each day from a number of cues from outside the body – light being one of the most important. Sunlight signals to us to be alert and active and darkness encourages sleep with the production of the hormone melatonin.

Lower melatonin levels affect sleep cycles which in turn means we have poor repair and maintenance of the body and brain, lower levels of antioxidants which impacts on cell damage and lower mitochondria function affecting energy levels.

When you consider many of us may spend as much as 90% of our time indoors away from natural sunlight and then, conversely, spend our nights exposed to blue light from our devices, it becomes clear how our circadian rhythms can be disrupted, impacting, among other things, our sleep/wake cycles. And just because you're exposed to artificial light during the day in the office, remember that the quality and spectrum of light you're exposed to is not the same as sunlight – when you don't have exposure to strong enough light during the day, melatonin production at night is affected.

Other circadian rhythm disrupters are obvious like shift work and long-distance travel or jetlag. Late-night eating can also have an effect as our bodies are not designed to be digesting food late at night.

Circadian health optimisation

We need to focus less on generic sleep solutions that simply emphasise getting more sleep and look instead to improve sleep quality (and overall health) by optimising our circadian health, allowing our bodies to find our healthy sleep patterns again. This means paying more attention to the timing and type of light exposure.

If you feel your sleep quality is poor, consider these steps to improve circadian health and improve your sleep quality:

- Minimise exposure to bright lights and electronic devices at least two hours before you go to bed. The blue light emitted from devices disrupts melatonin production so stay away from devices before bedtime, or if that's not realistic, invest in high quality blue light blocking glasses.
- Keep the lights in the house dim and use incandescent bulbs. These have less blue light than halogens, LEDs and fluorescents and is less disruptive to melatonin production.
- Ensure your bedroom is completely dark to promote optimal melatonin production.
- Your bedroom is only for sleep and sex. It is not for work or entertainment.
- Develop a night-time routine that allows you to relax and unwind. Try meditation or breathing exercises, reading (preferably from an old-fashioned book with pages or if you're using an electronic device, wear your blue light blocking glasses) or a warm bath instead of catching up with work or brain draining activities.
- Expose your eyes to the morning sun to promote melatonin production at night.
- If getting and staying asleep is still a problem, consider sleep restriction therapy which aims to improve your sleep efficiency by limiting the amount of time you allow yourself in bed trying to get to sleep. As your sleep efficiency improves, the amount of time spent in bed is slowly stretched out.

To improve your sleep, look at how you can have your body more adjusted to the natural light and dark cycles of the day. ■

Raewyn Ng ✉ *rae@mybod.co.nz* is a movement coach with an interest in wellbeing and holistic health, managing stress and living a balanced lifestyle.

TALKING ABOUT MENTAL HEALTH

Financial Wellbeing

It's more important now than ever

BY **JACKI HOUTWIPPER**

LATEST GLOBAL THOUGHT LEADERSHIP TELLS US THAT OUR financial wellbeing should be a primary focus. Research globally and in New Zealand shows us that there is a direct link between financial stress, and our physical and mental wellbeing.

When you're a lawyer, you often have high levels of stress. I've experienced it. And our broader lives and life events can cause us stress too.

COVID-19 is an extreme example of an event that is having a major impact on our lives at this time. It has disrupted our very way of living, as well as impacting our economy, and the livelihoods of many. In these difficult and uncertain times, it's natural to be worried, and it's more important now than ever to prioritise putting some focus on your financial wellbeing. By getting clear on your financial position and taking action to manage it, you will be able to ease your financial stress, and in turn be more resilient and able to manage through the challenges that life may present.

Even if you're not particularly stressed or worried about money, what if you could enhance your wellbeing and enjoyment of life, and have a better future, by putting some priority on your financial wellbeing?

Money is a taboo subject. For many New Zealanders, fear, shame or embarrassment stops them from talking about it or getting help.

I've learnt first-hand about the importance of financial wellbeing, how to strengthen it, and the difference that can make to your life.

So, to start with, here's my story. Spoiler alert – I use the 'M' word, and the 'F' word (money and fear), and I'm OK with that...

Jacki Houtwipper

Fear, guilt and stress – learning from the past

My parents came from poor backgrounds. My father got a scholarship to go to university and worked incredibly hard to get to the senior ranks of a prominent New Zealand engineering firm and provide for our family. My sister and I were both encouraged to go to university. We've had successful careers (and lives) by most standards. I'm incredibly grateful for the opportunities and experiences I've had, and the challenges and learnings along the way.

My father was extremely focused on financial security. His relentless drive to ensure we had educations that would enable us to earn well sprang from his past, his deep love for us and determination to make sure we would be okay. From the way money was talked about, the predominant feelings I took forward were fear, guilt and stress. It was subtle, but pervasive, with a huge emphasis on working extremely hard and doing your absolute best.

For the most part, that has served me well. On the flip side, at times, those feelings, pressure and stress around money have been harmful to my health, my wellbeing and my relationships. Undeniably, the times of high stress had a major impact. Earlier in my career I suffered from a chronic pain/fatigue condition. Luckily, I recovered fully from that.

Over time, I have learnt how important it is to prioritise your wellbeing, be clear about what you really *value*, and *how* you want to live your life.

A key part of that for me has been prioritising my financial wellbeing. It's not an exaggeration to say that has made a significant difference to my life – easing my stress, freeing up my mind, my time and energy for the people and things that are important to me.

Now I'm far more resilient and able to deal with unexpected shocks and life events. To complete the circle of the story of my father: this highly intelligent and capable man is now in the advanced stages of dementia. It's a debilitating, stressful, arduous journey for us all, and it only gets worse. It has emphasised for me the importance of minimising all the stress in life that you can, so that you have the capacity to deal with the hard times, and the energy to give and enjoy life's happier moments.

MASLOW'S HIERARCHY OF NEEDS

What is financial wellbeing?

The common elements in definitions of financial wellbeing are:

Resilience: The ability to cope with a 'financial shock' (a significant, unexpected expense or fall in income), eg, three months' worth of income saved.

Comfort: Feeling in control of your current and future financial situation, and able to do things you enjoy.

Managing the day-to-day: The ability to meet your day-to-day financial commitments without relying on credit for regular expenses, bills, or loan payments.

There are some common misconceptions people have around money that the research has debunked:

- Financial wellbeing is NOT about how much money you have. The research clearly establishes that it's mostly a state of mind – influenced by feelings, expectations and behaviour.
- Anyone, regardless of their income, age or stage of life can have low financial wellbeing. A high income doesn't necessarily mean strong financial wellbeing, and vice versa – those with low incomes can have high financial wellbeing.
- Previous research and institutional focus has been on retirement, but many people are worried about day to day expenses and unexpected financial shocks.
- Don't worry if you're 'not a numbers person', or you think that financial concepts are boring. Financial literacy and financial capability are out of date, limiting concepts that are not particularly relevant (although unfortunately, what some in the sector still focus on). Financial wellbeing is the new black, and it's really about what you *do* with your money. Taking action is what's important.

How common is financial stress?

If you're feeling stressed about money, or you feel that your financial wellbeing could be stronger, you're not alone. An ANZ financial wellbeing survey in 2018 showed that many New Zealanders, regardless of their income, were: 'struggling to meet day-to-day financial commitments, were not feeling comfortable with their financial situation and had little financial resilience for the future.' (ANZ, *'Financial Wellbeing – a Survey of Adults in New Zealand'*, April 2018). With the impacts of COVID-19, many more may find themselves in this position.

In that same survey, only 23% of New Zealanders classify themselves as 'No worries' when it comes to their finances.

Studies of employees consistently show that financial stresses are their biggest concern by far, well ahead of other stressors like their work or relationships.

Financial wellbeing & mental health

Research clearly shows that worrying about money can affect mental health. It can cause anxiety, depression, affect sleep and cause relationship issues.

A UK study in 2019 involving 11,000 employees found that 62% of employees said they were affected by money worries:

- 1 in 3 had felt stressed.
- 1 in 3 had felt anxious.
- 1 in 4 had lost sleep.
- 1 in 5 had felt depressed.

(Neyber *UK Workforce Study September 2019. Neyber 'DNA of Financial Wellbeing' research report 2019-2020.)*

In the December 2019 issue of *LawTalk*, Alice Anderson referred to the commonly used model for understanding Māori health, Te Whare Tapa Whā. One of the four dimensions of wellbeing is Taha

Hinengaro (mental wellbeing). This is where financial wellbeing sits. As Alice explained, if one of the four walls of the wharenui is missing, damaged or weak, a person may become unbalanced or unwell. In my previous work, I have engaged with kaumatua and experts in Māori wellbeing. The concepts we have identified together for financial wellbeing include: "how's the *mauri* of your relationship with money?" (*mauri* means the vital essence, source of emotions, or special nature); *Oranga pūtea* (financial wellbeing); and *whāngai* (meaning to nourish, foster, and nurture). These are powerful concepts that resonate and illustrate the integral role that money plays in our lives.

Putting your focus on financial wellbeing – as individuals and employers

Just like you might exercise, eat nutritious food, and get good sleep, you can take steps to strengthen your financial wellbeing. In fact, global thought leadership suggests that feeling secure about your finances sits in the foundational/primary sectors of Maslow's hierarchy of needs. Other wellbeing activities, such as exercise and nutrition, are further down the hierarchy. Many wellbeing programmes focus on the latter. However, for the large number of people who are suffering from financial stress, unless and until that is addressed, they are less able to engage in those activities. They are also less able to cope with the demands of their work, strategic transformation, or change.

Globally, governments and thought leaders are recognising that societies only move forward if wellbeing is addressed, and the way to do that at scale across society is through the organisations that people work for.

In the workplace:

- There is extensive research proving that providing support to employees for their financial wellbeing leads to a more productive workforce, higher employee engagement on multiple key measures, lower HR/payroll spend, better culture, better retention and attraction.
- Wellbeing is increasingly being recognised as the only strategy to create viable bottom line impact in today's world. It is often included as a key pillar in organisations' sustainability and social responsibility strategies.

The financial wellbeing continuum

You can think about financial wellbeing as a continuum, stretching from high financial stress at one end to empowerment and enjoyment at the other.

The good news is you can move along the continuum. You can shift from feelings of anxiety, frustration, guilt, lack of confidence, and money worries disrupting your sleep, work and relationships, to feeling confident, comfortable, and enjoying what life has to offer.

The key is taking action and being clear about what's really important to you.

- The first step is to build a detailed picture of your financial position. That means working out what you earn and (realistically) what you spend (a.k.a a budget) and making sure you are putting some of what you earn towards your financial future. There are multiple tools that are available for this, and many are free. It doesn't matter so much which tool you choose – try them out and see which one appeals to you – the important thing is to be using something to get clear on your personal position.
- Then set some goals about where you

want to be – make them manageable and specific about the steps you are going to take. Write them down and make them meaningful – if you can identify what's important to you (your personal 'why' for achieving your goal), then you're much more likely to get to where you want to be.

- In terms of actual practical steps to get there, you can set up an automatic payment to direct money that comes from your income into a separate account that you don't touch, and enjoy seeing it grow. The feeling of 'spending on your future' is much more satisfying than spending on things you don't really need. It may seem like a cliché, but the COVID-19 world is surely teaching us that our health, and the health of those around us that we love, is more important than many of the things we may have put value on before.

I shifted from not having any financial goals, not managing my spending or saving, or my future (a.k.a not doing anything to support my financial wellbeing), to setting goals, taking control of my spending, exploring ways to invest for my future and then taking action to achieve that.

It gave me comfort when I had clarity on where I was at and identified what I needed to do to get ahead, and why it was important for me. By taking action, I felt better, and that encouraged and empowered me to take more action and get further ahead.

Why wouldn't you?

As a final insight – it can be useful to examine the reasons for why you might not be focusing on your financial wellbeing. If you're honest with yourself and what's really important to you, you'll probably find that the benefits of prioritising your financial wellbeing are really compelling, and the reasons you may be avoiding it just don't stack up.

Maybe you have been busy or distracted with other things that seem more important? Maybe you think there's time to focus on it later in life?

- The OECD's *How's Life 2020* report found that 53% of New Zealanders would be at risk of poverty if they had to forgo three months of their income. COVID-19 should reinforce to all of us that you never know what might happen. It's best to do what it takes now to get some funds built up to help you manage in case you need it.
- The great thing about money is that the sooner you start, the more benefit you get. Don't delay! Small amounts now will multiply over time for your future.

Prioritise your financial wellbeing, so that you can be resilient and thrive, and get the most out of your money and your life – not just for you, but also for your family. Think about what's important to you and use that as the motivation to take actions to strengthen your position. ■

"The goal isn't more money. The goal is living life on your terms."

— *Chris Brogan*

Jacki Houtwipper ✉ *jacki.houtwipper@gmail.com* has been a technology lawyer in top New Zealand law firms and held General Counsel/senior in-house roles in multinational tech companies in New Zealand and overseas. She has also held senior business roles in a major New Zealand bank, and her most recent role focused specifically on financial wellbeing. Jacki welcomes the opportunity to talk to people and organisations about how improving financial wellbeing can make a tangible difference at a personal and enterprise level.

Sarah Taylor is the co-ordinator of this series, a senior lawyer, and the Director of Client Solutions at LOD, a law firm focused on the success and wellbeing of lawyers. If you'd like to contribute to this series, please contact Sarah at ✉ *sarah.taylor@lodlaw.com*

ACCESS TO JUSTICE

The new organisation for those doing 'uniquely challenging work'

The Defence Lawyers Association of New Zealand

BY **ELIZABETH HALL** AND **CHRISTOPHER STEVENSON**

Cicero, the masterful Roman orator and defence lawyer once uttered during an address: "But I must stop now. I can no longer speak for tears". Almost two millennia later the acclaimed defence lawyer Clarence Darrow, battling excessive sentencing, racism, and public vitriol through a trilogy of famous trials, described "little rest by day and but little rest by night" and exhausting all the strength he could summon.

More recently, Sir Peter Williams QC, the compassionate and brilliant defence lawyer said: "The river of injustice has flowed since the beginning of time and will continue to flow after you and I have gone. Your job will be to reduce its number of victims."

Last month defence lawyers in New Zealand launched the Defence Lawyers Association of New Zealand (DLANZ). DLANZ was founded by Christopher Stevenson and Elizabeth Hall. The Association is committed to providing support and advocacy for defence lawyers in the uniquely challenging work they do, specialised training to ensure a high-quality defence bar, protecting the innocent from conviction, ensuring fair trials, and advocating for policy and legislative reform to eradicate inequalities within the criminal justice system.

Elizabeth Hall

Christopher Stevenson

Stuff

The inaugural steering committee includes Christopher Stevenson (Co-Chair), Elizabeth Hall (Co-Chair), Judith Ablett-Kerr QC, Robert Lithgow QC, Marie Dyhrberg QC, Ron Mansfield, Nick Chisnall, Echo Haronga, Rob Stevens, Ngaroma Tahana, Debbie Goodlet, Julia Spelman, Kerry Cook, and Emily Blincoe (Secretary/Treasurer).

Support and advocacy

The role of defence counsel has a long and noble history. Yet it remains uniquely and exquisitely difficult. It requires great courage – dealing with challenging issues, complex law, often damaged individuals, and standing alone between the citizen and the power of the state.

The DLANZ aims to provide a support network for defence counsel – where members can talk frankly about their experiences, seek confidential guidance, ask questions, get ideas and share what is happening in New Zealand's courts with other defence counsel.

Specialised training to ensure high-quality defence bar

Specialist defence counsel undertake literally thousands of witness actions and hundreds of judge-alone and jury trials. But too often the accrued wisdom and knowledge is self-contained. Younger lawyers can struggle to connect with more experienced defence counsel. Meaningful training for defence counsel is not widely available. DLANZ aims to provide high-quality defence-specific training for all defence lawyers. Affiliations with international defence lawyers' associations and attendance at international defence lawyer training seminars demonstrates the scope for highly effective local training and knowledge sharing by, and for, defence counsel.

Reform

Addressing the United Nations last year, Justice Minister Andrew Little said: "Our justice system is broken".

A recent review confirmed that criminal justice system is in need of desperate change. A unified voice from the defence bar is critical as these challenges are confronted.

Judith Ablett-Kerr QC welcomes the establishment of DLANZ, saying: "It has a significant contribution to make to the administration of justice. As a defence-focused voice the Association will be able to provide an informed perspective as the justice system adapts to accommodate the inevitable changes that face both society and the profession. I do not refer merely to the changes associated with the

current COVID-19 crisis, although some of the issues they raise are troubling, but in particular I have in mind the need to address the inequalities that exist in access to justice and the need to ensure that the rule of law is not eroded for the sake of convenience."

Robert Lithgow QC, who is also on the steering committee, agrees: "There are serious wrongs to be righted and work to be done. The defence perspective and the promise of equality before the law needs to not just be listened to politely, but be heard and made to work for the people of New Zealand."

Rob Stevens, Public Defender Northern (PDS) observes: "An organisation focused on, and capable of effectively advocating for, the particular interests and needs of defence lawyers and our clients is long overdue in the New Zealand criminal justice sector."

Innocence and miscarriages of justice

One goal of DLANZ is to tighten the accuracy of the criminal justice system. Historically, the dominant reaction to the system's accuracy problems has been denial. Yet, the ghost of the innocent man convicted is not "an unreal dream" (Justice Learned Hand in *United States v Garsson*, 291 F. 646, District Court for the Southern District of New York (1923)). Exonerations have revealed that criminal justice systems, including ours, have serious accuracy problems. The "innocence revolution", founded in countless miscarriages of justice here and internationally, tells us the system keeps getting the same things wrong. The causes are multi-variate, but familiar across jurisdictions, including New Zealand.

International estimates suggest as many as 3-5% of those convicted are factually innocent.

Another member of the new organisation, and a senior defence practitioner, also welcomes formation of DLANZ, saying experience has made it clear that absent accountability for breach of rights nothing changes, and a defence-focused body is best equipped to advocate for change.

Marie Dyhrberg QC, speaking in support of the formation of the Association, says: "Without fair trials for those accused, trust in government and the rule of law collapses."

DLANZ intends to aggressively tackle systemic issues contributing to miscarriages of justice and conviction of the innocent.

Mass incarceration

New Zealand has the second-highest incarceration rate in the Western world per capita, with at least 30% of people in prison there on remand and presumed innocent. Many will never be convicted of any crime. Many wrongly plead guilty as a way of getting out of prison earlier. Jail has a serious criminogenic and intergenerational effect.

As Professor Peter Gluckman, former Chief Science Adviser to the Prime Minster, said in his report, *Using evidence to build a better justice system: The challenge of rising prison costs* (Report of the Office of the Prime Minister's Chief Science Advisor, 29 March 2018), tough on crime rhetoric has pervaded the New Zealand criminal justice system, resulting in disproportionate incarceration and cost, with no evidence of an associated increase in public safety. Defence lawyers see the terrible human cost of the mass incarceration failure for New Zealanders, and the normalisation of jail for deprivation, dislocation, mental illness and addiction. DLANZ will bring a unified voice to this issue.

Māori in the criminal justice system

As has been regularly observed, the enduring impact of colonisation is seen especially starkly in the criminal justice system. About half of all prisoners are Māori – the "entrenched asymmetry of Māori in prisons" as Justice Whata put it in *Heta (Solicitor-General v Heta* [2018] NZHC 2453 at [40] per Whata J). The asymmetry is apparent in police charging, in comparative conviction and incarceration rates. Māori women are said to be the most incarcerated indigenous women in the world. One Aotearoa iwi is the most incarcerated indigenous tribe in the world. If Māori had the same proportion of their population in prison as non-Māori, there would be only around 700 Māori in prison, not 5,500 as there are now.

Ngaroma Tahana, Echo Haronga and Julia Spelman, members of the steering committee have jointly commented: "Given the long-standing issue of over-representation of Māori in the criminal justice system, DLANZ recognises the importance of training for all defence lawyers in this area. The opportunity to provide culturally competent and inclusive professional development and networking in the criminal field is a hugely exciting feature of the work programme for the steering committee.

"In addition, attracting higher numbers of Māori lawyers to criminal defence work, and the professional development and retention of those currently in practice, will also be on the work programme. A strong, representative defence bar is needed in every region including rural settings.

"Māori lawyers are leading the advancement of tikanga arguments not just to the benefit of individual clients, but also to inform the development of criminal case law, as tikanga forms part of the unique and special context of the common law of Aotearoa, widening the scope of argument available for all clients."

This has been evident in the recent jurisprudence surrounding s 27 of the Sentencing Act 2002, and in *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648.

Greg King Scholarship

DLANZ is especially proud to announce the establishment of the

CONTINUED FROM PAGE 51

Greg King Scholarship. The scholarship will be awarded to a promising defence lawyer who embodies the mission and ethos of DLANZ. The lawyer will be given opportunity to work with top New Zealand defence lawyers and provided with junioring positions in trials.

Support from the profession

Tiana Epati, President of the New Zealand Law Society | Te Kāhui Ture o Aotearoa, and herself a senior defence lawyer, welcomes the formation of the Association.

The establishment of DLANZ is also warmly welcomed by Kate Davenport QC, president of the New Zealand Bar Association, who says: "We welcome the contribution and advocacy in this area. The more voices that are heard, the stronger the response will be."

Te Hunga Rōia Māori o Aotearoa – the Māori Law Society, advocates on issues affecting Māori and the law, including as an intervenor in the *Zhang* case. Te Hunga Rōia Māori is supportive of the new association. "Any rōpū (group) which brings a focus on criminal justice issues which disproportionately affect Māori, has our firm tautoko. We look forward to building and developing our relationship," says Marcia Murray, Tumuaki Wahine.

Membership

The influx of membership applications for the Association demonstrates the real need felt by defence lawyers for DLANZ. The resounding feedback from defence lawyers has been "excellent" and "about time".

Defence lawyers may join via the website. Support networks, knowledge sharing, training, and reform initiatives are commencing in the coming months. ■

Christopher Stevenson and Elizabeth Hall are senior criminal defence lawyers with over 40 years' combined experience.

ACCESS TO JUSTICE

CALD parties before the Employment Relations Authority

BY **MAI CHEN**

In *LawTalk* 938, April 2020, I wrote about "Judicial leadership on equal access to justice for Culturally and Linguistically Diverse Parties in Courts". That article summarised the unique insights that judges of the senior courts provided at a seminar co-hosted by New Zealand Asian Lawyers (under the umbrella of the Superdiversity Institute for Law, Policy and Business) and the New Zealand Law Society about the issues and challenges of representing culturally and linguistically diverse ("CALD") parties in Court. This seminar followed the launch of the Superdiversity Institute's report on "*CALD Parties in the Courts: A Chinese Case Study*" ("the CALD report") in November 2019.

I was recently asked by Members of the Employment Relations Authority (ERA) in Auckland to speak to them and the Registry staff about the issues and challenges of CALD parties in the ERA jurisdiction. That session highlighted that the ERA (which is an investigative body, in contrast to the senior courts which are adjudicatory bodies) is aware of the challenges in ensuring access to justice for CALD parties, and this issue is as significant in the ERA jurisdiction as in the higher courts.

The ERA Members reported that a high proportion of cases before the ERA in Auckland involve employees and employers from CALD communities. Many are recent migrants who do not speak English fluently or/and who have limited understanding of New Zealand employment law and practice.

Issues and Challenges

The key issues, challenges, and themes arising from CALD parties before the ERA, as discussed during the session and as confirmed by cases, include:

- high rates of self-representation among CALD parties;
- high rates of non-engagement by CALD parties – ie, failing to file statements in reply and failing to attend Investigation Meetings before the ERA;
- cultural concepts such as "face" acting as a barrier to settling matters before proceeding to the ERA;
- little contemporaneous documentary evidence available, including lack of required employment documentation including employment agreements and wage/time records;
- some CALD employers not understanding their employment obligations (and the effects of this lack of

understanding being exacerbated by employment of staff from their same ethnic group, or other migrants, usually recent arrivals, who similarly have little understanding of their rights under New Zealand employment law).

The following cases are illustrative of these issues and challenges, and the approaches that ERA members have taken to address these issues and challenges.

Mai Chen

QWU vs LSG Sky Chefs NZ Ltd [2019] NZERA 87

This case involved a Chinese applicant employee who had been employed on a work visa, who represented himself. He had raised a personal grievance against his employer, LSG Sky Chefs, for unjustified disadvantage and constructive dismissal. At issue were a number of interactions he had had with his manager. The manager's ethnicity was not described in the Authority's determination.

The Member presiding took an enabling approach to assist the Applicant's access to justice. Paragraph 4 of the determination records:

> "QWU's first language is not English. He represented himself. When he provided his statement of problem he included a written comprehensive timeline of events and a number of relevant documents. I did not require QWU to lodge a formal statement of his evidence as I relied largely on the documentation he had lodged with his statement of problem. I was grateful for the services of an interpreter to assist me to make sure that LSG and I fully understood QWU's case and his response to LSG's case. All witnesses from whom I heard evidence during the investigation meeting took a promise to tell the truth and answered questions from me and from the other party."

The Authority determined that despite the applicant's claims, the employer had acted fairly and reasonably in all the circumstances at the time. The employer had also "accepted that [the employee] was relatively new to the workforce in New Zealand and that some uncertainty about his rights and responsibilities… may have led to some of his decisions."

Laria Taouktsi v Z&L Group Ltd and Tong Zhang [2018] NZERA Auckland 144

The applicant employee in this case (whose ethnic background was not described) had no written employment agreement for her first year of employment, was not paid wages in a timely manner, was not paid wages due to her, was not paid holiday pay, and was not told about or enrolled in the KiwiSaver scheme. On making a written request to be paid what she was owed, the respondent employer, who was Chinese, "abused and threatened her" after which she resigned. The employee made a claim of constructive dismissal.

In this case, the respondent employer failed to participate in a case management teleconference, failed to provide medical information required to support his claim that he was unable to participate in the Authority's investigation, and failed to file any evidence. The Investigation Meeting proceeded in his absence, and the Authority ordered him to pay almost $50,000 to the employee, plus penalties.

Zhang Chao v LJ Catering Ltd [2019] NZERA 204

The applicant employee, who was Chinese, made a claim against his former employer (who was also Chinese), for unpaid wages. A particular focus of the determination was payslips which the employer provided. The strong implication from the determination was that the payslips were not authentic. The employee also denied ever receiving payslips during his employment. The Member made a finding that the employer's evidence on the employee's hours of work was not credible.

The Member was unable to determine whether screen shots from WeChat showing three payments of RMB 50,000 each provided by the employee, which the employer challenged as being "forged," amounted to a premium for employment, contrary to section 12A of the Wages Protection Act 1983. The Member directed that a copy of the determination be provided to MBIE's Labour Inspectorate.

Hyunwoo Kim v Kokos NZ Ltd [2019] NZERA 391

This case concerned the breach of a broad non-disparagement term in an agreement to settle a personal grievance between a Korean employee and his former employer, a company owned by a Korean director.

While cultural factors are not discussed in the determination, it is likely that these factors had a bearing on the parties' desire to take this dispute all the way to the ERA, despite the total amount received by the employee (less costs) being $715.14. The matter previously went to mediation which was unsuccessful.

Only one instance of breach was established. That breach was in a phone call between the two parties, where the employer asked the employee why he had lied, asked whether he was sorry and stated that the employee "would keep the 'shame' of what he had done forever". There was no disparagement to any third party. The Authority considered the nature of the breach, its extent, and "the limited damage done" and awarded the employee $800 and $271.56 towards costs (this did not cover the whole amount of costs incurred by the employee).

Jingjing Li v Grand Treasure Investment Ltd & Yuan Gao [2019] NZERA 716

In this case, concerning a Chinese applicant-employee and a Chinese respondent-employer, cultural factors were explicitly raised by the applicant who said that she had not been paid any wages but did not ask after those wages as it was "difficult for her to ask for payment because the money issue is a sensitive topic in Chinese culture. She did not want to embarrass [the employer] by mentioning it." Further the Member presiding noted that "There was surprisingly little email or social media documentation filed. Neither party provided any WeChat messages, despite that being how the two met."

In the end, the Member presiding noted with regard to credibility, "I had difficulties with both parties' cases... Standing back and looking at the evidence, by a fine margin, I prefer [the employee's] evidence." The Authority upheld the employee's claims in respect of wage arrears; holiday pay; and reimbursement of expenses.

Sharma v Icon Concepts 2012 Ltd [2018] NZERA Auckland 154

Credibility of the employer was also at issue in this case, which concerned an Indian applicant-employee and respondent company owned by an Indian director. The Authority found a number of inconsistencies in the evidence on behalf of the respondent, including as to whether or not the applicant was employed at all by the respondent.

The employer had previously been before the Authority in relation to another employee (who was Cambodian), where the employer had breached minimum wage requirements and failed to pay out holiday pay and bereavement leave.

Zuo v 123 Casino Ltd t/a 123 Palm Bar & Restaurant & Function Centre [2018] NZERA Auckland 271

This case concerned a Chinese applicant-employee and a respondent company owned by a Chinese director. The case highlights many of the issues and challenges that arise in such cases. Firstly, the Authority struggled with the contemporaneous documentary evidence that was provided by the parties, and with the competing accounts that were provided. For example, there was a dispute over when the employment agreement was provided, and the member had to resort to WeChat messages, that had been interpreted by an accredited interpreter, to ascertain the correct date. It was also unclear from the evidence provided whether Ms Zuo had been employed on a full-time, part-time or casual employment agreement, with the Member stating "I found the total picture confusing" (at [35]).

Recommendations to address these issues and challenges at the coalface

The investigative nature of the ERA under s 157 of the Employment Relations Act 2000 ("ER Act") gives it a degree of flexibility in "resolving employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities", which is well-suited to addressing the issues and challenges CALD parties can raise.

ERA Members already make use of this flexibility in making determinations to resolve employment relationship problems. In many of the cases reviewed, the Member presiding made use of the provision at s 160(3) of the ER Act 2000 which states that "The Authority is not bound to treat a matter as being a matter of the type described by the parties, and may, in investigating the matter, concentrate on resolving the employment relationship problem, however described," and further s 122 which states that "Nothing in this Part or in any employment agreement prevents a finding that a personal grievance is of a type other than that alleged."

These provisions were used where the pleadings did not relate to "any particular category of personal grievance" (as in *Ying Deng v Nancy Wang and Good Future Auckland Ltd* [2018] NZERA Auckland 1, where

both parties were Chinese and neither was represented).

A key recommendation that was discussed to improve access to justice for CALD parties coming before the ERA was the importance of ensuring that all parties coming in contact with the ERA have sufficient information in their first language to ensure they were aware of the importance of engaging with the process and to understand it from the beginning of the process. This is particularly important given the high number of unrepresented parties who will not be getting adequate advice from a lawyer or employment advocate.

Another recommendation discussed was making the consequences of non-participation in the process more explicit in communications from the Authority. For example, when parties are sent correspondence explaining that they are overdue to file their Statement of Reply, that correspondence could make clearer that the Investigation Meeting can proceed in their absence and that the ERA can find against them even if they do not participate in the process.

An issue raised during the course of the discussion was the impact of cultural factors on parties' demeanour before the ERA and how this is assessed when making credibility findings – for example, if the party does not make eye contact – is this because their evidence is not credible or is it a mark of respect in that party's culture and that party is therefore acting respectfully towards the Member presiding?

Further, can cultural factors inhibit parties from presenting evidence which assists their case? For example young Chinese employees struggling to articulate their grievances against older Chinese employees or employers, due to the cultural requirement to show respect to their elders.

Authority Members are keenly aware that cultural factors, experience and knowledge of New Zealand law and life, and fluency in English are all factors that affect the ability of employees and employers from CALD communities to participate effectively and fairly in the Authority processes.

The critical role of lawyers and employment advocates in educating their clients about the role of the ERA, and the consequences of non-participation in the process or a lack of good faith in their participation, was also underscored. In particular, the risk of an adverse determination by the ERA, and the loss of face that can result, can be a useful reminder to clients of the importance of complying with their employment obligations and to mediate or settle disputes that would otherwise go before the ERA.

In such an important jurisdiction as employment, there clearly is recognition and leadership by Members of the need to ensure equal access to justice for CALD parties.

Thanks to Rosie Judd of Chen Palmer who attended the seminar and helped me write up what was said.■

In such an important jurisdiction as employment, there clearly is recognition and leadership by Members of the need to ensure equal access to justice for CALD parties

Mai Chen is Managing Partner of Chen Palmer, Chair of the Superdiversity Institute for Law, Policy and Business (which includes NZ Asian Lawyers), and Adjunct Professor at the University of Auckland Law School.

ACCESS TO JUSTICE

Conviction, sentencing and imprisonment of adults in 2019

BY **GEOFF ADLAM**

THREE-QUARTERS OF THE PROSECUTIONS OF ADULTS IN DISTRICT and High Courts where there was an outcome resulted in convictions in 2019. One-fifth were "not proved" – which includes where a person was acquitted or discharged, or where the charge was dismissed or withdrawn.

This information comes from Statistics New Zealand's annual statistics on criminal convictions and sentencing for the 2019 calendar year. The data is provided by the Ministry of Justice and the information for a centre includes both District Court and High Court where applicable.

The data shows some distinct variations in conviction rates when analysed by gender, age, ethnicity, sentencing court and the type of offence.

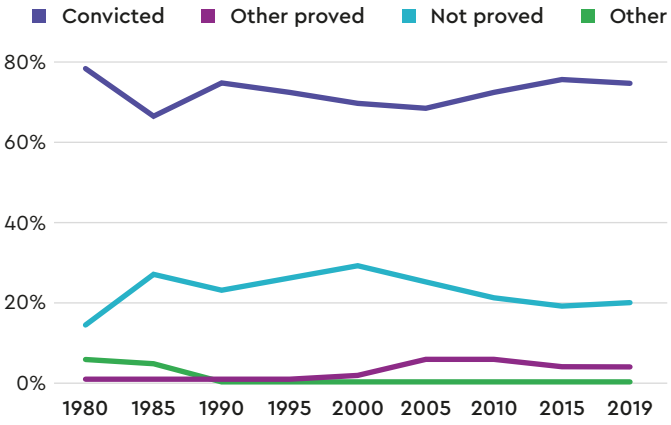
Of the 204,341 cases in District and High Courts where adults were prosecuted, 75% had an outcome resulting in a conviction. A further 4% of charges were "other proved" but not recorded as convictions – these included where Police offered diversion or the person was discharged without conviction under section 105 of the Sentencing Act 2002. Most of the rest – 20% – were "not proved". A very small proportion of cases ("other") resulted in a stay of proceeding, the person being found unfit to stand trial or acquitted on account of insanity.

Adult outcomes in New Zealand courts by calendar year

Outcome	Total 2019	% 2019	Total 2018	% 2018
Convicted	153,795	75.3%	158,563	76.1%
Other proved	8,018	3.9%	7,807	3.7%
Not proved	41,784	20.4%	41,232	19.8%
Other	744	0.4%	754	0.4%
Total	204,341	100.0%	208,356	100.0%

The data goes back an impressive 39 years to 1980. A general trend seems to have been a gradual fall then rise in the proportion of convictions, balanced by a rise then fall in "not proved".

Adult outcomes



Outcome	1980	1985	1990	1995	2000	2005	2010	2015	2019
Convicted	79%	67%	75%	73%	70%	69%	73%	76%	75%
Other proved	1%	1%	1%	1%	2%	6%	6%	4%	4%
Not proved	14%	27%	23%	26%	29%	25%	21%	19%	20%
Other	6%	5%	0.4%	0.4%	0.1%	0.1%	0.2%	0.4%	0.4%

Convictions by type of offence

Obviously the type of offence has a bearing on likelihood of conviction. When outcomes are considered by offence category there is a wide variation overall.

Perhaps unsurprisingly, driving offences have the highest conviction rate – there are few shades of grey. Against the overall conviction rate of 75%, 91% of all traffic and vehicle regulatory offences resulted in conviction. The highest rate for any single offence was exceeding the prescribed content of alcohol or other substance limit in a vehicle – with 95% of prosecutions resulting in conviction.

The lowest conviction rates were for sexual assaults and related offences. A high 45% of these were not proved and 52% resulted in conviction. Fewer than half the prosecutions for the

single offences of both non-aggravated and aggravated sexual assault resulted in conviction.

Homicide had one of the highest conviction rates in 2019 (at 74%), but in 2018 was one of the lowest, at 64% convicted and 29% not proved.

Outcomes for categories of adult offences prosecuted to a conclusion in 2019

Category	Outcomes	Convicted	Other Proved	Not Proved
Most likely to be convicted				
Traffic & vehicle regulatory	38,098	90.8%	1.7%	7.4%
Theft & related offences	22,032	80.1%	3.3%	16.4%
Offences against justice, govt security	44,330	78.2%	1.2%	20.5%
Dangerous or negligent acts	11,563	77.9%	10.6%	11.4%
Homicide	236	74.2%	0.4%	23.3%
Property damage, environmental pollution	7,531	72.4%	10.1%	16.8%
Least likely to be convicted				
Sexual assault & related offences	4,925	52.0%	1.2%	45.0%
Prohibited & regulated weapons, explosives	5,455	62.9%	3.0%	33.5%
Acts intended to cause injury	22,842	62.1%	8.9%	28.0%
Robbery, extortion	1,138	62.6%	0.6%	35.7%
Abduction, harassment	5,255	63.3%	4.4%	31.7%
Total Outcomes	204,341	75.3%	3.9%	20.4%

Outcomes for single adult offences prosecuted to a conclusion in 2019

Category	Outcomes	Convicted	Other Proved	Not Proved
Most likely to be convicted				
Exceeding prescribed content of alcohol or other substance in vehicle	17,293	94.9%	1.3%	3.8%
Driving licence offences	15,945	88.6%	2.2%	9.2%
Illegal use of property (except motor vehicles)	91	86.8%	4.4%	8.8%
Exceeding legal speed limit	1,155	85.6%	4.4%	8.8%
Theft (except motor vehicles)	14,199	85.2%	3.4%	11.2%
Least likely to be convicted				
Offences against government security	10	30.0%	0.0%	50.0%
Abduction and kidnapping	315	32.4%	0.0%	67.3%
Attempted murder	18	44.4%	0.0%	44.4%
Blackmail and extortion	143	45.5%	0.7%	53.1%
Non-aggravated sexual assault	620	47.3%	2.6%	47.9%
Aggravated sexual assault	3,421	47.4%	0.3%	50.0%

Differences by court

Over the whole country in 2019 in individual courts there was a difference of over 25% between the proportion of cases which resulted in a conviction. In Waihi District Court during 2019, 87.5% of outcomes resulted in a conviction. In the Wellington District and High Courts, 63.2% of outcomes resulted in a conviction.

Proportion of outcomes resulting in a conviction, highest 2019

Courts	Total outcomes	Convicted	% Convicted
Waihi	817	715	87.5%
Marton	337	294	87.2%
Te Kuiti	585	508	86.8%
Opotiki	739	631	85.4%
Taumarunui	405	342	84.4%

Proportion of outcomes resulting in a conviction, lowest 2019

Courts	Total outcomes	Convicted	% Convicted
Kaikōura	56	35	62.5%
Wellington	7,179	4,535	63.2%
Queenstown	1,026	650	63.4%
Greymouth	1,066	689	64.6%
Auckland	20,336	13,469	66.2%
Dunedin	4,106	2,771	67.5%

The very small Kaikōura District Court apart, Queenstown District Court had the biggest proportion of "other proved" (diversion or discharge without conviction) outcomes in 2019 (and 2018), at over 22% of all outcomes. At the other end of the scale was the District Court in Kaitaia and Kaikohe. Nationally, 3.9% of outcomes were in this category.

Proportion of outcomes resulting in an "other proved" finding, highest 2019

Courts	Total outcomes	Other proved	% Other proved
Kaikōura	56	13	23.2%
Queenstown	1,026	228	22.2%
Alexandra	434	63	14.5%
Levin	2,010	215	10.7%
Greymouth	1,066	100	9.4%
Dunedin	4,106	308	7.5%

Proportion of outcomes resulting in an "other proved" finding, lowest 2019

Courts	Total outcomes	Other proved	% Other proved
Chatham Islands	61	0	0.0%
Kaitaia	1,888	29	1.5%
Kaikohe	2,669	43	1.6%
Whangārei	6,083	100	1.6%
Rotorua	6,873	123	1.8%
Whanganui	3,073	61	2.0%

Wellington District and High Courts had the highest proportion of "not proved" outcomes (30%), with Marton District Court the lowest (8.6%). Nationally, 20.4% of outcomes were "not proved".

Proportion of outcomes resulting in a "not proved" finding, highest 2019

Courts	Total outcomes	Not proved	% Not proved
Wellington	7,179	2,155	30.0%
Auckland	20,336	5,812	28.6%
Blenheim	2,203	596	27.1%
Chatham Islands	61	16	26.2%
Greymouth	1,066	277	26.0%
Gisborne	4,176	1,048	25.1%

Proportion of outcomes resulting in a "not proved" finding, lowest 2019

Courts	Total outcomes	Not proved	% Not proved
Marton	337	29	8.6%
Te Kuiti	585	57	9.7%
Taumarunui	405	41	10.1%
Waihi	817	84	10.3%
Westport	286	35	12.2%
Taupo	1,822	223	12.2%

Ethnicity and sentences

In 2019, Māori adults comprised 44% of adults convicted of an offence where ethnicity was known (in 10% of convictions it was recorded as unknown), but made up 62% of adults who were sentenced to imprisonment. The Statistics New Zealand information shows the most serious offence. Information for people of Asian ethnicity has been included for the first time.

Of people of Māori ethnicity who were convicted of an offence during 2019, 16.4% were sentenced to imprisonment for their most serious offence. In contrast, 11.4% of Pacific People, 10.0% of Europeans, 8.4% of Asians and 13.6% of other ethnicities were sentenced to imprisonment.

People of Māori ethnicity who were convicted in 2019 were also most likely to receive a community-based sentence for their most serious offence. That also means that over half – 51.4% – of all sentences imposed in 2019 where there was some control on liberty (imprisonment or community-based) were imposed on people of Māori ethnicity. With the ethnicity of 10% of people convicted not recorded, this means this is an "at least" statistic.

Updated data released on 5 March 2020 for Census 2018 showed that 70.2% of the population identified as European, 16.5% as Māori, 15.1% as Asian, 8.1% as Pacific Peoples and 4.0% as other ethnicities (with people often identifying with more than one ethnicity).

Adults convicted by sentence type (most serious offence), 2019

Sentence	European	Māori	Pacific	Asian	Other	Unknown	Total
Convicted	21,175	24,969	5,702	1,946	1,054	5,566	57,065
Imprisonment	2,124	4,087	648	163	143	118	6,646
Community	9,878	12,244	2,686	733	493	838	25,111
Monetary	6,769	5,281	1,592	860	296	4,023	18,274
Other	1,362	1,630	379	107	66	272	3,617
None recorded	1,042	1,727	397	83	56	315	3,417

Proportion of sentences imposed by ethnicity (most serious offence), 2019

Sentence	European	Māori	Pacific	Asian	Other	Unknown
Convicted	37.1%	43.8%	10.0%	3.4%	1.8%	9.8%
Imprisonment	32.0%	61.5%	9.8%	2.5%	2.2%	1.8%
Community	39.3%	48.8%	10.7%	2.9%	2.0%	3.3%
Monetary	37.0%	28.9%	8.7%	4.7%	1.6%	22.0%
Other	37.7%	45.1%	10.5%	3.0%	1.8%	7.5%
None recorded	30.5%	50.5%	11.6%	2.4%	1.6%	9.2%

Sentence imposed on conviction for each ethnicity (most serious offence), 2019

Sentence	European	Māori	Pacific	Asian	Other	Unknown	Total
Imprisonment	10.0%	16.4%	11.4%	8.4%	13.6%	2.1%	11.6%
Community	46.6%	49.0%	47.1%	37.7%	46.8%	15.1%	44.0%
Monetary	32.0%	21.2%	27.9%	44.2%	28.1%	72.3%	32.0%
Other	6.4%	6.5%	6.6%	5.5%	6.3%	4.9%	6.3%
None recorded	4.9%	6.9%	7.0%	4.3%	5.3%	5.7%	6.0%

There were also regional differences when it came to the Justice Service Area where an imprisonment sentence was imposed. The table shows that in the Taitokerau service area (courts in Dargaville, Kaikohe, Kaitaia and Whangārei) imprisonment comprised 11.9% of sentences imposed on Europeans for their most serious offence, 17.6% of all sentences imposed on Māori, 17.4% on Pacific Peoples and 5.3% of all sentences imposed on Asians. Overall, 13.8% of all sentences imposed for the most serious offence in the service area was imprisonment (including other and unknown ethnicities).

Proportion of imprisonment sentences imposed, 2019 for most serious offence

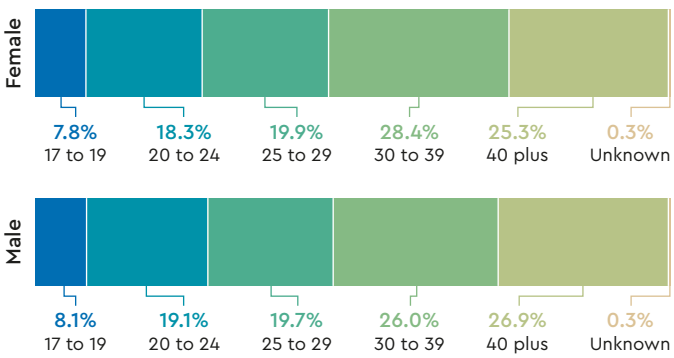
Justice Service Area	European	Māori	Pacific	Asian	All
Taitokerau	11.9%	17.6%	17.4%	5.3%	13.8%
Waitemata	7.4%	15.4%	10.9%	4.5%	7.9%
Auckland	13.1%	22.2%	16.3%	13.6%	13.4%
South Auckland	7.9%	12.7%	8.3%	5.9%	8.3%
Waikato	12.1%	18.5%	14.5%	7.6%	13.5%
Bay of Plenty	9.5%	16.2%	6.2%	9.5%	11.9%
Waiariki	15.4%	22.1%	24.0%	12.8%	18.3%
East Coast	7.6%	14.9%	13.8%	8.6%	11.6%
Taranaki/ Whanganui	10.1%	15.8%	15.9%	16.7%	11.2%
Manawatu/ Wairarapa	10.8%	16.1%	10.2%	10.5%	11.8%
Northern Wellington	7.8%	10.8%	5.8%	5.8%	7.3%
Wellington	10.9%	19.7%	16.3%	3.8%	12.4%
Nelson/ Marlborough	5.8%	9.5%	13.2%	3.2%	5.7%
Canterbury	11.2%	15.5%	11.9%	10.8%	10.4%
Otago	11.3%	19.3%	15.5%	8.3%	10.9%
Southland	8.8%	13.4%	6.1%	7.9%	8.0%
Total New Zealand	10.0%	16.4%	11.4%	8.4%	11.6%

Age and Gender

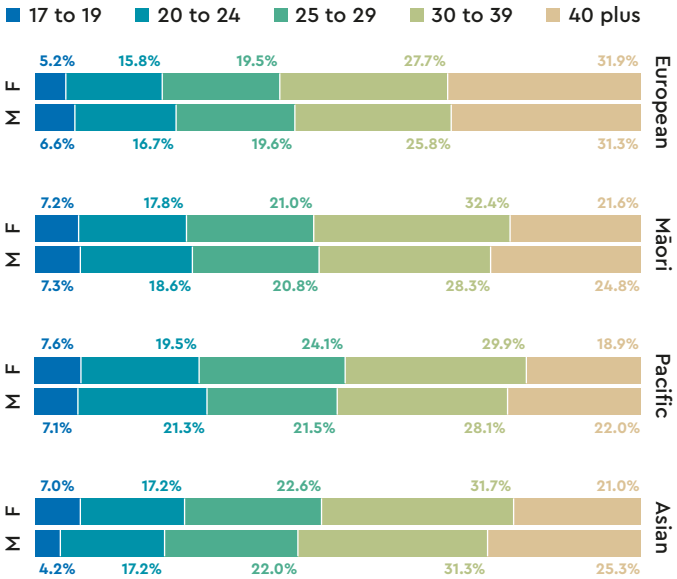
Overall, in 2019 men made up 78.8% of adults convicted (most serious offence). There was relatively little difference between men and women over age groups.

There were some age differences between ethnicities. Half of Pacific women and men convicted in 2019 were aged under 30, the highest proportions. A higher proportion of European women and men were aged 40 or more on conviction.

Adult convictions in 2019 (most serious offences)



Women and Men convicted in 2019 (most serious offences) by ethnicity



Imprisonment

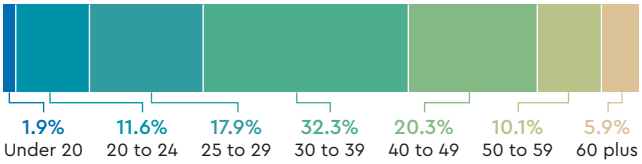
Department for Corrections information shows that at 31 December 2019, New Zealand had a prison population of 9,857 of whom 93.2% were male. Prisoners were held in 18 institutions, with the largest being Rimutaka Prison (1,021 prisoners), Mount Eden Corrections Facility (950) and Auckland South Corrections Facility (913). Remand prisoners made up 36.4% of the prison population, up from 30.1% a year earlier.

New Zealand prison population, 31 December 2019

Category	Male	Female	Total
Remand	3,322	270	3,592
Sentenced	5,869	396	6,265
Total	9,191	666	9,857

Of those in prison, 31.4% were aged under 30.

Age of those in prison, 31 December 2019



Over half those imprisoned were of Māori ethnicity. Prisoners of Asian ethnicity were recorded separately until the 30 June 2016 statistics, when they were included in "Other".

Ethnicity of those in prison, 31 December 2019 and 2018

Ethnicity	Proportion 2019	Proportion 2018
European	31.1%	31.7%
Māori	51.8%	51.0%
Pacific People	11.7%	11.2%
Other	5.2%	4.6%
Unknown	0.2%	2.5%

UPDATE – COMMERCIAL LAW

Clarifying the law of price fixing

No arrangement without commitment

BY **JOHN LAND**


John Land

On 2 April 2020 the Supreme Court issued its first decision on the application of the prohibition on price fixing in the Commerce Act 1986. In *Lodge Real Estate Ltd v Commerce Commission* [2020] NZSC 25 the Court confirmed that a number of Hamilton's biggest real estate agencies breached the prohibition on price fixing by reaching an arrangement to move to "vendor funding" of the cost of advertising properties on Trade Me.

Although the Commerce Commission was successful in *Lodge*, the Supreme Court's important clarifications of the law will make establishing a price fixing allegation in the future harder rather than easier. The Supreme Court judgment provides helpful guidance on two matters of significance.

The first is to confirm that there will not be an "arrangement" between competitors for the purposes of the Commerce Act 1986 unless there is a consensus between them involving a *commitment* from one or both parties to act in a certain way. This resolves the uncertainty as to what amounts to an arrangement or understanding for the purpose of the Commerce Act, following the previous leading decision (*Giltrap City Ltd v Commerce Commission* [2004] 1 NZLR 608 (CA)). The clarification by the Supreme Court that a mere consensus between the parties giving rise to mutual expectations is not enough unless the consensus involves a *commitment* from one or both parties is important. It will make it harder to establish that competitors have entered into an "arrangement", but in my view appropriately so.

The second is to confirm the approach to assessment of whether an arrangement can be said to "control" price in terms of s 30 Commerce Act. The test is whether the arrangement has the purpose or effect of restraining a freedom that would otherwise have existed as to the price to be charged for a good or service. The Supreme Court has clarified, however, that the relevant price that must be controlled is the *overall price* for the good or service. Contrary to the approach of the Court of Appeal (and of the Commerce Commission in its published guidelines) agreement on a small portion or component of a price will *not* necessarily amount to controlling the overall price. This will only be so if the particular portion or component could be seen as competitively significant. (Here the cost of Trade Me advertising was small compared to the average commission paid for real estate agency services but was nevertheless accepted on the facts as being competitively significant.)

The Supreme Court's clarification of the scope of what amounts to price fixing under the Commerce Act is particularly timely given the recent amendment to the Commerce Act which will criminalise price fixing with effect from April 2021. That criminalisation will add jail terms of up to seven years as a potential consequence of engaging in cartel conduct in addition to the suite of civil remedies already available.

Background to the *Lodge* Case

In 2013 Trade Me changed its fee structure for property listings. Previously, real estate agent offices could pay a capped monthly fee for unlimited property listings on Trade Me. Trade Me replaced this fee structure with a fee per individual property listing. This change substantially increased the overall cost of listings. For example, Lodge faced an expected increase in annual Trade Me listing fees from about $9,000 to $220,000.

The substantial increase in cost was the cause of much

concern by real estate agents. At a meeting of Hamilton real estate agents in September 2013, the agencies agreed in principle to stop absorbing the cost of Trade Me advertising and move in January 2014 to a model of "vendor funding" of the cost of Trade Me listings.

The Commerce Commission alleged that this agreement amounted to unlawful price fixing between the competing real estate agents under s 30 of the Commerce Act. The case was considered under the old form of s 30 prior to the recent amendments to that section passed in August 2017. However, the recent changes to s 30 are not material to the case. Both the old and new form of s 30 effectively prohibit competitors entering into a contract, arrangement or understanding containing a provision that has the purpose, effect or likely effect of fixing, controlling or maintaining price.

The Supreme Court had to consider two issues. First, was there in fact an "arrangement" between the real estate agents? Secondly, if there was such an arrangement, did a provision of that arrangement have the purpose or likely effect of controlling price?

Was there an arrangement between competitors?

On the question of whether there was an arrangement, the Supreme Court agreed with both the High Court and Court of Appeal. There was an arrangement between the real estate agents that they would not absorb the cost of Trade Me's proposed new listing fees and that subsequent Trade Me listings would be vendor funded.

Prior to *Lodge*, there had been debate about the correct test for deciding whether there is an "arrangement" for the purpose of the Commerce Act. That test is relevant to both the application of s 30 (which now prohibits arrangements between competitors that include a cartel provision, including price fixing) and s 27 (which prohibits arrangements that substantially lessen competition in a market).

The previous leading decision on what amounts to an arrangement or understanding for the purpose of the Commerce Act was the Court of Appeal's decision in the *Giltrap City* case. In that case, the majority of the Court of Appeal had held that there is an "arrangement" between competitors where there is a consensus among them giving rise to mutual expectations as to how those competitors would act. By contrast, the minority approach of McGrath J in *Giltrap City* would have required a finding of a "moral obligation" before there could be said to be an arrangement.

The majority's test from *Giltrap City* was potentially capable of being read as requiring quite a low threshold for establishing an arrangement. At first instance Jagose J even said that the "bar is determinedly not set high" (*Commerce Commission v Lodge Real Estate Ltd* [2017] NZHC 1497 at [21]). On one view, the test in *Giltrap City* might be satisfied in a situation where participants in the market understand full well how other participants will react to certain pricing or supply decisions that are made and can be said to have reached a "consensus" as to how they will each act and to have "mutual expectations" of such actions accordingly.

The term "conscious parallelism" has been used to describe this situation. Firms in a market make decisions (say as to prices or the supply of particular customers) based on a

well-founded expectation as to how other participants will react, but do so without actually commiting to each other how they will act.

It could potentially have been argued that the majority's approach in *Giltrap City* might have applied to at least some such situations on the basis that there was a clear consensus between market participants as to what would happen in a particular situation and a clear expectation as to how the participants would behave.

The Supreme Court has made it clear, however, that the test for an arrangement will not extend to a situation of conscious parallelism. There needs to be not only a consensus but a *commitment* to act in a certain way.

The Supreme Court summarised its approach at [58]: "If there is a consensus or meeting of minds among competitors involving a commitment from one or more of them to act (or refrain from acting) in a certain way, that will constitute an arrangement (or understanding). The commitment does not need to be legally binding but must be such that it gives rise to an expectation on the part of the other parties that those who made the commitment will act or refrain from acting in the manner the consensus envisages."

The Supreme Court preferred the term "commitment" to the term "moral obligation" which had been used in *Giltrap City*. The Supreme Court suggested that calling such an obligation a moral obligation was undesirable as it introduced morality into a context where it didn't add anything. (The Court of Appeal had similarly had concerns about a moral obligation test, as moral assessments are inherently unpredictable and imprecise.) The Supreme Court also confirmed that provided that there was a commitment of the kind described then there was no additional requirement to prove a moral obligation.

The Supreme Court's clarification of what is required to show an "arrangement" is very significant. The Supreme Court's approach will make it more difficult for the Commerce Commission to establish an arrangement for the purpose of s 30 (or s 27). However, in my view this is appropriately so. That is especially the case now that price fixing can amount to a criminal offence.

The Supreme Court found that the test for an arrangement had been met on the evidence. In the Court's view the consensus reached by the Hamilton agencies involved a commitment from each of them to adopt a vendor-funded model for Trade Me listings and to remove existing listings in January 2014. This created an expectation as to the common course of conduct the Hamilton agencies would follow.

The Supreme Court's clarification of what is required to show an "arrangement" is very significant. The Supreme Court's approach will make it more difficult for the Commerce Commission to establish an arrangement for the purpose of s 30 (or s 27)

The commitment based test for an arrangement adopted by the Supreme Court brings our approach somewhat closer to that applied in Australia. There, the Courts have been strict in requiring evidence of a clear commitment (moral or otherwise) before finding that there is an arrangement or understanding (*Apco Service Stations Pty Ltd v ACCC* [2005] FCAFC 161, (2005) ATPR 42-078 and *ACCC v Australian Egg Corporation Ltd* [2017] FCAFC 152).

However, the relevant evidence to establish such a test is different between the two jurisdictions. In New Zealand, the question of whether there is a commitment between the parties will be determined objectively from outward appearances (*Lodge* at [50]). By contrast, in Australia the courts are more concerned with whether the parties subjectively felt they were under a commitment to act in a certain way.

Controlling Price

The second issue that the Court had to consider in *Lodge* was whether the arrangement had the purpose or likely effect of fixing or controlling the price of real estate agency services. In the High Court, Jagose J had said there was no controlling of price because the real estate agents still retained a discretion as to whether they would in particular cases bear some or all of the Trade Me listing cost. The Court of Appeal had disagreed and held that the arrangement did control price. Further, the Court of Appeal even suggested that a *component* of price (such as the Trade Me fee) itself amounted to "price" for this purpose.

Argument relating to *"component"* of price

In the Supreme Court, Lodge argued that the Trade Me listing cost was not a sufficiently significant proportion of the price of real estate agent services so as to have the effect of controlling the overall price for such services.

A similar argument had succeeded in one Australian case (*ACCC v Olex Australia Pty Ltd* [2017] ATPR 42-540). In *Olex,* an alleged agreement between suppliers of electrical cable as to a cable cutting fee was held not to have the likely effect of controlling the overall price for supply of electrical cable. The cable cutting fee was not a materially significant proportion of the overall price for supply of cable. Further, not only was the cable cutting fee in question only a modest component of the overall price of electrical cable, the price of cable supplied by each manufacturer was not visible to each other. Accordingly, there was no commercially realistic ability to control the price of cable by controlling the price for cutting services.

In *Lodge*, the cost of Trade Me advertising at $159 was also small compared to the average commission paid for real estate agency services in Hamilton of $15,000.

The Supreme Court rejected, (at [156]) that part of the Court of Appeal's reasoning that suggested that under s 30 of the Commerce Act "price" automatically includes a component of the price. I have previously criticised that part of the Court of Appeal's judgment in my note on the judgment (see "Price fixing without fixing the whole price", *LawTalk* 925, February 2019, 52 at 54). As the Supreme Court pointed out, there can be cases where the component of price affected by an arrangement is so insignificant that it will not have the effect of controlling the overall price. Cases like *Olex* show that there can be situations where agreement on a component part of price could have no conceivable impact on the overall price of a good or service, or on competitive dynamics in the market.

The Supreme Court said therefore that the Court of Appeal's observation that price includes a component of price was incorrect as a general statement of the law. To this (limited) extent the Commission's Competitor Collaboration Guidelines (January 2018) (chapter 2, para 23 and footnote 21) must now also be considered incorrect.

Accordingly, it is necessary to show that there is a controlling of the *overall* price of a good or service, not just of a component of price.

The Supreme Court confirmed, however, that agreement on a small portion of a price can amount to controlling the overall price if the particular portion of the price could be seen as competitively significant.

Here, although the cost of the Trade Me fee was relatively small, it was nevertheless accepted as being competitively significant given the evidence as to the importance placed by the parties on the cost of the Trade Me fee.

The arrangement in relation to the Trade Me fee therefore did have the effect of controlling the overall price for real estate agent services. The Supreme Court was satisifed that although the arrangement related to a mathematically small component of the overall charges by Hamilton real estate agencies to their customers "it was nevertheless a sufficiently significant component of the overall price to bring the arrangement within the ambit of s 30." (at [161])

Argument relating to discretion to depart from price

The Supreme Court held that what the Commission had to prove to show a controlling of price was that the arrangement had the purpose or effect of restraining a freedom that would otherwise have existed as to the (overall) price to be charged by the Hamilton agencies to customers.

The Supreme Court held that the arrangement to adopt a vendor funding model for the Trade Me listing fee interfered with the competitive setting of price for the services offered by the Hamilton agencies. The Supreme Court accepted the argument that the arrangement ruled out the previous default setting of free Trade Me standard listings for all customers. The fact that agencies retained a discretion to depart from the new default position of vendor funding did not stop there from being an effect on the price setting process. Customers were deprived of the opportunity to be offered a price set under competitive market forces. In effect, they obtained a lesser service that may have been available to them for the same price if the agreed vendor funding model had not been adopted.

Relevance of *Lodge* to the current law

Although s 30 has now been replaced by a wider prohibition on cartel conduct, that prohibition includes a definition of price fixing that is in essentially the same terms as the prohibition on price fixing in the old s 30. Accordingly, the guidance provided by the Supreme Court in *Lodge* remains relevant under the new prohibition.

Further, the guidance will also be relevant in considering the new criminal offence provisions introduced by the Commerce (Criminalisation of Cartels) Amendment Act 2019, which comes into force on 8 April 2021. In particular, s 82B of the Commerce Act will now provide for a criminal offence for cartel conduct based on a definition of such conduct (including price fixing) that is the same as that applying for civil remedies already applicable under the Commerce Act. The only additional requirement for an offence to be committed is the addition of a mens rea requirement. In the case of price fixing, the defendant must have *intended* to engage in price fixing.

Criminal sanctions should not be applied unless the law is clear and the conduct truly culpable. Accordingly, with the introduction of a criminal offence provision, the clarity provided by the Supreme Court as to what amounts to price fixing is welcome.

So also is the Supreme Court's restriction of what amounts to a price fixing "arrangement" between competitors to situations in which the parties have entered into a "commitment" giving rise to mutual expectations as to how the parties should act. A lesser test for what amounts to an arrangement risks setting the bar too low for criminal cartel conduct. ■

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UPDATE – TORTS

Balancing corrective justice and indeterminate regulator liability

The Court of Appeal's decision in *Strathboss*

BY **TIM SMITH**

In *Attorney-General v Strathboss Kiwifruit Ltd* [2020] NZCA 98 the Court of Appeal allowed the Crown's appeal from the High Court decision finding that the then Ministry of Agriculture and Forestry (MAF) owed a duty of care to kiwifruit orchardists to avoid the devastating Psa bacteria entering New Zealand in 2010. The Court of Appeal agreed with the High Court that relevant MAF personnel had not acted with reasonable care and that MAF's failures were the likely cause of Psa's introduction into New Zealand. But it also held that the Crown had immunity from tort claims under the Crown Proceedings Act 1950 (as then worded). Further, the Court held that, for policy reasons, MAF did not owe the orchardists a duty of care. It found that the risk of indeterminate liability meant that such a duty would be unfair, unjust and unreasonable.

As an immediate point, and pending the inevitable appeal to the Supreme Court, the Crown will be grateful for the reprieve from an imminent potential liability for hundreds of millions of dollars (albeit that issues of quantum were put off pending determination of liability). More broadly, however, the real significance of the case lies in the Court's finding that policy factors outweigh corrective justice concerns such that, even in a context in which both the High Court and Court of Appeal found that MAF's failures caused the plaintiffs' loss, those plaintiffs should be left without a remedy. That finding will be a relief – for now – to all regulators whose operational activities could lead to significant loss, including Crown entities which fall outside of the scope of the 1950 Act. To the extent that the High Court decision raised floodgate concerns for government departments, Crown entities and others carrying out operational functions for the public good, the floodgates have, for now at least, been firmly closed.


Tim Smith

Background

In late 2010, Psa bacteria – long known to damage kiwifruit vines – were detected in two kiwifruit orchards in Te Puke. The bacteria, of the pandemic variety, spread rapidly causing severe damage to orchardists throughout the North Island. A number of them, as well as one post-harvest operator, sued the Crown for their losses.

Both the High Court and Court of Appeal found, accepting the plaintiffs' case on this point as probable, that Psa arrived in New Zealand in a consignment of anthers – being the part of the flower from which pollen is extracted. The anthers were imported from China by a small local company, Kiwi Pollen, with a view to artificially pollinating a number of orchards.

Unsurprisingly, given that the claim was for hundreds of millions of dollars, the plaintiffs' claim was against the Crown rather than Kiwi Pollen – centring on, firstly, at the pre-border stage, the decision to grant Kiwi Pollen the permit to import the anther consignment and, secondly, at the border stage, the inspection and risk-screening of the anthers on arrival in New Zealand.

The Crown Proceedings Act 1950

The High Court dealt with the issue of potential Crown immunity at the back end of its judgment – having already determined duty, breach and causation ([2018] NZHC 1559). In contrast, the Court of Appeal saw the question of whether the Crown Proceedings Act, as drafted at the relevant time, effectively precluded Crown liability as very much a preliminary one. Section 6(1) provided that no proceedings in tort should lie against the Crown unless the relevant act or omission would have given rise to a cause of action in tort against a Crown servant or agent. The Court extensively surveyed the history of Crown liability, back to 13th century notions that "the King can do no wrong", as well as more contemporary academic criticisms

of the principles underlying such ideas. Having done so, the Court found that, "[w]hatever the rights or wrongs of the matter may be as a matter of policy", the Crown could only be vicariously, and not directly, liable (at least in respect of actions before July 2013 when there were amendments to the Crown Proceedings Act and related provisions in the State Sector Act 1988 – with the full significance of those amendments essentially being left unexplored).

The difficulty for the plaintiffs arising from the finding that the Crown could only be vicariously liable was that they needed to attribute liability to particular MAF servants or agents. However, section 163 of the Biosecurity Act 1993, in effect, provides that those acting pursuant to any functions, powers or duties under that Act could not be liable unless they had acted in bad faith. The High Court had said that, to the extent that the section might apply, it should be read only as excluding personal liability for the relevant individuals rather than protecting the Crown from all vicarious liability. The Court of Appeal, however, held that, given this section excluded the personal liability of a Crown servant then the Crown's liability, which could only be vicarious, was also extinguished.

Duty of care

The case was determined on the short above point. However, recognising that the case was likely to go to the Supreme Court, the Court continued with a detailed analysis of both duty and breach, as well as causation.

As a preliminary point on the issue of duty, the Crown tried to argue that border control could not be subject to a duty of care at all – advocating that the plaintiffs' claims were simply not justiciable. This was essentially on the basis that that would require the Court to make a determination as to the correct public policy or political decisions to be made, including as to the level and manner of resourcing. The Court accepted that the principles of negligence must operate consistently with the doctrine of the separation of powers but agreed with the High Court that the risk assessment of organisms is a "technical decision" unrelated to economic or political considerations. Accordingly, the Court rejected that Crown argument and applied the standard analysis of novel duties of care – considering foreseeability of harm, proximity of relationship and policy considerations as mandated by the Supreme Court case of *North Shore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341 [*The Grange*] (in which the court determined that the Crown, unlike councils, did not owe a duty in respect of leaky buildings)

Foreseeability and proximity

Foreseeability of harm was easily determined and the Court rejected the Crown submission that proximity should be confined to "an actual relationship", such as that between MAF personnel and Kiwi Pollen as an import permit applicant. Rather the Court found that there were numerous factors supporting the finding of a proximate relationship between the kiwifruit growers and MAF. They included:

1. knowledge of MAF personnel that kiwifruit was a key export crop for which border security was of real importance;
2. knowledge that Psa was a pest;
3. the difficulty in containment of the disease coupled with the fact that kiwifruit growers in New Zealand are highly concentrated

geographically;

4. the operational control exercised by MAF personnel at both the pre-border (import permit approval) and border (inspection) stages;
5. the inability of growers to take steps to reduce border security risk; and
6. hence the inevitable reliance upon MAF personnel to manage and control risks to the industry and the growers' particular vulnerability to the consequences of a failure to manage and control the risks.

The Crown further argued that proximity should not be found because MAF personnel were neither the direct cause nor the primary source of the harm. The direct harm to kiwifruit growers' properties, it said, was caused by Kiwi Pollen through its application of the Psa infected material to the relevant orchards. The Crown said that it was not right to hold MAF personnel morally culpable (the ultimate foundation of negligence liability) for the Psa incursion on the ground that they failed to prevent a third party from bringing a dangerous good into New Zealand. However, the Court of Appeal cited familiar cases to emphasise that courts have routinely recognised duties for failing to prevent harm caused by third parties. In *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 (HL) the primary source of risk was the borstal trainees (not the Home Office employees). In *Couch v Attorney-General (Couch No 1)* [2008] NZSC 45, [2008] 3 NZLR 725 it was Mr Bell (not the parole officer). In the building inspection cases the primary sources of risk were the building, the environment and the builder (not the inspector). Further, the court recognised that kiwifruit growers, with property rights in the vulnerable vines, were a class specifically at risk from the introduction of a kiwifruit pathogen such that proximity between them and MAF should be found (noting that the Court did not engage with the cross-appeal of the post-harvest operator, in respect of which the High Court had found no duty owed).

Policy

The most significant aspect of the case, however, is the Court's analysis of policy arguments. The Crown argued that the growers' claim was one of liability for failure to protect their economic expectations against the adverse consequence of a biosecurity risk crossing the border and being realised. Such liability involved the potential indemnification of participants in any primary industry against such consequences – and hence enormous damages.

While recognising the strength in this argument, the High Court had ultimately rejected it. It considered that there was a societal benefit from corrective justice, stating that if a person was harmed by the negligence of a government body, it was in society's interests that the government compensate for that harm unless there is a sufficiently countervailing public interest. The High Court was not persuaded that generalised concerns about indeterminate and disproportionate liability provided such a sufficiently countervailing interest to displace the corrective justice interest in this case. Unsurprisingly, the plaintiffs, too, emphasised that ordinary principles of compensatory justice

dictate that a victim should not be left to bear reasonably foreseeable loss caused by a proximate defendant (which, as a matter of fact, both the High Court and Court of Appeal found in this case).

The Court of Appeal, however, saw indeterminacy as a more important issue, emphasising the example that a 2014 Economic Impact Assessment estimated that a large-scale foot and mouth disease incursion in New Zealand would result in a net present value loss in real GDP over the years 2012 to 2020 of $16.2 billion. Its view was that the fact that the Crown was the defendant was not a reasonable rejoinder to the problem of indeterminate liability. It emphasised that there is a legitimate interest in regulatory bodies being free to perform their role without the chilling effect of undue vulnerability to actions for negligence. The Court expressly rejected the High Court's views on corrective justice saying that "the implications of indeterminate liability of the scale in contemplation here are of such significance that even the Crown ought not to be cast in the role of indemnifier" (at [260]). It stated that "[i]f liability of this magnitude is to be contemplated for biosecurity hazards, we suggest that it would better it be introduced by legislation, in which its metes and bounds might be thoroughly examined and laid down."

Further, the Court of Appeal saw that the fact that imposition of liability would have potentially significant financial implications, both in terms of paying compensation and having to pay the costs of dealing with claims, which would either result in a reduction in spending on other public services or an increased burden on the public, or both, as "an additional telling consideration which serves to negate the imposition of a duty of care in the present case." Thus the Court concluded that the imposition of a duty of care in this case would not be fair, just or reasonable.

Comment

Issues of exclusion of liability and/or novel duty in tort are frequently dealt with at the strike out stage. It is unusual for plaintiffs to establish as a fact, as they did here, that a proximate defendant's negligence has caused them loss and yet be left without any remedy. Accordingly, even more than usual, this case raises squarely the tension between the role of tort law being to ensure corrective justice and the legitimate policy reasons to avoid the state being the ultimate indemnifier of social costs – particularly in areas in which it has no real choice but to regulate. The interpretive points relating the Crown Proceedings Act may ultimately be determinative. However, it is how the Supreme Court addresses the policy tension between the desire to ensure corrective justice and the problems of indeterminate liability that will be of most significance to regulators, their insurers, those who may suffer loss as a result of state action and, of course, their potential litigation funders. ■

Tim Smith is a partner with Bell Gully, Wellington. Tim was formerly a Crown Counsel in the Crown Law Office and was junior counsel for the Attorney-General in *North Shore City Council v Attorney-General (The Grange)*, the leading Supreme Court case on analysing novel duties of care.

UPDATE – AML/CFT

Crunch time for AML/CFT regimes

BY **MARTY ROBINSON**

FIRST, LET ME START WITH THE BAD news: You'll flunk your external AML/CFT audit if you based your documents on the Law Society templates without injecting considerable critical analysis of your firm's own specific situation, customising the templates accordingly and adding in the statutory requirements missing from the templates.

The Department of Internal Affairs said in its Regulatory Findings Report for 2018 – 2019, published in January, that:

> "Some businesses, particularly within the legal and accounting sectors, have relied heavily on generic templates, and their measures do not reflect their individual businesses' money laundering or financing terrorism risks."

The report inevitably concluded that many firms failed to treat specific ML/TF risks stemming from their customers, services, transactions and other factors, and also pointed to a disconnect between the processes outlined in AML/CFT documents versus what businesses were doing in practice.

Small legal (and accounting) practices in particular have placed undue faith in documents that were assumed (although were never intended) to be complete solutions to complex and dynamic obligations in an area of law most were unfamiliar with.

This is understandable given the weighty compendium of interpretive guidance material from the supervisors and the Police Financial Intelligence Unit, not to mention the novelty of the regime's risk-based decision-making and the need for practitioners to understand the Act's geopolitical underpinnings including various methods and structures employed to launder funds or move terrorist financing.

The sheer size of the compliance task has been underestimated by many practitioners lacking the budget, staff or personal time to devote to even the domestic law and guidance material, let alone the international information the supervisors recommend is reviewed.

Recent experience of compliance activity and audits

It's increasingly clear that firms who copied the generic templates without appropriate customisation have in many cases failed to properly understand or comply with their own documents. DIA compliance action and external auditors' reports are routinely finding that law firms' AML/CFT documents and systems, when based heavily on generic templates, are significantly less compliant than the firms assumed.

These issues, whether identified by auditors or firms themselves ahead of their 2020 audit, should ideally be fixed before the annual report is due in August 2020. This will ensure your firm's annual reporting is a positive experience rather than one that leaves a fear of looming regulatory attention.

Law Society warnings over generic documentation

While the Law Society templates were rebranded 'specimens' and their disclaimers augmented in late 2018 (see "AML/CFT Compliance: Emerging Practical Issues" on the Law Society AML/CFT web pages), not everyone saw this, nor did they fully appreciate that generic templates or specimens cannot perform the legislatively required tasks of:

1. assessing the firm's specific money laundering (ML) and terrorism financing (TF) risks through a number of statutory lenses; then
2. implementing customised processes accordingly to address those specific assessed risks.

The Law Society specimens lack some statutory requirements altogether and are light on others, requiring substantial additions to be fully compliant.

They were arguably a useful stepping off point, but it would be more apt to characterise them as an instruction manual (particularly the risk assessment) with some suggested compliance checklists rather than a ready-formed collection of compliant processes.

Typical small general practice firm

A small general practice with six staff recently had their documents inspected by the DIA, who returned a finding typical to those using the Law Society documents of:

- 11 areas of non-compliance;
- 12 of partial compliance (which could equally be termed partial failure);
- 8 areas of adequate compliance.

This degree of non-compliance came as an unpleasant surprise to the firm and cost extensive time and resource over several months on a remedial plan requiring two re-writes on a fixed schedule.

This is an increasingly common outcome both with DIA regulatory reviews and external audits.

Other developments

The regulatory heat has also started to rise with the DIA recently undertaking its first criminal compliance prosecution for non-compliance with the AML/CFT Act (to be distinguished from money laundering prosecutions under the Crimes Act) and, in the legal sector, lawyer Andrew Simpson's recent 13 convictions for money laundering in the context of an organised criminal group laundering drug criminal proceeds. Mr Simpson characterised his involvement as being initially naive (albeit with things "ramping up") rather than any fully intended participation in the laundering operation.

So how can all this impending calamity possibly yield *good* news?

DIA function

First, understanding how the DIA operates will help calm nerves and point to the best use of 2020 for your firm.

The supervisors take a targeted, risk-based, and responsive approach to their regulation as AML/CFT supervisors. They use risk analysis and intelligence to prioritise regulatory intervention where they can maximise compliance improvements and prevent the greatest potential harm. They seldom jump straight to the apex of the regulatory triangle of enforcement responses. Education and supportive engagement are their starting point.

While supervisor reviews of businesses' AML/CFT regimes have a degree of randomness at the outset, they become more targeted as they accumulate more information about a sector and its participants.

The DIA is generally more likely to request a copy of a law firm's documents or pay you a compliance visit if your services or customers present higher ML/TF risks or you fail to assess and treat those risks appropriately or both.

Lack of compliance with administrative aspects of the regime may suggest non-compliance with substantive aspects. So be on time with your audit (where possible) and your annual report at a minimum. (DIA advised on 24 April that compliance action will not be taken against firms completing independent audits late, provided they can show good faith efforts to complete it and explain how COVID-19 derailed them. Audit can occur remotely where the firm and auditor can access the necessary information.)

If your annual report is late or defective, or discloses more non-compliance than other firms, you'll naturally stand out as more likely to require intervention. Equally, a late audit may raise concerns.

Intervention usually starts with a 'desk-based review' where the DIA reviews your risk assessment and programme on paper for technical compliance. Typically, untailored Law Society specimens may indicate that a firm has not appropriately assessed its specific ML/TF risks and this may invite further attention as in the example above.

How quickly can this get dangerous?

High Court civil action and prosecution are not the next logical steps for the DIA when dealing with firms honestly trying to comply with the AML/CFT Act. Where a remedial plan was unsuccessful and the firm remained wilfully non-compliant, the DIA does have a range of enforcement tools it could use. But on past experience with Phase 1 entities, it seems highly likely that lawyers will not suffer anything worse than a formal warning any time soon. Such a warning simply warns the entity that sanctions may be imposed if areas of AML/CFT non-compliance are not addressed, and in all but the most egregious cases, they are. Depending on the seriousness of the non-compliance, the DIA has the power to publish the formal warning, in part to deter other entities in a similar situation.

Harder enforcement tools include enforceable undertakings, injunctions, civil pecuniary penalty applications (civil fines up to $2 million for entities or $200,000 for individuals) and, ultimately, criminal prosecution for compliance breaches.

The harder compliance responses could be used with Phase 2 entities in the more distant future but, given these responses have taken since 2013 to eventuate for the Phase 1 entities, it is a fair bet that lawyers have a good deal of time yet to mature in their compliance understanding and systems.

It may not necessarily take seven years like it has for Phase 1 entities to reach the top of the enforcement triangle. Arguably Phase 2 entities have benefitted from Phase 1 entities' mistakes and regulatory lessons, which could shorten the time for expected compliance maturity to some degree.

But the point of this article is to steer you towards tackling deficiencies while it can still keep you off the supervisors' radar.

Timing of external audits

Second, it's useful to know how your external audit can be used to increase your picture of compliance. Here, timing is important.

Your auditor must rate your compliance with the Act's various requirements and rate your policies, procedures and controls for their adequacy and effectiveness. They will generally recommend how you might fix any problems identified.

If you get your audit early, you'll have plenty of time afterwards to address the identified issues before you report to the DIA on the results and implications of your audit in August.

If you get the remedial work done in time you won't stand out as a compliance delinquent needing further attention. And that situation will probably endure beyond 2020 because:

1. you'll be seen as low risk by the supervisors; and
2. your early and proactive approach to the remediation will have given you useful insights into the AML regime and the necessary time to make what many are finding time-consuming and wide-ranging repairs. This will engender better confidence and contentment with the regime, which the DIA's Regulatory Findings Report correlated with higher quality compliance.

This will all put you in good stead going forward.

An even more proactive approach is to tackle your AML documents *before* getting the auditor in so that the audit highlights less remedial work to carry out before your annual report is due.

In this case, make sure to:

1. consider the various guidance documents carefully;
2. check you've covered all areas from sections 57 and 58 (the primary requirements for risk assessments and programmes); and
3. ensure you've brought relevant parts of guidance across rather than obliquely referring to large swathes of information in external documents – which your staff probably won't bother reading.

Some specifics to start with

The DIA said many firms' AML documents were simply incomplete, failing to cover all relevant obligations, such as appropriate procedures for checking for politically exposed persons, beneficial ownership checks, enhanced CDD and reporting SARs and PTRs.

The Law Society documents for example omit staff training procedures (they just reiterate the legal requirement to have some), their references to PTR and SPR reporting simply refer the reader to generic guidance in the Lawyers and Conveyancers Guideline (as is the case with many key concepts that should really be in the Programme), they do not deal with exceptions policies (not to be confused with delayed CDD), and they omit reference to whether the entity will opt out of the Code of Practice. Enhanced CDD in particular is dealt with by referring reader to the generic LCG guidance and needs greater inclusion in a firm's documents. And the Law Society's Matter Risk Assessment Form (a sub-part of its compliance programme) leaves practitioners without clear guidance about when enhanced CDD is statutorily required, meaning many firms are under-complying – or in some cases over-complying due to their lack of clarity about when enhanced CDD is triggered).

The Law Society's "AML/CFT policies" document (also a sub-part of its compliance programme) says the DIA's Guidelines for the Legal Sector can be found on the website of the Jersey Financial Services Commission (which is incorrect). The Law Society's division of the AML Compliance Officer into the roles of MLCO and MLCO is another unnecessary result of copying northern hemisphere regime precedents.

Some key guidance to start with

Some of the most useful documents firms should read include the Lawyers and Conveyancers Guideline, the guidance on creating risk assessments and programmes, and the DIA's Risk Assessment and Programme: Prompts and Notes document, all available on the DIA's lawyer-specific AML page.

Your documents must do more than suggest you will follow what's set out in those documents, as the specimens often do. That approach leaves the DIA and auditors wondering if you've properly considered how the generic guidance applies to your own situation and whether you actually link into those documents each time your documents refer you to them. Where relevant, provisions from the guidance need to be brought through into your own documents and customised to your specific services, clients and systems.

What to do

So to summarise, there is an annual report in August. You should will probably have had your auditor in by then. The annual report will take into account the results and implications of the audit.

You can either report back that you've fixed all the issues identified, or (even better) that you had a clear audit. (NB: This is very rare.)

The two suggested approaches then are to either get the auditor in quickly so you have plenty of time to address what may be extensive issues in their report, or proactively tackle the documents yourself while still getting an auditor early enough that you have sufficient time before August to address any remedial work you may have missed. Complicated AML/CFT obligations can significant take time to fix or get help with, so an early start is the best antidote to revelling in any compliance notoriety. And it will avoid bottlenecks.

Concluding note

Don't be disheartened. Your first external audit may highlight a number of unseen problems. But a proactive approach in the run up to August will serve you best in the long run and give you greater confidence in a tricky new area that has caused many firms stress and confusion as the regime beds in for the legal profession.

But remember, the DIA will always start with education and engagement first, particularly where firms are obviously trying to comply. They understand and appreciate that adjusting business processes and coming up to speed with the AML/CFT Act do require a lot of change. And they routinely remind entities that, despite early difficulties, compliance does become common practice as business processes mature and embed. ■

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New Zealand Law Society | Te Kahui Ture o Aotearoa comments

The Law Society agrees that specimen documents are a springboard for reporting entities to adapt to their own individual situation . The Law Society released complementary guidance in March 2018 to assist lawyers using specimen documents as part of preparing their compliance programmes and understanding their AML/CFT obligations. This guidance is a practical 'How to use' guide which emphasises the need for law firms to adapt any specimen to their individual circumstances and the need to draw on a range of sources in creating a compliance programme.

The guidance specifically says: "Lawyers must adapt any AML/CFT specimen documents to take into account their particular circumstances. The Department of Internal Affairs (DIA), as supervisor of the legal profession for AML/CFT purposes, emphasised the importance of this when it was consulted by NZLS about the specimen documents. The form and content of all AML/CFT compliance documents ultimately adopted by law firms must evidence a clear understanding of AML/CFT obligations and how they apply in the context of each specific legal practice. There is absolutely no 'one size fits all' approach to AML/CFT compliance".

It is important to look at the context within which specimen documents are provided. The Law Society has promoted a range of helpful guidance to be used in conjunction with the specimen forms. This includes the DIA's *Risk Assessment and Programme: Notes and Prompts* and a range of other resources including NZLS CLE Ltd webinars, topic guidance and a dedicated Panel of Friends.

In our experience, many firms have welcomed the assistance provided, and the specimen documents are just one piece of the support on offer. The Law Society engages regularly with the DIA on AML/CFT related concerns and works collaboratively to provide assistance and support to lawyers to ensure they are meeting their compliance obligations. ■

UPDATE – PROPERTY

The New ADLS-REINZ Agreement

Part 3

BY **THOMAS GIBBONS**


Thomas Gibbons

THIS ARTICLE CONTINUES A SERIES ON THE new ADLS-REINZ agreement for sale and purchase of real estate (10th edition) (*LawTalk* 937, March 2020, pages 47-48 and *LawTalk* 938, April 2020, pages 54-55). Property lawyers and legal executives are no doubt becoming more familiar with the new form of agreement.

Page 9 – Warranties

Clause 8.2(7) has an amended unit title warranty: that the vendor has no knowledge or notice of any fact which "might result in" the owner incurring liability under the Unit Titles Act 2010, or of any proceedings by or against the body corporate, or of any order or declaration being sought against the body corporate or the owner.

The "might result in" requires a degree of foresight on the part of a vendor (or, more likely, a lawyer or legal executive). An advisor likely has a positive duty to raise this warranty with a vendor client. But does an advisor have a positive duty to (say) ask for body corporate minutes, in order to be further satisfied as to the "might result in" test? Probably not, but it's worth considering the extent of vendor due diligence which might become desirable in future.

Clause 8.3 clarifies that the right to postpone settlement for non-provision of insurance information or non-provision of a pre-settlement disclosure statement on time is *in addition to* the purchaser's rights under sections 149 and 150 of the Unit Titles Act 2010, highlighting again the interplay of contractual arrangements with a statute. One reflection is that statutory provisions like those in the UTA could provide that different contractual provisions are okay, as long as they are no less favourable to a purchaser than the statutory protections. That is, why shouldn't a contract be able to provide more consumer protection than a statute without falling foul of it?

Clause 8.4(1) provides that a party's notified email is an address for service for the purposes of section 205(1)(d) of the UTA. (As a matter of interest, section 205(1)(d) also allows for fax service.)

Page 10 – Conditions

The finance condition contained at clause 9.1 has seen a massive overhaul. The assumption is now that the purchaser can choose its own bank or other lending institution, and that the terms of the finance must be satisfactory to the purchaser; but if the purchaser avoids the agreement for failing to satisfy the finance condition, the purchaser must "provide a satisfactory explanation of the grounds relied upon by the purchaser, together with supporting evidence, immediately upon request by the vendor".

Several points can be made. First, the agreement is now clear that evidence must be provided for failure to satisfy finance. Second, this has sort of been the case for some time, though with a greater degree of grey area. (A purchaser has long been required to take reasonable steps to satisfy finance, and any other condition, under clause 9.10(5).) Third, it amplifies what all lawyers and legal executives know already – that a finance condition is not a general right of exit.

Fourth, and perhaps most importantly, the words "satisfactory explanation" invite further question. Satisfactory to whom? The vendor, or the purchaser? Or a third party? It may well be the case that the vendor would deem any explanation satisfactory, while for a purchaser, nothing would cut the mustard. We must therefore impute a reasonableness requirement into this clause; perhaps, on reflection, "reasonable" might be a better word than "satisfactory".

Clause 9.4 has seen two amendments: one which allows 15 working days for a builder's report (clause 9.4(1)), and one which provides that a builder's report must be in writing (clause 9.4(2)).

Page 11 – Conditions (continued)

Clause 9.5 sees an entirely new clause: a condition for a toxicology report. Now, there is an argument that the days of methamphetamine and other contamination reports have passed, as the

Gluckman report on methamphetamine contamination in residential properties significantly altered thinking around the appropriate standards.

The toxicology report gets marked on the front page. The purchaser is to order the report and make an assessment as to whether it is "satisfactory to the purchaser, on the basis of an objective assessment" (clause 9.5(1)). It is work noting that these words as to an "objective assessment" are missing from the finance condition. The default timeframe for the clause is 15 working days, and the purpose of the report is to detect whether the property has been contaminated by the preparation, manufacture, or use of drugs (including but not limited to methamphetamine). The report must be in writing, and prepared in good faith by a suitably qualified inspector using accepted methods (in particular, NZS 8510:2017 *Testing and decontamination of methamphetamine-contaminated properties*). Subject to the rights of any tenant, the vendor is to allow the inspector to attend the property at reasonable times and on reasonable notice to perform the inspection, though invasive testing must not take place without the vendor's prior written consent. If the purchaser cancels the agreement for non-fulfilment of this condition, then the purchaser must provide a copy of the inspector's report immediately on request by the vendor.

Interestingly, clauses 9.1(2) as to finance and 9.4(5) as to the builder's report refer to a purchaser *avoiding* the agreement, while clause 9.5(6) (toxicology) refers to a purchaser *cancelling* the agreement. The meaning is presumably the same, though the word "cancel" seems both more modern and more precise.

Also interestingly, clauses 9.1(2), 9.4(5), and 9.5(6) seem to refer to the finance evidence or builder/toxicology report only being provided if the agreement is avoided/cancelled by the purchaser for non-fulfilment of that condition. This creates a couple of further issues. First, if a purchaser has a builder's report showing substantive issues, then a purchaser could avoid the agreement under that without having to provide copies of (say) the finance evidence and the toxicology report. Second, if a purchaser simply does not notify the vendor as to the condition and the vendor then cancels, or even if the agreement remains in abeyance, then it seems the vendor has no entitlement to the report. So, for example, let's say the finance condition is due on 10 May. If the purchaser does not satisfy the condition, then the vendor can make enquiries as to what the purchaser has done under clause 9.10(2), but not a lot further. Eventually, on say 25 May, the vendor gets sick of waiting and cancels. As the purchaser has not avoided/cancelled, the obligation to provide the evidence/report has not been triggered.

The Overseas Investment Act 2005 has increased in application, with recent reforms covering residential property to a greater extent than was previously the case. The OIA condition in clause 9.6 has been amended, to provide that OIA consent must be on terms and conditions that are "satisfactory to the purchaser, acting reasonably" (noting again that these are the words missing from clause 9.1). Clause 9.7, as to the Land Act 1948, has been amended to clarify that Land Act approval is a condition. A heading on the application of section 225 of the Resource Management Act 1991 has been added.

And if you thought the contractual provisions in the UTA were poorly drafted, then re-read section 225 of the RMA. That's at a whole other level. Though it also reinforces a difficulty mentioned above: the challenge of drafting a contract that fits in with differing statutory provisions. We live in a world in which many contracts are regulated by statute, and the ADLS-REINZ is an archetypal example of this. ■

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UPDATE – PROPERTY

Challenging a Tenancy Tribunal decision

BY **JOSHUA PIETRAS**

The Tenancy Tribunal ("the Tribunal") is an unfamiliar forum for most civil litigators. This is most likely due to the prohibition on legal counsel in all Tribunal proceedings, except where the amount in dispute exceeds $6,000.00.

However, the Tribunal is also the most popular judicial forum in New Zealand. The Tribunal hears approximately 20,000 cases each year, more than any other Tribunal including the Disputes Tribunal. This arguably makes it the most common interface with the justice system for many citizens.

Unsurprisingly, there has been a large number of challenges made against Tribunal decisions. In fact, in 2019, there were 100 appeals from the Tribunal to the District Court.

The Tribunal does not just hear disputes between tenants and landlords. It also has jurisdiction to hear disputes between unit owners and body corporates under the Unit Titles Act 2010. In all cases, the Tribunal can award damages of up to $50,000.00.

Due to the Tribunal's broad jurisdiction, all civil litigators should have a general understanding on how to challenge a Tenancy Tribunal decision.

There are two ways that a party can challenge a Tribunal decision:

1. Apply to the Tribunal for a rehearing; or
2. Appeal the Tribunal's decision to the District Court.

Joshua Pietras

This article will discuss these two options in more detail, with reference to recent case studies.

Rehearing

Grounds for rehearing

The Tribunal may order a rehearing on the ground that a substantial wrong or miscarriage of justice has occurred.

The words "substantial wrong or miscarriage of justice" set a high threshold for a rehearing. A rehearing will not be granted just because one party believes the Tribunal was wrong in its findings of facts or in its application of the law. It will usually require a party to point to some procedural unfairness with the way the hearing was conducted.

Some examples of when a rehearing may be granted include:

- Where an Adjudicator has improperly admitted or rejected evidence;
- Excessive intervention by the Adjudicator;
- Misconduct by one of the parties;
- Misconduct by a witness;
- Where a party has not had an opportunity to cross-examine a key witness;
- The availability of new evidence in certain circumstances; and
- Where a party has not received notice of the hearing.

Timeframe

A party must apply for a rehearing within 5 working days of the Tribunal's decision being issued. This timeframe is strict, and the Tribunal will not normally indulge requests for an extension.

Where a rehearing is excluded

It will not always be possible to seek a rehearing for every type of dispute that comes before the Tribunal.

In *Pandey v Keralan & Co Trust* [2019] NZTT Palmerston North 4160041 the tenant applied for a market rent review under section 25 of the Residential Tenancies Act 1986, alleging that the landlord's purported rent increase from $180.00 to $250.00 per week was unlawful because it exceeded the market rent by a substantial amount.

At the first hearing, the Tribunal found that the tenant had failed to

prove that the new rental figure "exceeded the market rent by a substantial amount". This was because the landlord had produced a market valuation by a property manager who was familiar with the building, together with MBIE rental statistics. As a result, the tenant's application was dismissed.

The tenant immediately applied for a rehearing on several grounds, one of which was that the landlord's market rental valuation was defective because it had been based on a different unit within the same building.

The Adjudicator decided to grant a rehearing, but in doing so, overlooked the fact that section 105(6) of the Residential Tenancies Act 1986 expressly prohibits a rehearing of any market rent review application.

After this matter was brought to the Adjudicator's attention, the Tribunal agreed that it did not have jurisdiction to order a rehearing on this ground alone. Accordingly, the tenant's challenge to market rent review was dismissed.

Appeals

Grounds for Appeal

Where a party disagrees with the Tribunal's decision, the most appropriate way of challenging the decision will be to file an appeal in the District Court.

Section 117 of the Residential Tenancies Act provides that a party can appeal the decision of the Tribunal (including a decision to grant or refuse a rehearing) to the District Court if:

1. The order is a final order and not an interim order;
2. Where the appeal is against a money order, the amount in dispute is $1,000.00 or more;
3. Where the appeal is against a work order or failure to make a work order, the value of the work in dispute is more than $1,000.00.

Most Tribunal decisions will require one party to pay a certain sum of money to the other party.

However, the right to appeal will not be affected by a deduction of any amounts awarded under a counterclaim.

For instance, in *Stewart v Bland* [1994] DCR 417 the District Court found that the adjudicator's award of $950 could be appealed against because it comprised an award of $1,440 to the landlord less an award of $490 on the tenant's counterclaim.

There is an automatic right of appeal against all other non-monetary orders, such as a possession and termination order.

Timeframe

Appeals must be filed in the District Court where the hearing was held within 10 working days of the date of the Tribunal's decision. Again, the timeframe for lodging an appeal is strict and extensions will not be granted unless there are exceptional circumstances.

Nature of Appeal

The courts will generally treat an appeal in the same way as a rehearing, where the court will consider for itself the issues canvassed at the original Tribunal hearing.

The courts have adopted a conservative approach when considering appeals against an order of the Tribunal.

In *Housing New Zealand Corporation v Salt* [2008] DCR 697 the District Court made it clear that it will only differ from the factual findings of the Tribunal if:

1. The conclusion reached was not open on the evidence; that is, where there is no evidence to support it; or
2. The Tribunal was plainly wrong in the conclusion it reached.

The narrow grounds for appealing a Tribunal order is demonstrated by a recent High Court decision.

Case Study: *Whakatihi v Rent Assured Rotorua Ltd* [2019] NZHC 2873

This case concerned an appeal against a decision of the District Court, which itself was an appeal from a previous decision of the Tribunal.

Background

Ms Whakatihi was the tenant in a property in Rotorua. The respondent, Rent Assured Rotorua Ltd, was the landlord. Ms Whakatihi had rented the property for just over one year, when the landlord issued a 90-day termination notice under s 51 of the Residential Tenancies Act.

The notice was the culmination of an ongoing dispute between Ms Whakatihi and her neighbours, which the landlord had tried to resolve unsuccessfully. Ms Whakatihi's neighbours were also served with a 90-day termination notice, and left the property without issue.

Tribunal Decision

Ms Whakatihi's claim before the Tribunal was that notice was unlawful because it was "motivated wholly or partly by her exercise of her right to quiet enjoyment".

In dismissing Ms Whakatihi's claim, the Tribunal found that the landlord had taken reasonable steps to try sort out the problems between the neighbors, and that "the notice was a last resort to end the ongoing and seemingly intractable dispute".

The Tribunal also placed considerable reliance on two written statements from the landlord's contractors, which confirmed that Ms Whakatihi had acted in an aggressive manner on previous occasions.

District Court Decision

On appeal, District Court Judge Mabey found that he was satisfied that the Tribunal's ruling was correct. In His Honour's view, there was not a hint of retaliation in the actions of the landlord, and Ms Whakatihi had not provided any evidence to show that the 90-day termination notice was "motivated wholly or in part by retaliation for her insistence on her right to quiet enjoyment."

High Court Decision

Ms Whakatihi appealed once again to the High Court. This time, her main ground of appeal was that there was simply no or insufficient evidence upon which the District Court Judge could have reached the conclusion that he did. She was also concerned with the reliance placed by both the Tribunal and the District Court on the written statements by the two contractors who were not called to give oral evidence and therefore were not cross-examined.

At the outset, Justice Fitzgerald noted that there was no dispute that the District Court had correctly applied the statutory test under s 54 of the Residential Tenancies Act. The sole issue for the appeal was whether there was no or insufficient evidence to support the findings actually reached.

After reviewing relevant case law, Justice Fitzgerald concluded that, in rare occasions, an ultimate conclusion of a fact finding body can sometimes be so unsupported – so clearly untenable – as to amount to an error of law. However, in Her Honour's view, those circumstances did not arise in the current case.

The High Court agreed with the District Court Judge that there was ample evidence that the issue of the notice was not "motivated wholly or partly by the exercise by the tenant" of any rights under the tenancy agreement. Rather, it was issued as a last resort in the context of an ongoing and intractable dispute between two neighbors.

Finally, Justice Fitzgerald found that the Tribunal and the District Court were entitled to receive into evidence the two written statements from the landlord's contractors. What weight the Tribunal and Judge Mabey put on those statements was entirely a matter for them.

As a result, Ms Whakatihi's appeal was dismissed.

Conclusion

The Tribunal is New Zealand's most popular and unpopular *quasi-judicial* body.

The Tribunal is the most popular forum in terms of the sheer volume of cases that come before it. It is also the most unpopular forum due to the increasing number of challenges made against its decisions.

Tribunal decisions often involve complex factual and legal issues involving questions of property rights. The right to bring a claim before the Tribunal is an important part of exercising one's property rights, whether as a tenant, landlord, unit title owner or body corporate.

It is anticipated that the number of challenges to Tribunal decisions will continue to increase as parties come to grips with recent amendments to the Residential Tenancies Act 1986 and the Unit Titles Act 2010, and as the economy slowly recovers from the COVID-19 outbreak. ■

The Tribunal is the most popular forum in terms of the sheer volume of cases that come before it. It is also the most unpopular forum due to the increasing number of challenges made against its decisions

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UPDATE – TRUSTS

Use of mediation under the new Trusts Act 2019

BY **CAROLE SMITH**

Carole Smith

Of course, parties have always been able to use mediation to settle their disputes, as long as they are all willing to give it a try. However, cases involving trusts are a little out of the ordinary when it comes to compromise. One of the reasons for this is that trustees' ability to compromise is limited by statutory powers, and the court's interpretation of those powers.

Trustees' ability to compromise has also historically been limited by concerns that there may be pushback from beneficiaries who may not be bound by any settlement reached. Further, trust cases often involve family relationships, which can be complex at the best of times, and all parties may simply not be willing to enter into the mediation process.

The number of trust cases which have ended up before the courts, including the Supreme Court on occasion, have been a source of frustration for judges. As Dobson J said in *McLaren v McLaren* [2017] NZHC 161 at [93]: "I endeavoured to convey to counsel and the parties at the conclusion of the hearing my clear view that it is the professional responsibility of all advisers to apply their minds constructively and co-operatively to pursue all options for an overall settlement. Their primary task ought to be building bridges between the two sides, not preparing rockets to fire at each other".

One of the real difficulties with trust cases is that litigation costs are usually sought from the trust fund. So regardless of the outcome of the litigation, the fund is usually depleted, sometimes substantially. That cannot be in the beneficiaries' best interests.

Trusts Act mediation provisions

The Trusts Act 2019 will, when it comes into force on 30 January 2021, bring about a sea change on the mediation front. The court will be able to order Alternative Dispute Resolution (ADR) for internal matters regardless of whether the parties consent. Internal matters are disputes between trustees and beneficiaries, or trustees and trustees. The exception to this power is where the terms of the trust indicate a contrary intention.

My hope is that this provision will see far fewer trust cases make their way through the court system. The fact that if the court orders it, it will be mandatory, should not mean that mediation will not succeed. One only needs to look at the employment model to see how successful mandated mediation can be.

Other provisions in the Trusts Act will help to address other concerns trustees may have about compromise. For example, the Trusts Act provides a mechanism for internal matters to ensure that where a trust has unascertained or incapacitated beneficiaries, representatives for those beneficiaries will be appointed. Such beneficiaries will therefore be bound by any compromise reached.

Costs can often be a major factor in preventing compromise being achieved. When trustees apply to the court requesting mediation, they can also ask the court to order that the costs of that mediation be paid from the trust fund. If beneficiary representatives are required, their costs may also be met from the fund.

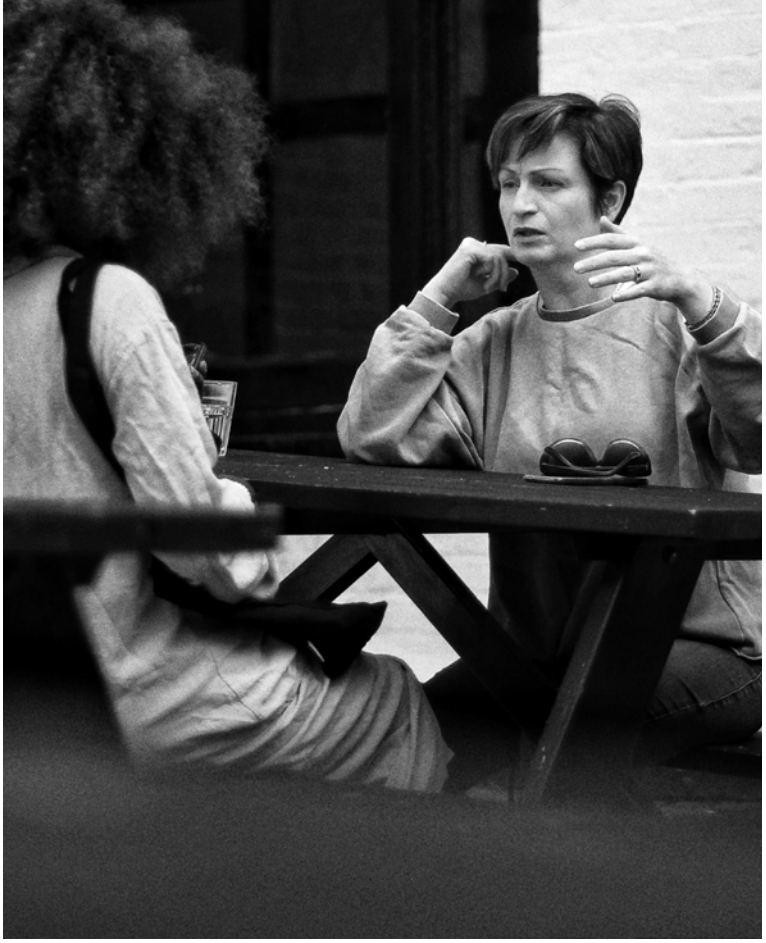
The indemnity position under the Trusts Act regarding when trustees may take their costs from the fund is essentially the same as the current position; that is, they may do so where they have acted reasonably. This is what the court will consider when being asked for an order under the Trusts Act that the trustees' costs of mediation be met from the fund. One would think that in requesting mediation, trustees would always be acting reasonably. However, much depends on the type of dispute the trustees are engaged in.

If compromise is reached, then if it involved court appointed representatives under the Trusts Act, the court's approval of the compromise will need to be sought. The court will not sanction the compromise if it is not in the best interests of the beneficiaries (for an Australian example in a family protection context see *Re Finnie; Petrovksa v Morrison* [2020] VSC 9). Trustees' participation in a compromise which is not court sanctioned will also potentially jeopardise their being allowed to take the costs incurred in mediation from the fund.

Have the trustees acted reasonably?

How can trustees properly assess whether they are acting, or have acted, reasonably? The issue of whether trustees have acted reasonably is a deceptively complicated beast. However, in short, following the categorisation of trust disputes in *Alsop Wilkinson v Neary* [1995] 1 All ER 431 and other relevant caselaw, the broad position regarding where trustees may take their costs from the fund, whether following litigation or compromise, is as follows:

1. where trustees are involved in a hostile trust dispute where there are rival claimants to a beneficial interest in the trust, such as a creditor of the settlor, trustees should remain neutral and leave it to the rivals to fight their battle. If they are seen to be preferring one beneficiary over another, and "lose" (whether as part of the compromise terms, or in litigation) they are at risk as to costs personally;



2. where trustees are involved in a hostile trust dispute regarding claims by beneficiaries to further provision from the trust, whether trustees can compromise depends on whether any element of the compromise involves a variation of the trust or a variation of the beneficial interests. If so, any compromise will require all beneficiaries' consent (although it could be argued that in the latter class of variation only the consent of the main protagonists would be required);
3. claims against trustees for breach of trust are dangerous territory for trustees regarding their costs – but all is not necessarily lost if trustees are able to remedy the breach of trust. In the context of compromise, much will depend on whether there is an admission of the breach;
4. claims seeking to remove trustees are very context dependent – even where trustees are removed by the court, they have on occasion been said to have acted reasonably in defending the application for their removal. In particular, the High Court in *Triezenberg v Mason* [2019] NZHC 920 was impressed with the efforts the removed trustee had made to resolve the proceedings. By way of contrast, the decisions of *Summerlee v Pool* [2019] NZHC 387 and *Jones v O'Keeffe* [2019] NZCA 222 provide examples of where removed trustees have had to pay not only their own costs personally, but at least part of the other parties' costs in addition;
5. claims seeking rights in the administration/execution of the trust to be enforced are generally straightforward, in terms of being both capable of compromise, and costs being met from the fund. However, it is not difficult to envisage a situation where, for example, trustees have not acted entirely reasonably in refusing to provide a beneficiary with information, and costs consequences may therefore arise (note the English decision of *Lewis v Tamplin* [2018] EWHC 777 (Ch) in this regard);
6. in disputes involving third parties, trustees still need to show that they have acted reasonably in order to take their costs from the fund. Whilst third parties might not be concerned about money coming out of the fund, beneficiaries may be and any settlement would, as with all settlements reached by trustees, need to be in the best interests of the beneficiaries.

This list is not exhaustive of the types of disputes trustees might find themselves embroiled in. However, it does provide some guidance on how trustees should conduct themselves regarding any compromise, and whether or not they are likely to have acted reasonably.

Beddoe orders

An article referring to trustees' costs would not be complete without mentioning *Beddoe* orders. Named after the 1893 decision of *Re Beddoe (Downes v Cottam)* [1893] 1 Ch 547 trustees can, if they are unsure about whether to pursue or defend proceedings, seek the court's directions about what to do. If Beddoe relief is granted, the trustees are fully protected as to their costs from the trust fund (assuming full disclosure was made in the first place).

Applications for Beddoe orders are relatively rare in New Zealand, but much more common in England, particularly in the context of pension schemes. It may be that they are not sought as often as they should be here. If trustees can take advantage of the ADR provisions in the Trusts Act at an early stage, any need for Beddoe orders will be further reduced.

Power to compromise

The specific power to compromise contained in current trust legislation is being subsumed into the ADR provisions in the Trusts Act. However, the power remains a broad one, with trustees essentially being able to compromise anything as long as they have acted honestly and in good faith (or any higher standard the trust deed imposes). Interestingly, trustees will not be liable by reason only that the ADR settlement was not consistent with the terms of the trust. It will be interesting to see how this provision is interpreted, but one possibility is that the common law restrictions regarding variation of trusts may be relaxed.

Ultimately, trustees have an obligation to preserve and safeguard trust property for the benefit of the beneficiaries. Mediation is a flexible confidential process able to deal with even extreme hostility. In *McLaren v McLaren* [2017] NZHC 161 and referred to above, at [94] Dobson J then said: "However embittered each side's view of the other might now have become, putting differences aside and making every possible endeavour to objectively recognise the concerns of the other side is now required. The alternative is to commit disproportionate personal and trust resources for the benefit of the lawyers."

Let's see if we can really help parties to trust disputes achieve an outcome that is in everyone's best interests. ■

Carole Smith is an Auckland-based barrister and mediator with FortyEight Shortland Barristers. She speaks and writes regularly on mediation and trust related topics. For more information, visit *www.carolesmith.co.nz* or *www.fortyeightshortland.co.nz*.

LAWYERS COMPLAINTS SERVICE

Complaints decision summaries

Censure and fine for conflict of interest

All names used are fictitious.

A lawyer who acted for the vendor and purchaser of a company, and for the company, has been censured and fined $3,000 for acting where there was a conflict of interest.

Mr Q agreed to sell Mr R his 42% shareholding and to exit the company they were both directors of.

The purchase price for the shares was to be repaid by monthly instalments over three years.

Mr Q was also to receive repayment for his current account advances to the company by monthly instalments over three years, and be released from a personal guarantee to the bank and supporting mortgage security he had given for company borrowings, within one year of the sale of his shares.

Six months after the agreements were signed, Mr R and the company stopped making the monthly payments. Mr Q was still owed a substantial amount of money and also remained liable for a bank guarantee.

Mr Q complained to the Law Society that the lawyer, Wrexham, who acted for both him and Mr R on the Agreement for Sale and Purchase of Shares and the Exit Agreement failed to adequately advise him or protect his interests.

However, Wrexham asserted that he had only acted for the company, and not for Mr Q or Mr R in a personal capacity.

Upon review of the material before it, a lawyers standards committee noted that Wrexham had met with both Mr Q and Mr R, copied Mr Q into a number of emails sent to Mr R, and provided advice directly to Mr Q in relation to a query about tax.

Breached rules 6.1 and 7

The committee found that by acting for Mr Q, Mr R and the company, Wrexham had contravened rule 6.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

Rule 6.1 prohibits a lawyer from acting for more than one client in circumstances "where there is more than negligible risk that the lawyer may be unable to discharge the obligations owed to one or more of the clients".

The committee said that as "primary parties" to the agreements, Mr Q's and Mr R's "respective interests were different and created a conflict". The interests were also "competing" and "needed to be protected".

Mr Q was "incapable of giving informed consent" for [Wrexham] to act for more than one party because Mr Q had no "proper appreciation" of the conflicts or their implications.

The committee also found that Wrexham breached rule 7 by not disclosing to Mr Q all the information in his possession that was relevant to the matter.

The share sale agreement provided for a three-year repayment term and the exit agreement required Mr Q's personal guarantee and mortgage to the bank to support the company borrowings for a year beyond Mr Q's departure from the company.

Those factors ought to have raised doubts for Wrexham about the financial positions of the company and Mr R, and the prospect of default by Mr R.

Wrexham did not advise Mr Q about these issues "or the need to include provisions in the agreement that might provide [Mr Q] with some protection," the committee said.

Contravened rule 8.7

The committee also decided that by using the company's confidential information for Mr R's benefit, Wrexham had contravened rule 8.7.

Information important for Mr Q to have received at that time was that if he transferred his shares to Mr R before Mr R paid for them, Mr Q would be an unsecured creditor of Mr R and of the company in the event of a default by Mr R.

That information, confidential to the company, was ultimately used "for the benefit of [Mr R] and to [Mr Q's] disadvantage."

As well as the censure and fine, the committee ordered Wrexham to pay $2,000 costs and ordered a summary of the decision to be published without any details that might lead to the identification of any parties.

On review, the Legal Complaints Review Officer (LCRO) – in LCRO 74/2017 – confirmed the committee's determination that Wrexham had breached rules 6.1, 7 and 8.7, which constituted unsatisfactory conduct.

The LCRO also confirmed the censure, the $3,000 fine, the $2,000 costs order and the committee's publication decision. However, the LCRO reversed the committee's determination that Wrexham had also breached rule 8.7.1.

Allegations of intimate relationship unfounded

All names used are fictitious.

A lawyers standards committee has taken no further action in relation to what it considered to be an unfounded allegation that a lawyer had entered into an intimate personal relationship with her client.

The lawyer, Humberside, represented

Mr M in proceedings under the Care of Children Act 2004. The Family Court made an interim parenting order and a temporary protection order against Mr M's former partner, Ms T, in favour of Mr M.

Ms T subsequently complained to the Lawyers Complaints Service, alleging that Humberside had entered into an intimate personal relationship with Mr M. Humberside denied the allegation.

After considering the submissions of both Ms T and Humberside, the standards committee considered that Ms T had failed to adduce any evidence whatsoever which would support her claim against Humberside.

While the committee considered that Humberside's correspondence illustrated "that she has at all times treated Ms T in a respectful manner", it was concerned about both the tone and content of Ms T's email correspondence with Humberside.

The committee readily acknowledged that Family Court proceedings are stressful for the parties, particularly when there are children involved. It did not accept however, "that Ms T was entitled to make [Humberside] the target of her personal frustrations with Mr M."

"Mr M is entitled to legal representation and to exercise his legal rights, whether by bringing proceedings or by some other means," the committee said.

While Ms T may have been disappointed that Mr M had not accepted her offers to resolve the proceedings outside of court, Ms T did not have a right to take out her disappointment on Humberside.

"There is no place for such conduct in Family Court proceedings. All parties, whether or not they are lawyers, must conduct themselves appropriately," the committee said.

The committee was satisfied on the material before it that Humberside had done nothing more than act on Mr M's instructions and protect and promote her client's interests in accordance with her professional obligations under the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

The committee also noted that if a lawyer is sufficiently concerned by the conduct of a party to a Family Court proceeding, "they should not hesitate to raise the conduct with the Family Court Judge presiding over the matter".

Lawyer misused court process

All names used are fictitious.

A lawyer has been fined $4,000 for filing an application for a parenting order on a without notice basis in circumstances where she could not have been satisfied the application complied with the requirements of the Family Court Act 1980 and the Family Court Rules 2002.

When imposing the fine, a lawyers standards committee said it considered the level of fine was "modest when considering the gravity of the conduct, relating as it did to the misuse of a court process".

The committee also noted that the lawyer, Berkshire, had been the subject of a number of previous disciplinary findings.

Ms A and Mr B were parents of a young child. After they separated, Ms A moved to another city, with Mr B's approval, while he did not move.

Ms A then instructed Berkshire for legal advice on her separation. On Ms A's behalf, Berkshire filed a without notice application under the Care of Children Act 2004 for an interim parenting order.

In the application, Ms A expressed a fear that Mr B would "retain" the child during or after an impending visit to the city where she now lived to have contact with the child.

Interim without notice parenting order declined

The Family Court Judge declined to make an interim parenting order on a without notice basis and directed that the application proceed on notice. The Judge referred the parties to Family Dispute Resolution (FDR).

Ms A and Mr B attended FDR and reached an agreement about contact arrangements for the next two years. The mediator documented what he understood to be the agreed parenting arrangements.

Ms A considered the mediator's report did not fully and accurately reflect her understanding of what had been agreed at FDR. Berkshire then prepared a consent memorandum, setting out Ms A's position on contact, and sent it to Mr B.

Meanwhile Ms A and Mr B agreed between themselves that Ms A would travel with the child to the city where Mr B lived so that he could have contact around the time of his birthday.

Berkshire then indicated that unless a written agreement was in place, unsupervised contact – including the planned contact in Mr B's location – could not occur.

Mr B signed the consent memorandum but said he had done it under duress because of "the written threat that he signs the memorandum or is outright denied further contact" with the child.

Berkshire was unwilling to accept the consent memorandum on the grounds that Mr B considered he had signed it under duress.

Mr B had concerns about the professional conduct of Berkshire and made a formal complaint to the Lawyers Complaints Service.

"Clear abuse" of without notice process

When considering the complaint, the standards committee noted that the Family Court Judge said the without notice application "represents a clear abuse of the without notice process".

"The strongest aspect of the application," the Judge said, "is the applicant's statement that she is 'concerned he may try and retain the child'. There is not a skerrick of evidence that the respondent will retain the child or has made any statements that he would attempt to do that."

The committee said it wished to reassure Berkshire that it did not consider it was bound by the Judge's views but would reach its own conclusion after considering the evidence before it.

A parenting order can only be made without notice, the committee said, where the risk of making an order on notice might entail serious injury or undue hardship, or risk to the personal safety of the applicant, or any child of the applicant's family, or both.

"There are onerous obligations on

lawyers providing a certificate in connection with a without notice application."

The committee said it considered it "significant" that Mr B had consented to the child moving cities with Ms A and to the child being enrolled in day care.

"Facebook messages exchanged by Ms [A] and Mr [B] suggest that they were on relatively amicable terms during the period following Ms [A]'s relocation.

"Mr [B] had even consented to Ms [A] travelling to Australia with [the child]. Mr [B] appears to have been accommodating with Ms [A]."

No suggestion of intention to retain child

The committee also noted that "there was no suggestion, in the amicable messages the pair exchanged, that Mr [B] or Mr [B]'s family intended to 'retain' [the child]".

The application "ought never to have been made on a without notice basis. [Berkshire] should have encouraged Ms [A] to engage in negotiations with Mr [B], and if those failed, to participate in FDR."

In providing a certificate for the without notice application, Berkshire had effectively misled the court. Her conduct was "very concerning from a professional standards perspective".

The conduct breached Berkshire's professional obligations under rules 2, 2.1, 2.3, 13, 13.1 and 13.2 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008. It was unsatisfactory conduct.

Mr B also alleged that Berkshire threatened that Ms A would not participate in a planned contact unless he signed the memorandum agreement. Even after he signed the agreement, Mr B said, the planned contact did not take place.

The committee said it rejected Berkshire's submission that it was not unusual in COCA matters which were subject to negotiations for no contact to occur until there is an agreement.

The stance Berkshire adopted towards contact was "troubling from a professional standards perspective", the committee said.

Berkshire had acted in an "unnecessarily adversarial and inflammatory manner" by suggesting an order was necessary for the planned contact to occur. However, the committee acknowledged that this was a "finely balanced case" and concluded that no useful disciplinary purpose would be served by making a further finding against Berkshire as concerns withholding contact.

As well as the $4,000 fine, the committee ordered Berkshire to apologise to Mr B in writing and to pay $1,000 costs.

Charged more than a 'fair and reasonable fee'

All names used are fictitious.

A lawyers standards committee has made a finding of unsatisfactory conduct against a lawyer who charged more than twice what a cost assessor considered a fair and reasonable fee.

The committee fined the lawyer, Edinburgh, $8,000 and ordered her to pay $1,000 costs.

The conduct was, in its view, at the "upper end of unsatisfactory conduct", the committee said.

Mr and Mrs N controlled a farming company. After a crop was sprayed and subsequently died, the company instructed Edinburgh to pursue a claim against the spraying company.

The firm Edinburgh works for billed approximately $73,000 plus GST and disbursements for the spraying claim, which was advanced to the point of sending a letter of demand to the spraying company.

The firm also provided advice in relation to insurance and earthquake claims for two properties; invoices for that work and the spraying claim totalled approximately $90,500.

The standards committee considering the complaint appointed a costs assessor.

The cost assessor noted that Edinburgh's hourly rate was $700 plus GST and an hourly rate of $200 plus GST for a junior lawyer working on the file.

The costs assessor considered a reasonable charge-out rate for Edinburgh's work was $500 an hour. That was based on an assessment of what other senior litigation practitioners in the local area, and national law firms, applied as their hourly charge-out rate.

Charge-out rate not disclosed from outset

In addition, it was also "most unfortunate" that Edinburgh's charge-out rate of $700 was not disclosed to Mr and Mrs N from the outset and well before the bills became disputed, the costs assessor said.

Noting that the junior lawyer had done the bulk of the work, the costs assessor observed that all the time recorded by the junior lawyer had been charged without any reduction made whatsoever.

"Any senior lawyer who employs junior lawyers to assist them, must supervise their work in a competent fashion and carefully scrutinise any time recorded against the value of the work undertaken and what is proposed to be charged," the committee said.

"A useful yardstick is to calculate the time that an experienced practitioner would have taken to complete the work required and then contrast that with the time recorded and the work actually undertaken."

As the cost assessor noted in his report, it was "quite extraordinary" to have charged such a fee for a case where proceedings had not been issued and no hearing (interlocutory or otherwise) had occurred, the committee said.

The costs assessor assessed a reasonable fee as being approximately $37,500.

A lawyer responding on behalf of the firm Edinburgh works for accepted that in all the circumstances, the fees rendered could not stand.

"It is to the significant credit of [Edinburgh and her firm] that they have accepted the recommendations and conclusions in the costs assessor's report and taken affirmative action," the committee said.

"They have written off all of the unbilled work, provided credit notes and reduced the accounts rendered by approximately $28,500."

The total fees have been reduced to approximately $37,500 and the firm has sent Mr and Mrs N a cheque for approximately $28,500.

LEGAL HISTORY

Three Twentieth Century Judges

BY **SIR IAN BARKER QC**

▲ Sir Ian Barker QC

When first writing this series I intended that I should discuss people prominent in the law in those distant days when I was a young(ish) lawyer. I later extended the menu to include some deceased judges who might not be well-known to many of today's lawyers. However, two of those I am including in this present offering are fairly recently deceased. All three were all excellent lawyers and judges as well as wonderful human beings. I was very fond of them and hence I felt able to step outside of any self-imposed limitation of subject-matter.

None of these was accorded a memorial sitting after his death. Such sittings have been fairly rare in Auckland in recent years, although I do recall a couple. Memorial sittings give the judiciary and the profession the opportunity to express not only sadness at the loss of a distinguished person, but to detail the contributions to the law made by the deceased – some of which would be unknown to many.

Sir Graham Speight (1921–2008)

Graham Speight was appointed to the Supreme Court bench in late 1967. I remember well walking with him along Waterloo Quadrant after a hearing in the saga of *Steel Construction Ltd v Queensland Insurance/ Westfield Freezing Works v Steel Construction Ltd* where he had been briefed as senior counsel. (As noted in an earlier article, *Westfield v Steel Construction* [1968] NZLR 680 was TA Gresson J's last written judgment: "The (then) Supreme Court Judges", *LawTalk* 935, December 2019, pages 69-75). Graham told me that I would have to soldier on in the case as leading counsel because of his appointment: but he generously offered the services of David Baragwanath as a junior. David was from his firm and newly returned from Oxford. He and Graham had been two of the successful counsel in *Fraser v Walker* in the Privy Council in the previous year. Needless to say, this offer was eagerly accepted.

Graham had had a distinguished war record. He was a partner in Meredith, Meredith, Kerr and Cleal (as Meredith Connell then was called) – then as now, the Auckland Crown Solicitor's office. He succeeded Sir Vincent Meredith and Mr GSR Meredith (known as "Mister Bob") as Crown Solicitor, the office he held at the time of his appointment to the bench.

He was one of the best cross-examiners I have ever encountered. I have listened to 40 years of cross-examination – some good, some execrable and most fairly ordinary. His questions were always shortly-expressed and usually permitted only one of two possible answers. He would never end a question with "Wouldn't you",

▲ The Kaimai ranges which separate Waikato in the west from Bay of Plenty in the east, where on 3 July 1963 an NAC DC3 en route from Auckland to Tauranga crashed.
epitree

"Didn't she" or other "N'est ce pas" type expressions which some lawyers use today and which are confusing for witnesses and judges. His addresses to the jury were succinct, displaying a complete mastery of facts and without unnecessary emotion. He was a very effective, fair and ethical prosecutor. His knowledge of the criminal law was encyclopaedic. In fact my first contact with him was as one of a class of about 25 in 1953, when I was taught criminal law by him.

Graham was briefed in civil cases – both for the Crown (lots of railway and forestry personal injury cases and Ministry of Works compulsory acquisition claims) and by other firms, mine included. The profession realised his skill in absorbing difficult facts and making them understandable to judges and witnesses.

The Kaimai air disaster proceedings

I had become involved with the aftermath of the Kaimai Air Disaster in 1963 when an NAC DC3, en route from Auckland to Tauranga, crashed into the Kaimai ranges on 3 July, killing all 23 people on board. Because none of the passengers was on an international ticket, the Warsaw Convention did not apply. Compensation for death claims on domestic flights was limited by a common form of statutory regulation in those over-regulated times, designed to limit the liability of a government-owned entity. The maximum amount that could be awarded for any one claim was £5,000 and, unlike for international claims, one had also to prove negligence. Some of the potential claimants under the Deaths by Accident Compensation Act 1952 clearly had claims for more than that amount.

Graham Speight (whom I instructed as senior counsel) and I persuaded all the various solicitors acting for the estates of deceased passengers and crew to agree to join forces in their damages claims. An unfortunate precedent showed the desirability of such a tactic. Sometime before

the air disaster, on 7 February 1963, a bus carrying people who had been to the annual Waitangi Day functions went off the road whilst traversing the Brynderwyns between Auckland and Whangārei when the brakes failed. There were 15 fatalities with others seriously injured, our worst road crash. A succession of diverse and uncoordinated claims was filed by different lawyers, without much commonality of defendants or causes of action. Some sued the bus operator; others the garage which had passed the brakes for a warrant. I believe there were other defendants. Defendants had different insurers. Some claims settled quickly, some dragged on. Some were said to have been settled too readily. I do not know since I was not involved in any of these claims. Yet the legal quagmire of uncertainty in the bus case convinced us that, given a statutory limitation and a deep-pocket defendant, all Kaimai claimants had to be united.

The solicitors who were in different locations, readily agreed and each estate was levied a contribution to the fighting fund. Each plaintiff was named in the proceedings that were issued. A cautionary tale for any sort of action involving plaintiffs with identical liability claims. We felt that prudence demanded the nomination of all plaintiffs in the proceedings filed because of an earlier test case which held that Glasgow leases (and there are a lot of them in Auckland) were subject to the Tenancy Act. The case had been taken in the name of one leasehold owner but many had contributed to the fighting fund. The leasing organisations (mainly church-oriented) quickly lobbied to get legislation passed to nullify the court ruling. But only the one plaintiff was excluded from the scope of the "reforming" legislation, despite the fact that many in a similar position had been affected and had contributed to the litigation cost. So we deemed it advisable to have all plaintiffs involved in the litigation. This cautionary tale about legislative "patching up" may still apply today in other than personal injury situations. One would hope that the Legislature nowadays would not be so compliant and be more resistant to lobbying.

The Air Department as defendant

Mindful that the draconian limitation of liability might prove hard to overcome, we looked around for another defendant and sued the Crown in the guise of "The Air Department" (because our expert advice had been that there were deficiencies involving the beacons and warning systems for Tauranga airport which, if better, might have warned the pilot of impending danger). We lost before Hardie Boys J (the elder) on a challenge to the limitation regulations (see *Graham v Attorney-General* [1966] NZLR 93). The Court of Appeal was sympathetic but agreed with the judge. It refused leave to appeal to the Privy Council.

Most of the claims were under the limitation figure but some were not. NAC waived the requirement of proving liability, as I recall. All were eventually settled with the Crown contributing for those settlements over £5,000. The litigation cost to individual claimant estates was definitely less than it would have been if the claims had each been administered separately. The same strategy was followed, I understand, to combine the resources of all claimants in the litigation after the Erebus Disaster – to similar positive effect.

On the bench, Graham was courteous, quick and usually several jumps ahead of counsel. I remember an early judgment of his where I had persuaded him to find for a taxpayer against the IRD which appealed, instructing the formidable Eric Winkel as its counsel. Sir Alfred North was against me from the start of the appeal, at one point removing his wig (this was before the Woodhouse "experiment" to abolish wigs in that court), scratching his pate and intoning in adenoidal tones about the judgment under appeal: "Well, he must have been a very clever judge to have given this judgment so quickly".

The loser is most important

In his Harkness Henry Lecture, published in (2004) 12 Waikato Law Review 1, Sir Noel Anderson recounts Graham's advice to new judges that the most important person in the courtroom is the loser. Graham lived up to that advice when giving judgment. He was – because of his huge experience in criminal law – the "go-to" person for any judge with a criminal law problem; something that often happened unexpectedly in the course of a trial. No matter how he was placed work-wise, Graham was always immediately available to solve the problem. He had probably encountered it before.

He was one of the first Executive Judges for the Auckland region when Davison CJ created the role. Even in those days, this was not an easy job, but one which he discharged with his trademark panache and knowledge of the strengths and weaknesses of each of his flock. Criminal trials under Graham took up far less time than they seem to do now because of his vast knowledge of crime and his pleasant and efficient disposal of objections. Counsel were not inclined to raise frivolous and time-wasting points. Those who tried were

On the bench, Graham was courteous, quick and usually several jumps ahead of counsel… "he must have been a very clever judge to have given this judgment so quickly"

▲ Sir Thomas Thorp and Sir Muir Chilwell were both captured in this reunion photo at Auckland Law School. Fourteen of the law students who graduated between 1947 and 1950 reunited on 29 June 2010 for drinks and a light lunch. The photo in front is of returned servicement and others who were admitted in Auckland around 1949. The Law School's photo shows the group as follows:
Back row: Warwick White, Stuart Bawden, Sir Thomas Thorp.
Middle Row: Sir Duncan McMullin, Judge Arnold Turner CMG, Barrie Hopkins, Sir Muir Chilwell QC, Michael Malloy, Maurice Hunt, Pat Towle.
Seated: Rev Jack Ward, Kevin O'Sullivan MNZM, Peter Buddle, Richard Savage.

fairly pleasantly but effectively told what the situation was.

He was Chancellor of the University of Auckland for six years – a role which I later filled. He brought his flair for efficiency and his people skills to this role which has probably become more difficult and time-consuming over the years as student numbers burgeon and funding decreases. The judges were all pleased that Graham had been chosen for this prestigious role, which did not diminish his judicial output.

Judging in the Pacific

After his retirement, Graham became Chief Justice of the Cook Islands, succeeding Sir Gaven Donne who had set the newly-independent nation on an excellent legal path. Graham was the first of the retired High Court judges and leaders of the bar who, over the years, have fulfilled this role with distinction. He also became a judge of the Fiji Court of Appeal. I first sat in that court with him and Sir Barry O'Regan in 1984. A great experience for me to sit with two fine lawyers who had a relaxed manner and who were delightfully amusing and stimulating company for the month of the session. One case in that session which I recall involved Ratu Mara as a party, represented by Michael McHugh, soon to become a judge of the High Court of Australia

Graham was also a pioneer in putting New Zealand on the map for international arbitration. He was the arbitrator in the Mobil Oil arbitration competition case (see the excellent judgment of Heron J delivered on 1 July 1987 and reported as *Attorney-General v Mobil Oil NZ Ltd* [1989] 2 NZLR 649 and also the Court of Appeal judgments in an early ICC arbitration involving the Marsden Point Oil Refinery (*New Zealand Refining Co Ltd v Attorney-General* CA 40-92, 17 December 1992). He also arbitrated other less-celebrated disputes

He was also a fine yachtie, becoming Commodore of the Royal New Zealand Yacht Squadron. When a civil case settled or there was a late guilty plea in a criminal trial, Graham would head for the golf-course, accompanied at times by Peter Mahon. His judgments were always up-to-date.

Much more could be written about this accomplished judge who excelled in his task to which he devoted his many skills and his wide experience of life both within and out of the law.

Sir Thomas Thorp (1925–2018)

Tom Thorp was only five and had just started school when the Napier Earthquake of 1931 struck. He vividly recalled that day even when he was in old age. His father owned a shoe store, damaged in the quake. Tom was to go on to study for a law degree at Auckland, clerk for Nicholson, Gribbin, Rogerson & Nicholson and move to Gisborne. He soon became a partner in the firm of Nolan & Skeet which had a history dating back many years, as Tom pointed out when arguing before me in Gisborne his last case before appointment to the bench. In one of the old authorities on which Tom had relied, Mr Skeet (not usually in the pantheon of deceased Poverty Bay lawyers) was recorded as counsel.

Operating from a rather

gaunt-looking building, where Sir Āpirana Ngata had once been employed by the firm, Tom and his partner and friend, the late Peter Robinson, built up a large and successful practice on top of the one already established. Tom became an expert in several areas – notably taxation. His advice was sought not just from the firm's clients – some of whom were numbered amongst New Zealand's then financial elite. Law firms from many other parts of the country turned to him for taxation and estate planning advice. His drafting ability was legendary. I remember the late Peter Mahon – himself no slug with the written word – recounting to me his amazement at Tom being able to dictate a complex document of great length which, when typed out, required no editing or amendment. Tom was also well-versed in Māori Land legal problems and offered advice to Māori leaders.

Another of my diversions. At Nolan & Skeet in Tom's time, partners always signed letters in the firm name, "Nolan & Skeet". Tom's spidery and distinctive handwriting, displayed in the firm's signature was something else! In the 1960s and 70s, a few other New Zealand firms followed this procedure. "Bell, Gully & Co" comes to mind; English and Sydney firms often did this procedure. I should be interested to know whether any New Zealand firms employ this rather quaint custom now. Probably not, because so much correspondence is by email.

Crown Solicitor

Unlike most commercial lawyers, Tom had a broad knowledge of criminal law and practice, being appointed Crown Solicitor in 1963. Whilst possibly one of the most scholarly persons to have held that role, Tom was widely respected in the criminal justice system for his compassionate and understatedly moderate approach which proved very effective.

He was also for some years President of the Gisborne District Law Society and helped maintain the tradition of competence and good preparation that I, as a visiting judge to Gisborne, always found to be the hallmark of Gisborne counsel. I speculate that the long tradition of Supreme Court sittings plus the long-standing self-containment of the legal community (with their own Land Transfer Office, Stamp Office, Companies Registry, etc) was reflected in the careful submissions and conduct of trials, civil and criminal, that I always encountered at the Gisborne sessions.

So it was no surprise when he was appointed to the Bench in 1979. He was sworn-in by Perry J, then Senior Puisne, with no other judges in attendance – unlike present-day occasions when, at Auckland at least, many of the judges attending as co-consecrators (to use an ecclesiastical analogy) have to be accommodated in the jury box because the bench is too crowded!

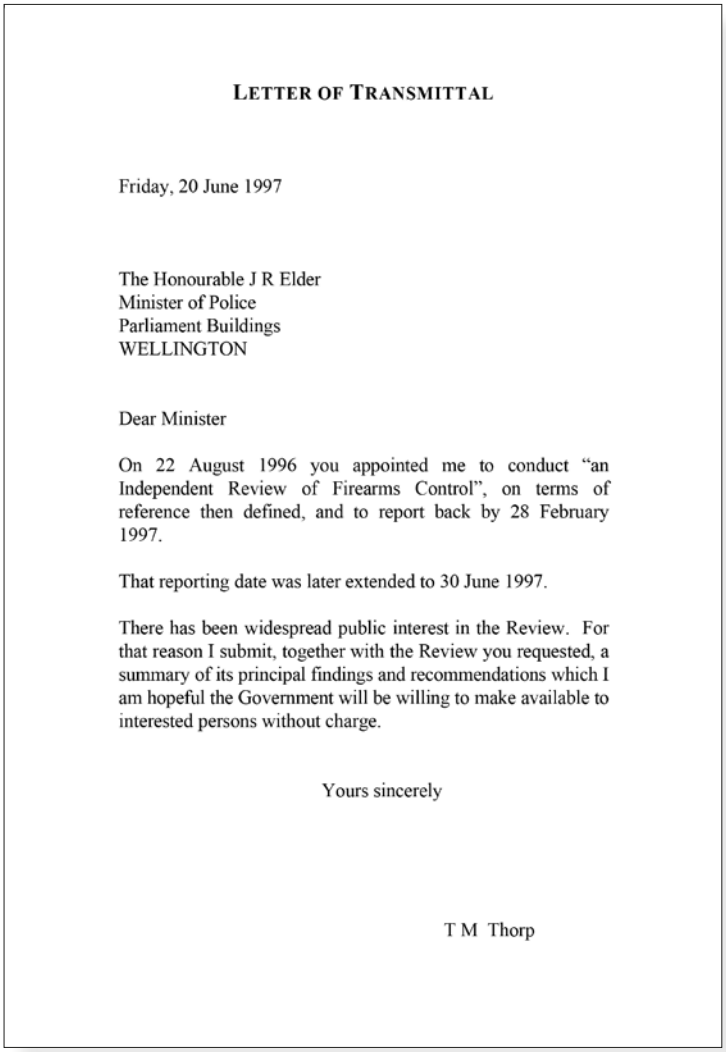
Tom was an instant success as a judge. That success never diminished over his time on the bench. Quick, courteous and usually right. He ran trials – criminal and civil – with great efficiency but with consideration for witnesses and counsel

Tom was an instant success as a judge. That success never diminished over his time on the bench. Quick, courteous and usually right. He ran trials – criminal and civil – with great efficiency but with consideration for witnesses and counsel. Because of his Crown Solicitor experience, he was often a "go-to" for judges with trial problems. He rarely needed to take time to prepare a reserved judgment on a procedural issue. He always knew the answer! Complex proceedings did not phase him. His organisation of the many complex issues in the Goldcorp litigation, for example, earned him praise from the Privy Council. On the bench, as in practice, he was able to balance pragmatism and principle. See Simon Mount QC's obituary on the New Zealand Law Society website.

Auckland's High Court

Tom took on the superintendence from the judges' point of view of the refurbishment of and the additions to Auckland's historic High Court. He was meticulous in this task which had many frustrations. The finished product – especially the old Number One Courtroom – is a tribute to his tenacity and powers of persuasion with the bureaucracy. He always said that the additions were not sufficiently large and that further Chambers and courtrooms were essential for future expansion. But his pleas for greater facilities fell on deaf civil service ears. Several expedient additions – like building extra Judges' Chambers on the roof – have proved Tom right in his predictions of future needs. I just do not know how 25 judges, four associate judges plus associates and clerks are able to be housed in the appropriate way in a building designed to house, at most, two-thirds of that number.

As Executive Judge for most of the gestation period of the additions, when we and the public had to use



LETTER OF TRANSMITTAL

Friday, 20 June 1997

The Honourable J R Elder
Minister of Police
Parliament Buildings
WELLINGTON

Dear Minister

On 22 August 1996 you appointed me to conduct "an Independent Review of Firearms Control", on terms of reference then defined, and to report back by 28 February 1997.

That reporting date was later extended to 30 June 1997.

There has been widespread public interest in the Review. For that reason I submit, together with the Review you requested, a summary of its principal findings and recommendations which I am hopeful the Government will be willing to make available to interested persons without charge.

Yours sincerely

T M Thorp

◂ Letter of Transmittal from the firearms report produced by Sir Thomas Thorp in 1996

the temporary facilities offered by "ice-cream" and "soft drink" factories in Eden Crescent (1982-1991), I was glad that the ever-reliable Tom had accepted the real burden of looking after the new building project.

Tom was also on a judges' committee of which also included Eichelbaum J (as he then was), Holland J and myself to suggest reforms to the Court system. His experience and perspicacity were greatly valued by us all.

Tom also found time to sit on various committees of the judiciary concerned with criminal practice and sentencing as well as with IT for judges. When the Criminal Appeal Division was created, he was appointed to that and sat regularly on criminal appeals. In my view, he should have been appointed to the Court of Appeal. I do not know why this did not happen. Maybe he did not want to leave Auckland where his wife, Patricia, was an extremely competent City Councillor who headed the important Planning Committee.

After his retirement in 1996, Tom took on the challenge of Chair of the Parole Board. He was the perfect fit for this stressful but highly-important role. His humanity and understanding were paramount. He studied international practice and academic writings and introduced a structured decision-making process whilst retaining his human touch.

The firearms inquiry

He was asked in 1996 by the then government, after the Tasmanian shooting massacre, to conduct an inquiry into firearms in New Zealand. After careful analysis and consideration of the views of interested parties, he produced a report in his trademark logical and lucid way.

He made a number of recommendations including one that semi-automatic rifles be banned and a buy-back scheme be instituted for those already in private ownership. Australia had quickly implemented that sensible course after the Tasmanian tragedy but New Zealand did nothing to implement Tom's very considered and sensible report. Legislation – not about banning semi-automatics – was introduced in 1999 and like another muted reform attempt some years later, it withered during the parliamentary process. It was said not to have proceeded because of lobbying by "the gun lobby" .The attacker in the Mosque shootings of last year used a semi-automatic weapon which he might not have been able to acquire had the Thorp recommendations been adopted by successive governments. In the public discussions about gun control following the Christchurch tragedy, I do not recall reading any reported comment from the parties of those politicians who opposed the legislative implementation of the Thorp recommendations, as to why they did so.

Tom also went to South Africa, at the request of its government, to make recommendations on gun control. He told me, a few months before he died, that the South Africans wanted further help from him on gun laws. He was not well enough to entertain this request.

Criminal Cases Review

Another project of this multi-talented man was to advocate the establishment of a Criminal Cases Review system. He felt that there had been some fairly rare miscarriages of justice for which the present system did not fully cater. At his own expense, he published a

book entitled *Miscarriages of Justice* and travelled abroad to investigate similar schemes: the one he favoured was the Scottish scheme. He felt that the current system had revealed after his comprehensive review of numerous cases, that there had been miscarriages of justice and that the system did not serve Māori and Pasifika people well. He was greatly pleased when, not long before he died, the current Minister of Justice, Andrew Little, visited Tom at his Parnell home to talk about his proposal for a similar regime in New Zealand and to indicate that legislation was to be introduced.

His interest in the criminal case reviews may have been started from his reviews, at the Justice Department's request, of several cases of alleged miscarriages of justice and applications to the Governor-General for the exercise of the royal prerogative of mercy. He investigated the Ellis and Bain cases. He expressed misgivings about the Ellis case and made recommendations which, I believe, were not implemented.

Tom's life was so replete with memorable initiatives which he fostered in practice, on the bench and into an active retirement. The above is but an incomplete summary of the career of an exceptional judge and wonderful human being.

Sir Muir Chilwell (1924–2014)

Muir Fitzherbert Chilwell – despite his fancy given names – was an extremely modest individual, especially on the subject of his numerous accomplishments. Unlike the other two subjects of my present study, he could be painstakingly thorough. While they too were thorough, they were naturally quicker to respond. Yet their convergences of personality were many. Kind, generous, courteous to all, knowledgeable in the law, and with a fine sense of justice. Many more similar epithets which describe their enduring qualities come to mind, but all three did not tolerate praise happily.

After war service, Muir attended Auckland Law School and gained an LLM with first class honours in 1950. Unlike today's bright young law graduates, Muir did not head off for a prestigious overseas university for post-graduate study and a job with one of the "Magic Circle" London law-firms. Apart from other factors, there were very few scholarships or other forms of financial assistance available to law graduates then. Instead, he soon became a partner in the firm of Haddow, Haddow and Chilwell where he stayed until his appointment as Queen's Counsel in 1965. He was also to add an appointment as a silk in Victoria (the ones with the black rosette on the back of their gowns). His fame had spread across the Tasman to the extent that he was admitted in Melbourne – pretty unusual for a Kiwi barrister in the 1960s.

"Conveyancing and Taxation"

I first encountered Muir when he was lecturing in the strangely-combined course called Conveyancing and Taxation. His 25 or so students wanted to learn a bit more about conveyancing, since most were involved with property transactions in their employment as law clerks. Few were interested in taxation which, in those days, was the holy grail of a few specialist lawyers as well as accountants – then often accused of trespassing on the legal patch.

Muir was completely up with the play in both subjects and I certainly learned a lot from his carefully-prepared but informally-delivered lectures. Since this was a "certificate" paper, if the lecturer had passed you in term tests and considered that you would pass the final paper, then he (no female lecturers and only one female student in our class, Robyn McMeekan) would issue a certificate to that effect and one did not have to sit the final. Muir was of a generous disposition and subscribed to the "every player a prize" philosophy which meant that even the doubtfully deserving got their certificate.

In practice, Muir specialised in commercial law, including taxation, as well as intellectual property, trusts and probate litigation with some personal injury cases for plaintiffs. He was versatile and briefed by many firms – particularly after he took silk. He played a full part in professional life, becoming President of the Auckland District Law Society, President of the Legal Research Foundation, and President of the Auckland Medico-Legal Society, to name but some of his appointments.

I recall briefing Muir in my early days in practice to

appear in the Court of Appeal. Appearances there were "big-time" then – no divisional Courts of Appeal, not much waiting for a fixture and a permanent court of three judges. I learned much from my experience as Muir's junior. Mastery of the facts and the law were essential. His arguments were finely-crafted and exceedingly comprehensive. The case was about "reasonable access by sea", a subject Muir, as a boatie, knew much about. It was not his fault that we lost the appeal!

Something good in everybody

His 18-year career as a judge began in 1973. He conducted his court with great courtesy and calm, always helpful to counsel and empathetic to witnesses. He would be loath to cut short even an argument which was bordering on the hopeless and was anxious to explore every facet of the case before him. Criminal accused were always treated with dignity and compassion. He always looked for something good in everybody.

When I became a judge in 1976, one could not find a more helpful colleague. Long before judges were issued with "bench books" suggesting model directions to juries, Muir had compiled his own set of precedents of commonly-required jury directions. He was always generous in lending his precedents to his colleagues. One could use the precedents in the knowledge that the subject had been well-researched and the direction rendered as appeal-proof as possible.

One situation where I was grateful for Muir's help occurred when I found myself presiding with a jury in Whangārei's first defamation trial since High Court sittings were introduced there in 1971. Unusually, this was a claim based on an alleged slander (ie, not the usual written defamatory statement) said to have occurred on the occasion of a meeting of a cooperative dairy company in Dargaville. The very experienced counsel were Paul Temm QC and John Henry QC (as they then both were). At the conclusion of the plaintiff's case, the defendant chose to call no evidence which meant that I would have to sum-up on the next morning. This contingency had not been expected since the trial had been scheduled to last longer. So I had had to prepare a summing-up in a tricky area of the law in which I had had little experience. In practice, would-be defamation plaintiffs had seen the wisdom of a "Even if you win, you lose" approach. I knew that the Whangārei law library was singularly bereft of text books. Certainly there was nothing there on such an esoteric subject as defamation.

An SOS call to Muir saw his defamation precedents sent north on the next bus. I laboured until late preparing my summing-up with deep gratitude to Muir, but was somewhat deflated when Paul Temm came into Chambers in the morning and elected a non-suit. All that then remained was an argument about costs.

The *Benipal* judgment

Muir's attention to detail meant that his judgments were longer than those of the rest of his brethren and they took longer to prepare. His longest judgment was that in *Minister of Foreign Affairs v Benipal* [1988] 2 NZLR 222 (this citation is for the Court of Appeal judgment). His judgment runs to 489 pages and consisted of a meticulous review of the evidence and submissions. The Court of Appeal at page 227 spoke of the judge's "single-minded concern to do justice that led to these remarkable judgments".

I was Executive Judge in Auckland at the time the *Benipal* judgment was in gestation. Muir laboured intensely, his Chambers crowded with law reports. He acknowledged that his way of writing judgments made demands on available sitting time and on his colleagues. But nobody could ever be cross with him. He worked harder and longer than most and his diligence was exemplary.

His was a respected voice at judicial meetings. Even when in the throes of composition, he would always drop what he was doing to help a colleague with advice. On his retirement, he was appointed to the Cook Islands Court of Appeal where he sat for a few years. His professional and judicial life was marked by his commitment, courage and diligence – but most of all by his humanity and modesty. ■

Muir laboured intensely, his Chambers crowded with law reports… He worked harder and longer than most and his diligence was exemplary… His professional and judicial life was marked by his commitment, courage and diligence – but most of all by his humanity and modesty

Sir Ian Barker QC *ian.barker@xtra.co.nz* was admitted as a solicitor in 1957 and went on to a legal career as a barrister, Queen's Counsel, High Court Judge, law academic, arbitrator and mediator.

Will Notices

Bell, David Garry

Would any lawyer holding a will for the above-named, born on 6 January 1965, who died between 24 and 25 March 2020, **please contact Greg Presland at Presland & Co Limited:**

- greg.presland@mylawyer.co.nz
- (09) 818 1071 Fax (09) 818 4966
- PO Box 20 310, Glen Eden, Auckland 0642 DX DP94003

Chan, Kevin Won

Would any lawyer holding a will for the above-named, late of NorthPark, Auckland, born on 13 March 1934 and who died on 13 March 2020, **please contact Sarah Clapson of Hesketh Henry Lawyers:**

- sarah.clapson@heskethhenry.co.nz
- (09) 375 8688
- Private Bag 92093, Auckland 1142

Corles, Thelma Marion

Would any lawyer holding a will for the above-named, late of 14/140 Lake Road, Northcote, Auckland, born on 27 August 1932, who died on 12 April 2020, **please contact Robyn Jenkins:**

- robyn.graemejenkins@gmail.com
- (09) 424 3979 or (021) 424 397
- 39 Scott Road, Stanmore Bay, Whangaparaoa, 0932

Crawford, Graham Edward

Would any lawyer holding a will or other documents for the above-named, late of 111 Paihia Road, One Tree Hill, Auckland born on 16 September 1940 who died at Auckland on 23 February 2020, **please contact Warren Corston of Perpetual Guardian:**

- warren.corston@pgtrust.co.nz
- (09) 927-9449
- PO Box 1934, Shortland Street, Auckland 1140

Crean, Mark Gerard

Would any lawyer holding a will for the above-named, late of 1210 Lake Sumner Road, Hawarden, Farmer, born on 7 February 1964 who died on 4 October 2019, **please contact William Jennings:**

- usmuletrain@gmail.com
- (022) 431 9489

Ferrario, Daniel Christian

Would any lawyer holding a will for the above-named, late of Akaroa, born on 12 March 1959 who died on 21 August 2019, **please contact Joyce Sia of Davidson Legal:**

- joyce@davidsonlegal.co.nz
- (03) 365 6050
- PO Box 6613 Christchurch 8442

Harbin McKay, Helen Julie

Would any lawyer holding a will for the above-named, late of Maungaturoto who died on 16 April 2020, **please contact Dave Dennis, Hammonds, Solicitors:**

- dave@hammondslaw.co.nz
- (09) 439 7099, Fax (09) 439 6464
- DX AA23502 or PO Box 16, Dargaville

Jolliffe, Corbin Anthony

Would any lawyer holding a will for the above-named, late of Christchurch, Law Student, born on 3 November 1996 who died on 17 March 2020, **please contact Gregory Francis Kelly:**

- greg.kelly@trustlaw.co.nz
- (04) 498 8504
- PO Box 25243, Wellington 6140

Kealey, Nicholas Ivan

Would any lawyer holding a will for the above-named, late of 107 Hampshire Street, Cannons Creek, Porirua, born 01 October 1962, who died on 24 February 2020, **please contact Shiree Mackay, Macalister Mazengarb:**

- Shiree.mackay@macmaz.co.nz
- (04) 472 5131
- PO Box 927, Wellington 6140

Lam, Yuek Chuen (aka Peter)

Would any lawyer holding a will for the above-named, late of Auckland, Businessman, Aged 61 years, who died on 27 January 2020, **please contact Violet Yu of Haigh Lyon:**

- violet.yu@haighlyon.co.nz
- (09) 306 0621
- PO Box 119, Shortland Street, Auckland 1140

Lay, Yao-Shen 賴耀森

Would any lawyer holding a will for the above-named, late of 17 Thornbury Crescent, East Tamaki Heights, Auckland, born on 29 August 1939 who died on 16 July 2017, **please contact Sarah Moore of Morris Legal:**

- sarah.moore@morrislegal.co.nz
- (09) 930 8403
- Level 15, The Shortland Centre, 55 Shortland Street, Auckland 1010

Littin, Colleen Fay

Would any lawyer holding a will for the above-named, late of Hamilton, previously of Wellsford, born on 10 October 1938, who died on 25 November 2019, **please contact Hayley McLeod at McHardy Parbery Lawyers:**

- hayley@mplawyers.co.nz (09) 481 1196
- PO Box 34051, Birkenhead, Auckland 0746

Lock, Patricia Marie

Would any lawyer holding a will for the above-named, latterly of Waikanae, who died at Waikanae on 13 April 2020 aged 80 years, **please contact Sarah Hosegood of TREADWELLS:**

- sarah@treadwells.co.nz
- (04) 472 1784 Fax: 04 479 7106
- PO Box 859, Wellington 6140 DX SP20005

O'Toole, Patrick John Joseph

Would any lawyer holding a will for the above-named, late of 100A Seaview Road, Whangamata, who died on 20 December 2019, aged 88 years, **please contact Pearl Butler, Gellert Ivanson:**

- pearl.butler@gellertivanson.co.nz
- (09) 575 2330
- PO Box 25239, St Heliers, Auckland 1740

Prasad, Reshma Wati

Would any lawyer holding a will for the above-named, late of 11 Hinton Place, Weymouth, Auckland, Retired born on 28 March 1979, who died on 30 November 2019, **please contact Sushil Chetty, Khan & Associates, Solicitors:**

- sushil@khans.co.nz
- (09) 278 9361, Fax (09) 278 1209
- PO Box 23492, Hunters Corner, Manukau 2155 DX EP74515

Roderick, Tane Ross

Would any lawyer holding a will for the above-named, late of Mt Wellington, Auckland, born on 28 April 1977, who died on 6 February 2020, **please contact Tayla Rapley of Haigh Lyon:**

- Tayla.rapley@haighlyon.co.nz;
- (09) 306 0609
- PO Box 119, Shortland Street, Auckland 1140

Sidler (nee Borrie), Elisabeth Ruth

Would any lawyer holding a will for the above-named, latterly of Murchison Street, Island Bay, Wellington, who died at Wellington on 18 September 2019 aged 55 years, **please contact Sarah Hosegood of TREADWELLS:**

- sarah@treadwells.co.nz
- (04) 472 1784 Fax: 04 479 7106
- PO Box 859, Wellington 6140 DX SP20005

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For a confidential discussion contact Rob Stevens on 027 705 2210.

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CALL FOR EXPRESSIONS OF INTEREST FOR APPOINTMENT AS AN ENVIRONMENT JUDGE

Christchurch

The Attorney-General wishes to hear from suitably qualified persons who would like to be considered for appointment as an Environment Judge. In addition to appointment to that position the successful candidate will also be appointed a District Court Judge. To be eligible for appointment candidates must have held a practising certificate as a barrister or solicitor for at least seven years.

Appointments to the Environment Court are made by the Governor-General on the recommendation of the Attorney-General following consultation with the Minister for the Environment and Minister of Māori Affairs.

The Attorney-General is conscious of the value of increasing diversity on the District Court bench generally and therefore seeks to encourage expressions of interest from qualified women as well as those from under-represented ethnic groups.

All eligible persons who complete an expression of interest form will be considered. Appointments are based on merit. The criteria for appointment include:

- Demonstrated knowledge and wide application of the law, in particular the Resource Management Act 1991, and overall high quality as a lawyer demonstrated in a relevant legal occupation.
- Personal qualities such as honesty and integrity, impartiality, good judgement and the ability to work hard.
- Excellent oral and written communication skills.
- The ability to absorb and analyse complex and competing factual and legal material.
- Awareness and sensitivity to the diversity of New Zealand society.
- Knowledge of cultural and gender issues.

A copy of the document setting out the process and criteria for appointment and a copy of the Expression of Interest form are available at www.justice.govt.nz/about/statutory-vacancies/

Persons interested in appointment are asked to complete an Expression of Interest form, provide a Curriculum Vitae and submit them to the Judicial Appointments Unit by 5pm on Friday, 29 May 2020.

The appointee will not take up the role until October 2020.

All expressions of interest will be handled with the highest degree of confidentiality.

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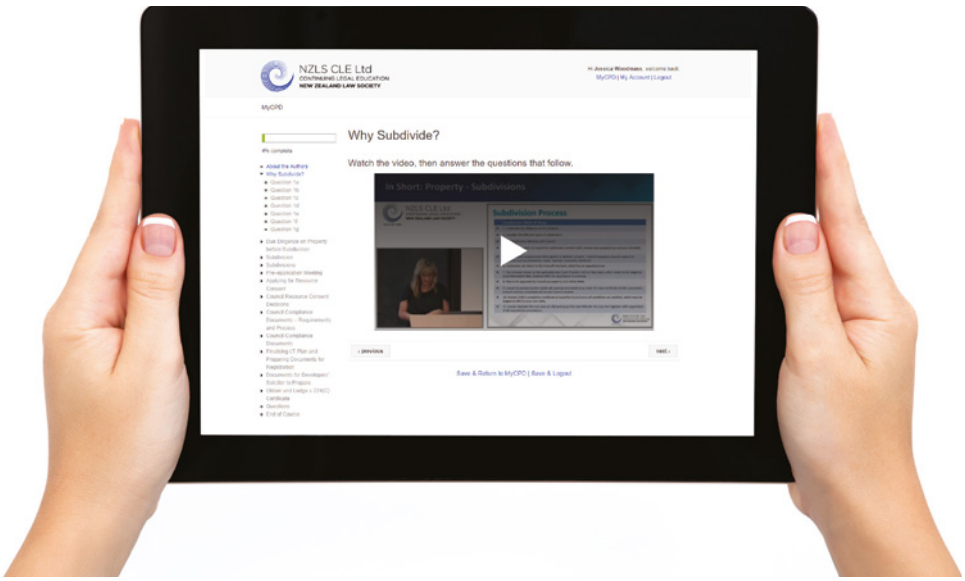

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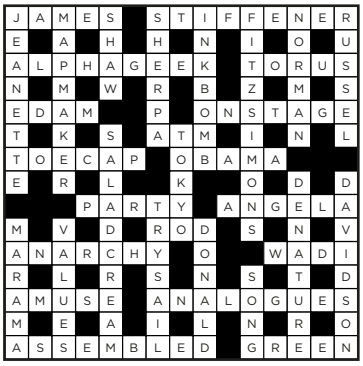
LIFESTYLE

A New Zealand Legal Crossword

SET BY **MĀYĀ**



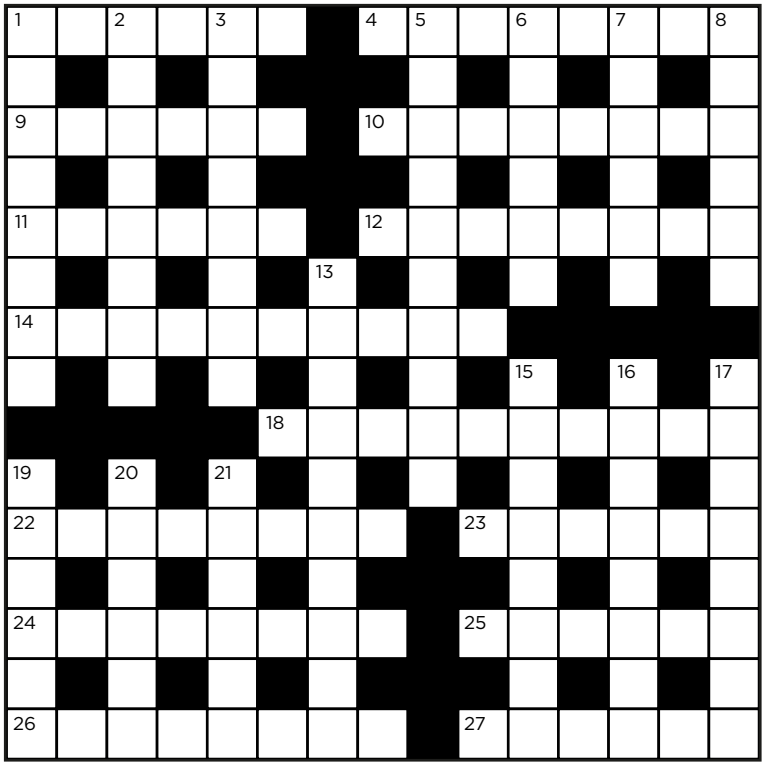
Solution to April 2020 crossword

Across

1. James, **4.** Stiffener, **9.** Alpha Geek, **10.** Torus, **11.** Edam, **12.** Onstage, **14.** ATM, **16.** Toecap, **17.** Obama, **20.** Party, **22.** Angela, **25.** Rod, **27.** Anarchy, **28.** Wadi, **30.** Amuse, **31.** Analogues, **32.** Assembled, **33.** Green.

Down

1. Jeanette, **2.** Map Maker, **3.** Shaw, **4.** Sherpa, **5.** Ink Bomb, **6.** Fitzsimons, **7.** Norman, **8.** Russel, **13.** Salad Cream, **15.** Tokyo, **18.** Denature, **19.** Davidson, **21.** Trysail, **23.** Marama, **24.** Values, **26.** Donald, **29.** Song.



The first and last clues have been removed.

Across

1 (6)
4 21 appeared around now (8)
9 Lassie, perhaps, is Hardy, perhaps, if 1 across (6)
10 Swap from 1 across sequential hermaphroditism, for example (8)
11 One who 21, when 1 across, becomes chatterbox (6)
12 Soaks setter's 1,000 napkin queens (8)
14 Around mid-August, fossil fuel workers become setters (10)
18 Uber transported painter to get French sauce (6,4)
22 Noisy 21 in drink tipped over fruit (8)
23 Costed ad for 1 across (in two senses) (6)
24 Never 25, even with automobile running on rims (8)
25 S plus 1 across equals 1 across 1 across (6)
26 Saddest people start dancing – not blood relatives, at least (8)
27 We made an agreement: stewed prune and pea, say (3–3)

Down

1 Give approval to crank case making regular sound (4–4)
2 Overture, loud, holds 21 charity as shade for dates (4,4)
3 Pious? Gee whizz! That's growing close to the ground (8)
5 Test in there's wasted on six-footers (10)
6 Plant writer and 1 across (6)
7 Season with 1 across mint and last of pepper (6)
8 Legendre's symbol is held to be stylish (6)
13 Stored 21 creature – Des taken aback (10)
15 Cry of approval might be a clue to this place (4,4)
16 Māyā's first do – second ring lost, and shoe (8)
17 1 across and 21 26 taking on rugby union, surprisingly sold to get something dearer (6,2)
19 Sir notes it's praying? (6)
20 Rude – if 1 across and 21, leads to rowers (6)
21 (6)

LIFESTYLE

Memphis: City of two Kings

BY **JOHN BISHOP**

▲ Top: The entrance to Graceland

▲ Bottom: The Million Dollar Quartet captured at Sun Studios. Elvis is seated at the piano and from left Jerry Lee Lewis, Carl Perkins and Johnny Cash.

Memphis, the biggest city in Tennessee, epitomises the old and new South of the United States. Once a major slave trading centre, in the 1960s it was the focus of civil rights action. Dr Martin Luther King was assassinated there, and the National Civil Rights Museum in the city is his memorial.

It has always been, and still is, a major musical centre for blues, country, jazz and rock and roll. Elvis Presley began his career here and he wasn't the only one.

Memphis's Sun Studios recorded Elvis but can also count Roy Orbison, Jerry Lee Lewis, Johnny Cash and Carl Perkins among its stars. Later, Stax Records, a label devoted entirely to recording black musicians, had Otis Redding, the Bar-Kays, and Booker T and the MGs creating a special soul sound.

On or near Beale Street, there's the Gibson Guitar factory which supplied so many legendary performers. Visitors can delve back in time at the excellent Museum of Rock and Soul, the Memphis Music Hall of Fame and the Memphis Blues Museum.

In the early 20th century Memphis was a major jumping off point for black people going north, which made for a vibrant music scene.

Beale Street

In a state and a city where race segregation was the official policy from the 1880s onwards, Beale Street was the centre of the black community with many black owned stores operating from there.

Today Beale Street is party central every night with bars, music and tourists filling the street.

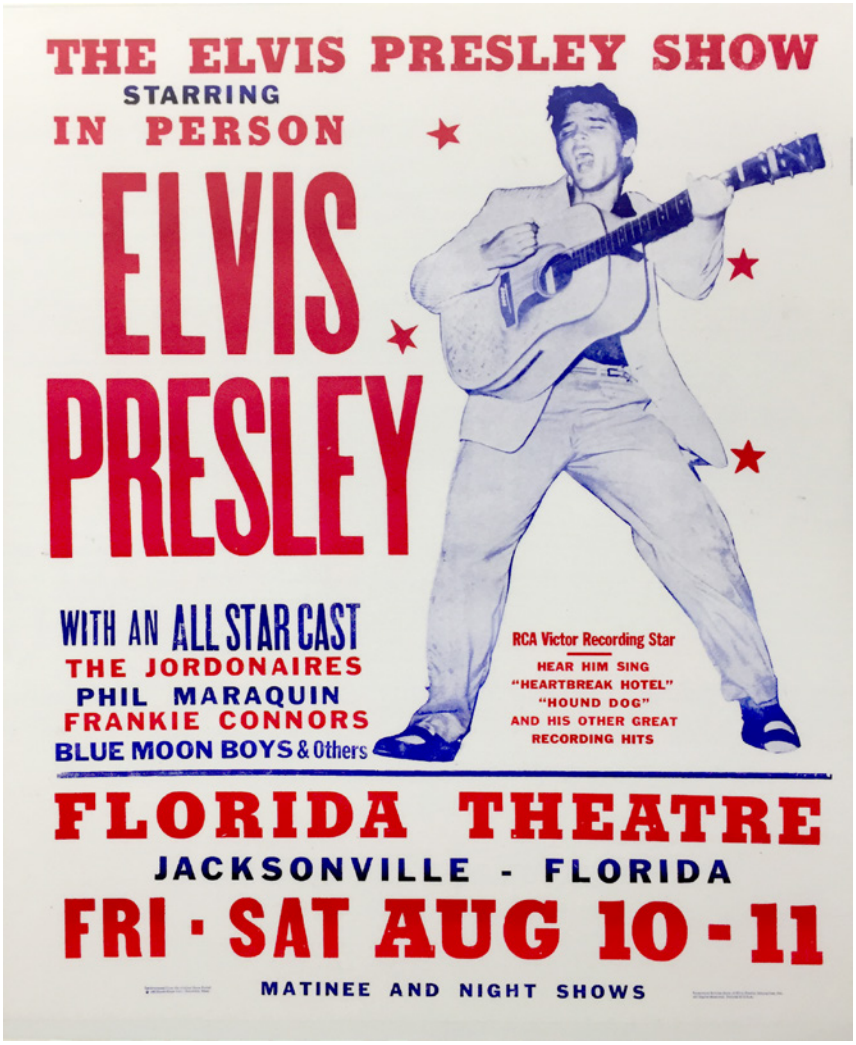
During the day you can shop for nostalgia goods and memorabilia from the hippie era and drop into A Schwab, a general store going back to the 1870s. Have a root beer float or a flavoured soda at the original counter.

Pretend it's still the 1950s because around the corner is Lansky Bros, where Elvis hired a tuxedo to go to his high school grad ball at the Peabody Hotel in 1951. He signed his contract with RCA Records at the Peabody in 1955. It was worth $35,000, a huge sum at the time.

The Peabody still holds its twice daily parade of mallard ducks, who live in the penthouse and come down in the elevator at 11am each morning to spend their day in a carved Italian travertine marble pond in the foyer and return by elevator each night.

The hotel's history says the tradition started in the 1930s, and in 1940, a Bellman by the name of Edward Pembroke (who had been a circus animal trainer) volunteered to care for the ducks. Pembroke was given the position of 'Duckmaster' and served in that position until 1991.

The parade is over in 15-20 seconds and attracts



hundreds of gawping spectators struggling to get a good picture.

The current Duckmaster, Doug Waterford, told me "ducks accept and adapt to their environment. They are creatures of habit and they remember what they do. This is what they expect each day." Incidentally, no duck products of any kind are served in the hotel.

Graceland

Graceland, Elvis's home, is still the biggest single attraction in Memphis and has recently had a multi-million dollar revamp. The house where Elvis and his family lived is preserved as it was but across the street (where the tours begin) the displays are much bigger and better.

There's a new focus on Elvis the cultural icon and on his significance in the history of popular entertainment. It's worth remembering that he sold over a billion records, an achievement still unmatched, and starred in 34 movies.

In a wall of tributes some stand out: John Lennon: "Before Elvis there was nothing." Keith Richards: "the world changed from black and white to vivid colour." Buddy Holly: "without Elvis none of us would have made it."

For teenagers in the 1950s rock and roll was "the sound of emotional freedom." This was the first generation that listened to music other than their parents' music. Elvis was the first to embody the spirit and the passion of rock and roll.

The look and sound were provocative and unmistakeably youthful. It was not an imitation of anything or anybody that the 1950s teenagers' parents liked or respected. That's what made it theirs, and that was special.

The old Arcade

Deep in the heart of old downtown Memphis is where visitors find The Arcade, the city's oldest restaurant.

A Greek migrant, Speros Zepatos, set it up in 1919 and moved it to its present site in 1925. Zepatos was one of many migrants from southern Europe and the Middle East who came to the United States in the period between the end of the Civil War and the Great Depression.

Many settled in Tennessee, Alabama and Mississippi where their descendants still live and work. It is now managed as a 50s-style diner by his descendant Harry Zepatos.

I had redneck eggs, described as sausage with biscuits soaked in gravy with eggs and hash browns. The bacon was crisp, almost dried out, and the mysterious biscuits were soft pieces of white bread like a bap.

The sausage is a meat patty, made from turkey. The gravy is not the flavoursome jus one gets with a good steak but a very thick white sauce, flecked with black bits which turned out to be finely-chopped mushrooms, poured over the biscuits and served on the side. The hash brown is grated potato recombined and cooked like a rosti. Eggs were flattened and served with a firm yolk.

Like many cities downtown Memphis was gutted in the 1960s and 70s, after its inner core rotted and decayed into seedy ghettos and slums occupied by the poor, prostitutes, drug users and criminals.

Once The Arcade was at the busiest intersection in town and got a lot of business from the train station opposite, one of three in Memphis

each owned by a competing rail company.

Only in more recent years has there been a single national rail passenger operator (Amtrak) and it struggles to stay afloat. It's heavily subsidised by the taxpayer – as are most rail systems in modern countries.

Southern cuisine

Southern cooking, whether it's barbecue, fried chicken, or the more sophisticated modern trends, is flourishing and is a major drawcard.

Southern barbecue and fried chicken are staples in Memphis and not to be missed. In the South there are only two types of people: those who prefer dry ribs and those who want them wet. Dry ribs at The Rendezvous, or wet ribs at Corky's will not disappoint. Try Gus's for fried chicken and the Four Way restaurant for soul food, all spots favoured by locals.

For more sophisticated fare go to Itta Bena above BB King's Blues Club in Beale Street, a quiet haven of good taste and beautiful southern food which can also be found at the Gray Canary and the Hu Diner.

The Mississippi River passes through town and New Orleans to the south has long been a major international port. Goods went up the river to Baton Rouge, Natchez and Memphis, and onto Vicksburg and St Louis right up to Chicago.

Underground Railroad Museum

The Slave Haven Underground Railroad Museum is on the edge of town. It was the house of Jacob Burkle, a German migrant who fled political persecution in his homeland, which became a secret hiding place for runaway slaves.

Burkle ran stockyards on the edge of the city, but secretly the house was part of the underground railway for runaway slaves heading north up the nearby Mississippi River.

How slaves communicated the routes and hiding places to each other is not well understood. Visitors can see the hiding places, tunnels and trap doors used by the fugitive slaves. The Mississippi River was a 100 metre sprint away.

From the displays I learned that in 1858 there were 10 registered slave traders in Memphis including Nathan Bedford Forrest, who became a renowned Confederate cavalry leader in the Civil War and later led, but eventually renounced, the KKK. His statue in the town has now been removed.

Memphis is where Martin Luther King Jnr was shot and killed on 3 April 1968. He was in town to help the striking black garbage collectors and was staying at the Lorraine Motel, a modest place well out of downtown, as Memphis was still a racially segregated city in 1968.

The motel has been transformed into the National Civil Rights Museum, a deeply moving record of slavery and the civil rights movement.

The last scene on the tour looks into the room Dr King was staying in, the bed clothes neatly folded back, his coffee cup on the night-stand. Just after 6pm he stepped on to the first-floor balcony and was shot from across the street and died an hour later. ■

▲ Top: Memphis is a sweeping and majestic river city with an interesting past.

▲ Bottom: The Burkle Estate Cottage housing the Slave Haven Museum

John Bishop received assistance from Memphis Travel during his visit. His work can be seen at *www.eatdrinktravel.co.nz*

TAIL END

Some observations from the legal world during lockdown

John Maldjian is an upstanding, law-abiding citizen who even dedicated his Facebook Live performance to our local health care workers. His only intention was to entertain his friends online via Facebook Live.

— Mitchell Ansell, attorney for New York intellectual property lawyer John Maldjian, who was charged with violation of several ordinances after he violated New York State lockdown laws by performing Pink Floyd songs on his front porch while a group of about 30 people watched from his yard. Police stopped him in the middle of "Wish you were here".

My expectation is that once we are through the challenges that COVID-19 has presented, we will return to justice that is administered predominantly in-person and from courthouses. The courthouses in the cities and towns of New Zealand are and will remain important places of justice for our communities.

— Chief Justice Helen Winkelmann in a letter to the legal profession on 8 April.

One male lawyer appeared shirtless and one female attorney appeared still in bed, still under the covers. And putting on a beach cover-up won't cover up you're poolside in a bathing suit. So, please, if you don't mind, let's treat court hearings as court hearings, whether Zooming or not.

— Broward County, Florida circuit judge Dennis Bailey in an open letter to the bar association about the dress worn by some lawyers in Zoom court proceedings.

The other major event in recent times that had similar implications was the sequence of Canterbury earthquakes. Experience from that time shows that collegiality and goodwill between parties led to the best outcomes for all concerned until normal business was able to resume. To that end, the Property Law Section asks that practitioners show true consideration to their colleagues, while balancing client interests. The clear message from Prime Minister Jacinda Adern is to 'be kind' to one another, and the same applies in our professional dealings during this unprecedented time.

— Property Law Section chair Duncan Terris recommends that property settlements are deferred until an agreed time in the future, to avoid lengthy arguments and potential litigation.

Presently in this very large courtroom, apart from myself, there are only three members of staff, two lawyers, six members of the media, one member of police, one security officer, and Mr La Fraie, and Messrs Alibi and Fouda from the Linwood and Al Noor mosques – a total of 17 people – all of whom are deliberately spread out and sitting considerable distances apart from each other in this very large space.

— Justice Mander reflects on the situation produced by COVID-19 at the 26 March hearing where the plea of the Christchurch mosque murderer was changed to guilty to 51 charges of murder, 40 charges of attempted murder and a charge of committing a terrorist act.

We are experiencing an unprecedented event and this creates uncertainty and questions for a lot of people. We hope we can provide answers that alleviate some of these worries for people.

— Nick Earl, a director of Tauranga firm Lyon O'Neale Arnold, which produced and made available short videos addressing lockdown legal issues.

We're going to see a huge explosion of litigation related to this. You've got some very wealthy, well-established collective action lawyers there who won't be shy about taking this on.

— Karl Lindgren of Californian class action specialist Fisher & Phillips believes the largest group of class actions resulting from COVID-19 are likely to come from employees.

For the first time in 25 years of practice I am at the mercy and will of a crippling wifi bandwidth, the never-ending chorus of neighbourhood power tools and a printer/scanner with a mind of its own.

— Pitt & Moore, Nelson, partner Anissa Bain reflects on the joys of working from home.

He was one of the greats. His country, and the human rights movement, will miss him.

— Human rights activist Anneke Van Woudenberg tweets on news of the death of Democratic Republic of Congo human rights lawyer Jean-Joseph Mukendi wa Mulumba, 73, from COVID-19 complications.

Alright, now that Lucy and Mittens have joined us, let's get this team meeting started. Hamish, what's your capacity this week?

My experience as a family lawyer is that when there is stress it unfortunately coincides with an increase in family violence so I'm worried there's been less applications filed.

— Erin Ebborn of Ebborn Law is concerned at news of a 49% drop in without notice protection orders during the first week of the Level 4 lockdown.

It is amazing how quickly you drop into a new routine. I tend to have a more relaxed start to the day and work slightly shorter hours fitting in a local run. There is no such thing as a weekend anymore so the trade-off is that I will do some work each day.

— Gerard DeCourcy, partner at Dunedin's Downie Stewart, finds some positive aspects.

Based on the requests that we have so far reviewed, there are hundreds of people – from young lawyers to seniors and their families that were caught off guard by the pandemic and they are going to need our support.

— Ugandan lawyer Assumpta Kemigisha Ssebunya, one of a group of lawyers who set up an emergency relief fund for colleagues suffering from the country's lockdown.

A mark must pass several tests before being registered, including whether the term is descriptive or distinctive. Trying to register COVID-19 as a trademark would be equivalent to registering 'cancer' or 'diabetes'.

— Toronto IP lawyer David Lipkus comments on news that Montreal lawyers Meriem Amir and Giovanni De Sua have filed applications to trademark "COVID-19" and "COVID-19 prevention and cure".

Due to COVID-19, anecdotal reports globally have highlighted recent spikes in divorce rates and online search volumes for divorce lawyers. In Australia, we have also started to observe this trend with online searches up 20% this calendar year compared to the same time last year.

— A statement from ASX-listed Australian Family Lawyers, reporting a rise of over 40% in its earnings in the latest quarter and anticipating a spike in business thanks to COVID-19.

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**

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