LawTalk
ISSUE 946 · WINTER 2021

Te Ao Mārama

COMING INTO THE LIGHT

New Zealand Law Society
Te Kāhui Ture o Aotearoa

Contents

FROM THE LAW SOCIETY

Te Ao Hurihuri | Our changing world

Barack Obama once said that change is always a work in progress. It takes longer than we think, and the path is never a straight line. We zig and zag and sometimes move forward and other times move a step back. In the past few months there have undoubtedly been steps forward.

It was an honour to stand with Chief District Court Judge Heemi Taumaunu on a cold crisp morning in Tūranga-nui-a-Kiwa | Gisborne last month in support of his announcement that our District Court would be the next court – after Kirikiriroa | Hamilton – to roll out Te Ao Mārama in the District Courts. Following that announcement, I sat down with the Chief Judge to understand more about what it means for justice delivery and how the legal profession can support the transformative change. You can read my interview in this magazine.

▲ Tiana Epati and Mana Taumaunu

Taonga in our courts

In the same week, the Chief Justice approved the wearing of taonga in place of the traditional necktie for all court lawyers and staff. This was a change I sought following a LinkedIn post I wrote about a young Gisborne lawyer who had sought leave to wear his taonga for just one day. It has been heartening to see all the photos which have been sent to me by lawyers from around the country proudly wearing their taonga and feeling like they can bring their true selves to work.

Te Ao Māori in our law schools

Last month the New Zealand Council of Legal Education resolved that Te Ao Māori concepts, particularly tikanga Māori, would be taught in each of the core law subjects within the Bachelor of Laws and Bachelor of Laws with Honours degree. The Council will shortly commence consultation with stakeholders and relevant Government departments on transitional arrangements and timeframes.

This historic resolution has come just weeks after I attended the Otago Faculty of Law F.W. Guest Memorial Lecture by Justice Joe Williams who spoke movingly and with great passion about decolonising the law, the role our law schools must play and how each of us can contribute to thinking differently.

Progress in our profession

In the past three months the Law Society has made real progress on the priorities that I outlined in the last edition of LawTalk. Nearly 5,000 lawyers joined us for the free webinar on the amendments to the Conduct and Client Care Rules which come into force on 1 July. We have released draft guidance to support the profession to understand the new obligations and I would encourage you to read those and provide feedback. It will be through collective commitment that we will make

▲ Manaaki Terekia, Tiana Epati, Mana Taumaunu, and Heather Vaughn

It will be through collective commitment that we will make the change needed to make this a safer, healthier, and more inclusive profession

the change needed to make this a safer, healthier, and more inclusive profession.

At a system level we have had more than 600 submissions on the draft Terms of Reference for the upcoming Independent Review into the statutory framework for legal services. This will be an ambitious review, with the potential to result in significant change to how legal services are regulated, including the conduct of lawyers, and how the profession is represented. The next step now is to finalise the Terms of Reference and appoint an independent reviewer.

Access to Justice is another priority area for me in my final year as President. I recently represented the Law Society alongside Community Law and others at the official launch of Te Ara Ture, a new digital tool to connect lawyers wanting to do pro bono work with those most in need of legal help.

Wellbeing in the profession

The wellbeing of the profession remains a constant focus for me. In May I spoke at a session on 'Looking after ourselves' at the District Court Jury Trial Judges' Triennial Conference in Wellington. I shared my concerns about the wellbeing of lawyers, particularly those doing legal aid work, and the scheduling pressures we are under in the courts. I highlighted what the Law Society is doing to support lawyers through initiatives such as the Legal Community Counselling Service, the LawCare freephone line and National Friends Panel. But for the most part, I took the judges on a journey of a 'day in the life' of court lawyers in 2021. For many members of the judiciary, it was an eye opener.

Building on the communication channels created in response to Covid, we must keep the dialogue going between the legal profession and the judiciary to work together and find solutions. We all have the shared objective of access to justice, but it cannot be at the cost of our health and well-being.

What this year has shown me already is our ability to move forward, even when unprecedented events are thrust upon us. Despite Covid, we have been able to take the lead and implement reforms, many of which will have a lasting impact on our profession and Aotearoa's legal system.

I want to end by thanking the outgoing Chief Executive of the Law Society, Helen Morgan-Banda, who has led the Law Society through a period of unprecedented change, modernising its structure, ways of working and how we engage with not only lawyers but others across the legal landscape. She has worked tirelessly through crises no one could have predicted and leaves the Law Society in a much stronger position. ■

COURTS

Te Ao Mārama coming into the light

At the end of May the Chief District Court Judge Heemi Taumaunu, along with the Principal Family Court Judge Jacquelyn Moran and the Principal Youth Court Judge John Walker visited Gisborne District Court to announce the introduction of the Te Ao Mārama model for that court.

Following the announcement in Gisborne, Law Society President Tiana Epati sat down with Judge Taumaunu to understand more about Te Ao Mārama and how the legal profession can support its successful implementation.

Ms Epati: I'll start by just acknowledging where we are for this interview, Te Poho-o-Rawiri Marae in Tūranga-nui-a-Kiwa. I'd like to ask you to explain the significance of where we are in relation to the kaupapa that we're going to talk about.

Chief District Court Judge Taumaunu: This is a very special place to be talking to you, as this is the marae where the Rangatahi Court started. Almost to the day 13 years ago we were here celebrating the launch of the Rangatahi Court. The first sitting in the world happened right in this whare.

I think about the many Rangatahi Court sittings that have been held on this marae and more particularly, the kaumatua and kuia who have been involved in supporting the Court. My memories go back to the very early days when we were venturing off into the unknown with the Rangatahi Court. At that stage we weren't really sure how it would operate and work within the law and today, as I speak, there are 17 Rangatahi Courts around the country that follow the example that was set here at Te Poho-o-Rawiri. It's a wonderful thing to be here today and to speak to you about Te Ao Mārama.

Ms Epati: When you introduced Te Ao Mārama you described it as being inspired by the concept "mae te po ki tea o marama" meaning "the transition from night to the enlightened world". You've spoken about how it will reflect the needs of modern-day Aotearoa, a multicultural Aotearoa where everyone can seek justice and feel that they are heard and understood. How do you envisage this working in practice? How will the model of Te Ao Mārama benefit all New Zealanders?

Judge Taumaunu: When you think about what Te Ao Mārama represents with this idea of the transition of night to the enlightened world, the first point to make is that it's the response to the calls for change, and it is important to see the Te Ao Mārama kaupapa within that context.

For the last 40 years or so there have been multiple reports and articles written about the District Court, the Criminal Jurisdiction and Family Jurisdiction of the District Court. Since then, we've had the seminal reports that were written by Moana Jackson, He Whaipaanga Hou, and John Rangihau who helped produce "Pūao-te-Ata-tū". We've then had more recent reports, especially from the Chief Victims Advisor, that have all given our Court a very consistent message: that people are coming to our Court and when they've left they feel they haven't been seen, they haven't been heard and they haven't been understood. They haven't been able to fully participate in the proceedings that relate to them, and in short, they believe they haven't had a fair trial and haven't been able to receive justice.

And this is not just a message from defendants, this is across the

board. This is victims of crime saying the same thing, it is witnesses, parties to proceedings and supporters who believe they haven't been able to meaningfully participate in the proceedings that relate to them.

So, it's in this context that Te Ao Mārama has emerged. This idea of a more enlightened world where all people can come to our court to seek justice and be heard, be seen and be understood. A place where they can meaningfully participate in the proceedings that relate to them.

Whilst it's obviously framed with the traditional Māori narrative about the creation of the world and Te Ao Mārama it's also important to bear in mind that this model is intended to apply to all New Zealanders, not just Māori. Those calls for transformative change that we are answering have come from across the spectrum of our multicultural society.

Ms Epati: There is no reason why someone who is not Māori can't benefit from a tikanga approach to justice. When you look at something like the Ellis case, there we have non-Māori whānau who are essentially the beneficiaries of a tikanga approach to resumption of a criminal appeal. That's an example of the law shifting for the benefit of everybody.

Judge Taumaunu: Correct

Ms Epati: You talk about the model having to work slightly differently in each District Court because it will be developed in partnership with iwi and local communities. Can you tell me more about the engagement you have planned with iwi and local communities and what differences we might see as a result of that engagement?

Judge Taumaunu: What we are intending to do is engage with local iwi in terms of the partnership relationship under the treaty and between the various government agencies that are involved in the justice sector and those iwi who are involved in the local community.

The intention is also to engage fully with the local community service providers that are engaged in providing services to the Court and to ascertain those service providers who currently aren't providing services to the Court but actually could if the invitation was extended to them. These are some of the changes we can make if we are able to better coordinate the way that the Court reaches out to the community. This is all about making our Court more relevant to the community it serves by bringing the community itself into the Courtroom.

Ms Epati: You talked about mainstreaming some of our specialist Courts and the Rangatahi Court is a good example. What are the best practices of these specialist Courts that Te Ao Mārama will be drawing on?

Judge Taumaunu: It's probably worth going back a little bit further

in time to 1980, because the very first specialist court that adopted solution focused judging was the Family Court. That was followed relatively quickly by the Youth Court, which was established in 1989, so we've actually been doing solution focused judging in this country for a long time.

Since 2008 there have been further specialist courts developed like the Rangatahi Courts, Matariki Courts, the Homelessness Court, the Special Circumstance Court, the Alcohol and other Drug Treatment Court for example. However, access to these has been limited to where you live. There is a criticism that needs to be addressed and that is that we are engaging in postcode Justice where the benefits of these courts are only available to limited numbers of people.

That won't be the case with Te Ao Mārama. It is actually an intentional approach to deliver into the mainstream as much of the best practice as we possibly can from those specialist courts and offer those advantages and benefits to as many people as we possibly can.

What are some of those mainstream best practices that we want to bring under the Te Ao Mārama model? Well, some of them are fairly straightforward. Talking in plain language is one them, recognising that if we start speaking in plain language then people might stop leaving court wondering what just happened to them.

The idea of toning down formalities, to make the experience of coming into court one that is less intimidating and one that helps people engage properly in cases that are actually about them or are affecting them so that the experience is a bit like sitting in this wharenui here. A relatively comfortable one to try to ensure that people are able to present the best version of their evidence or the best version of themselves.

▲ Tiana Epati

Some other examples of best practice are the solution focused judging approach. And in many ways what we've learned in this whare, for example, throughout the course of our 13 years running or operating the Rangatahi Court on this Marae is that the process that we're engaging in is, for many people, just as important as the outcome. It might be that a person would have received the same type of outcome in the conventional Courthouse but by going through the process in the Rangatahi Court they're able to leave the Court feeling not only that they had a fair hearing but the outcome itself was just because of the process that was adopted.

That's leading on to what I was going to say about the best practice that will form quite a major part or Te Ao Mārama which is the idea of solution focused judging. Where people who come to court, and for example plead guilty, will have an opportunity for their risks and needs to be assessed to understand the drivers that brought them to Court. If it's something that can be addressed, then a plan can be put together to be either monitored by the Court or by a probation officer as part of the sentence. Or it could be monitored in a different way potentially through a community channel.

So that solution focused judging approach is probably one of the key ideas that is going to be brought from the specialist Courts into the mainstream. It hasn't been done before to my knowledge in the mainstream in any jurisdiction in the world, so it is a world first or a leading approach in the common law countries that are comparable to ours. I'm confident that if it is as successful as we hope it will be that

▲ Chief District Court Judge Heemi Taumaunu

many other countries will be taking note of what's happening here, as they have done with all the other innovative Courts that we have established here in Aotearoa.

Ms Epati: One part of this is about making the environment and the language relevant to a community or a person who comes into it, but I think the other part as you were saying is about solution focused judging and having good information to make good decisions.

Judge Taumaunu: Correct. So at the end of the day if the process has produced the best information possible to be given to a Judge then a well informed decision can be expected. And that at the end of it all is the essence of what we are trying to achieve, which is fairness for everyone involved in the process.

Ms Epati: Many lawyers have come to me really positive and very hopeful about Te Ao Mārama. You have said that the successful introduction of Te Ao Mārama will require a cultural shift. We've already talked about the language – that's going to be a hard one for us to start dropping the jargon we are so accustomed to using. How else do you think the legal profession can help to ensure that Te Ao Mārama is a success.

Judge Taumaunu: In terms of the legal profession and the role that advocates will play in Te Ao Mārama, if we adopt this cultural shift and start using plain language, chances are that the people who we serve will actually understand what's going on in court. In turn there will be an improvement in the level of understanding and that could well translate into ensuring that well informed decisions are being made by people when they are pleading to charges. I'm hoping that is one of the key results that occurs here.

That by using plain language, toning down formalities, trying to adopt processes where people are assessed we will identify if there are barriers to their participation, which is very important. For example, it's important to know whether someone suffers from dyslexia, so if you give them a piece of paper to read you can be confident that they'll understand it.

In many ways a lot of what we are talking about is not rocket science. It is actually quite straightforward. As far as the profession is concerned, I am not surprised at the support you're hearing about because when I look back at what happened in 2008 here in Gisborne, it was actually the profession who was heavily involved in that first meeting. It was those lawyers who came to the Court and told me that there was complete job dissatisfaction with the way they had been involved in the system as advocates where they had watched grandfathers, fathers and sons of the same families going through the Family Court system, through the care and protection system, graduating into the Youth Court, graduating then into the District Court and then spending long times in prison.

Te Ao Mārama kaupapa is about trying to do something different to achieve a different result, to bring people to a better place than they are at the moment. So, I welcome the enthusiasm of the profession to support Te Ao Mārama.

Ms Epati: And this is something I've talked with you about – access to justice -it's actually a big issue for the profession in terms of wellbeing because if they see the people they are representing are entering a

maze with no exits then that actually affects the wellbeing of the legal profession coming to Court. After all our purpose is primarily to help people.

Judge Taumaunu: And you can see why there is enthusiasm for Te Ao Mārama because part of this design process will be looking at what are the alternative pathways available to people to find a legitimate exit from a system that they find themselves trapped in.

Ms Epati: Why is now the right time for Te Ao Mārama?

Judge Taumaunu: Well, when you think about the Te Ao Mārama concept, it is timeless. It actually goes back, in terms of the traditional Māori narrative, to the beginning of time. Why is now the right time? Well, it's actually been the right time for a long time. It's just a matter of being realistic about the fact that it needed alignment between a number of different agencies, it needed alignment within the judiciary and it needed alignment and support within iwi and within local communities. It's an idea whose time is right now.

Ms Epati: There seems to have been this renewal of interest in learning Te Reo and about concepts of tikanga. In particular I've observed the judiciary moving towards ensuring that all judges are educating themselves to understand more about Te Ao Māori; what would you like to see from the legal profession in terms of upskilling themselves?

Judge Taumaunu: It goes back to the whole idea that there needs to be a cultural shift in thinking that then needs to be expressed by action. From the profession's point of view, I would encourage the profession to remember how important it is to be able to pronounce names properly. How important it is to be able to introduce yourself and reflect both founding cultures of this country and in doing so also potentially to be able to reflect the multicultural nature, the multilingual nature of modern-day Aotearoa New Zealand.

Ms Epati: I'm glad you brought up the point about being able to pronounce people's names and at the very least, have the minimum Te Reo so you can do that. I remember

Moana Jackson talking about how it's just common human decency to be able to pronounce a person's name. That's the minimum level which one would expect from a person in terms of mutual respect.

Judge Taumaunu: If we are intentionally engaging with people to try to ensure that they do understand what's happening, that they can be heard, that they can participate then we shouldn't be creating barriers unintentionally by mispronouncing names.

The profession needs, I think, to reflect carefully on what it is that the profession wants to see itself doing in 2040, which is a very good goal, because that's not far away. That's the 200th anniversary of the Treaty of Waitangi.

From the profession's point of view, I would encourage the profession to remember how important it is to be able to pronounce names properly

Ms Epati: What are the challenges going to be in mainstreaming this approach?

Judge Taumaunu: The first challenge is going to be in our minds collectively, to really embrace this challenge in a positive way and not see it negatively. The reality is that if we don't change then in 2040 nothing would have changed. If we just think of this call to action, 200 years from the signing of the Treaty of Waitangi what is it that we want to be proud of about our justice system and about our Court. Let's think carefully about what each of us individually can contribute and then, collectively, I think we can be very proud of ourselves at the end of all of this when we come to that particular date on 6 February 2040.

Ms Epati: Sir Joe Williams talks about how it has to start with the individual and decolonizing our minds first, and I know you put it in a much more positive way, but that is a big part of it, isn't it?

Judge Taumaunu: There's two ways to look at this, and I prefer this way. We are looking at the unfulfilled potential to remedy the wrongs of the past. That's my preferred way of looking at Te Ao Mārama. And if you look at where Te Ao Mārama began in terms of the personal narrative where Te Maihāroa in 1877 left Arowhenua in search of the promised land which was called Te Ao Mārama in those days. I prefer this idea of the unfulfilled potential that lies within our country Aotearoa New Zealand.

Ms Epati: What does success look like?

Judge Taumaunu: Success looks like people leaving our Court believing that they've had a fair hearing, confident that they just received justice. That's what success looks like in terms of Te Ao Mārama and if all people are able to leave Court feeling that way, then we have achieved what we are setting out to achieve.

Ms Epati: If people come to Court and they feel that they have been seen, heard, understood, engaged in the process it is more likely that they'll not return.

Judge Taumaunu: Not only is it more likely they'll not return, I'm very confident it is more likely that the community we serve will see the Court as relevant and that the respect for the rule of law within the communities we serve is enhanced by the way that we conduct ourselves.

Ms Epati: Kia ora Judge. Thank you for being a true visionary leader. You are very much seen as a merchant of hope, so I like the idea that we all have through this the opportunity to be merchants of hope.

Judge Taumaunu: Kia ora Tiana. ■

PROFESSIONAL STANDARDS

Getting ready for new Client and Conduct Care Rules

New rules governing the behaviour of lawyers, with an emphasis on tackling bullying and harassment, come into force from 1 July. The amended rules clarify the standards of behaviour expected of lawyers when engaging with clients, colleagues and others.

"Bullying, discrimination, racial or sexual harassment and other unacceptable conduct has no place in any profession," says New Zealand Law Society | Te Kāhui Ture o Aotearoa President Tiana Epati.

The changes are amendments to the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (RCCC). The amended rules include:

- Clearer definitions of bullying, discrimination, harassment, including racial, sexual harassment, and violence.
- New reporting requirements for notifying conduct to the Law Society to ensure that there is an appropriate regulatory response.
- Each law practice will need to have effective policies and systems to prevent and protect employees and other people it engages with from bullying, discrimination, harassment or violence. The definition of law practice includes an individual lawyer practising on their own account. This means that sole practitioners and barristers are included.
- Each law practice will need to nominate a designated lawyer to report annually to the Law Society that the law practice has complied with its mandatory reporting obligations.
- Victimising a person who makes a report in good faith is expressly prohibited.

Guidance to support lawyers to understand what's required of them under the changes has been released in draft by the Law Society. Consultation on the guidance is open until 16 July 2021. You can read the guidance on the Law Society's website *www.lawsociety.org.nz*

"Everyone has an individual part to play in securing the well-being of our legal community," says Ms Epati.

"We also need to ensure the public can have trust and confidence in the legal profession." ■

Defined behaviours

Bullying

Repeated and unreasonable behaviour directed towards a person or people that is likely to lead to physical or psychological harm.

Discrimination

Discrimination that is unlawful under the Human Rights Act 1993 or any other enactment.

Harassment

(a) intimidating, threatening or degrading behaviour directed towards a person or group that is likely to have a harmful effect on the recipient; and
(b) includes repeated behaviour but may be a serious single incident.

Racial harassment

Behaviour that:
(a) expresses hostility against, or contempt or ridicule towards, another person on the ground of race, ethnicity, or national origin; and
(b) is likely to be unwelcome or offensive to that person (whether or not it was conveyed directly to that person).

Sexual harassment

Behaviour that:
(a) subjecting another person to unreasonable behaviour of a sexual nature that is likely to be unwelcome or offensive to that person (whether or not it was conveyed directly to that person); or
(b) a request made by a person of any other person for sexual intercourse, sexual contact, or any other form of sexual activity, that contains an implied or overt promise of preferential treatment or an implied or overt threat of detrimental treatment.

Violence

Includes the following:
(a) physical violence:
(b) psychological violence:
(c) sexual abuse
(d) sexual assault.

Policies and systems to prevent and protect from prohibited behaviour

Policies and systems to prevent and protect all persons from prohibited behaviour should include:

1. A clear statement that bullying, discrimination, harassment, racial harassment, sexual harassment or violence is not accepted by the practice at any level.
2. A clear and simple reporting process.
3. Avenues of support for people affected by prohibited behaviour.
4. Investigation of complaints.
5. Confidentiality and privacy (which cannot operate to exclude reporting requirements to the Law Society).
6. Ensuring the active support of senior lawyers and managers, including modelling respectful behaviours themselves.

All lawyers are obliged to report prohibited behaviour

Under Rule 2.8 if you have reasonable grounds to suspect that misconduct may have occurred, you must report it to the Law Society. You have a discretion to report unsatisfactory conduct under Rule 2.9.

Support for those affected by prohibited behaviour

If you or someone else has been affected by bullying, discrimination, harassment or other forms of prohibited behaviour, there is support and help available. Law Society options for support include:

- Legal Community Counselling Service: 0508 664 981
- Law Care free phone line: 0800 0800 28
- National Friends Panel members who deal with sensitive matters.

Checklist of actions before 1 July

All lawyers:

- ☐ Read the draft guidance
- ☐ Ensure you understand the reporting requirements that apply to you
- ☐ Ensure any staff that report to you have read the guidance and understand the requirements that apply to them

Law Practices:

- ☐ Notify the Law Society of your designated lawyer – email *registry@lawsociety.org.nz*
- ☐ Sole practitioners and barristers sole will automatically be the designated lawyer for their practice, there is no need to send an email

Law practices, sole-practitioners and barristers sole:

- ☐ Must put in place policies and systems to prevent and protect employees and other people you engage with from bullying, discrimination, harassment or violence
- ☐ Ensure your designated lawyer understands when they are required to report to the Law Society

Designated lawyer

Rule 11.3 requires each law practice to have a lawyer who is the "designated lawyer" for that practice. The designated lawyer is required to:

- fulfil the law practice's annual reporting obligations; and
- notify the Law Society on behalf of the law practice, within 14 days:
- if there is a written warning or dismissal due to conduct such as bullying, discrimination, harassment, theft, or violence; or
- a person leaves the practice within 12 months of them being advised that they were being investigated in relation to this conduct.

This requirement was introduced to ensure that prohibited behaviour by lawyers is reported to the Law Society. The designated lawyer must be in practice on their own account, such as a partner, director or sole practitioner.

If you are not a sole practitioner or barrister sole, you must notify the Registry Team at the Law Society who your designated lawyer is by emailing *registry@lawsociety.org.nz* This does not apply to in-house lawyers who do not need a designated lawyer.

WHY I PRACTISE

Isaac Hikaka

Partner at Lee Salmon Long

Working across a broad range of areas Isaac specialises in trusts, relationship property, South Pacific law, electoral law, public law and sports disputes. He appears in Court and tribunals throughout New Zealand and the Pacific Islands, including as lead counsel in the Privy Council. He is also a member of the Law Society's Rule of Law Committee.

A passion for unusual work in unusual places

I joined LeeSalmonLong straight after university. I had considered becoming a Judge's clerk but the variety of work that the law firm offered was more appealing.

More than a decade later I know I made the right choice – I have had some really interesting opportunities, particularly working across the Pacific. I'm actually a permanently admitted member of the Cook Islands bar, have previously been admitted in Samoa and am currently also admitted in Texas – so I get around!

I was lucky to be in the right place at the right time near the end of my first year with LeeSalmonLong when the call went out for help with a case in the Cook Islands so I put my hand up. It was a judicial review of a decision made under the Environment Act. Since then I've been involved in quite a number of cases in the Cook Islands. In fact, I once cross examined the Cook Islands Prime Minister which was quite an experience.

In Samoa I was very privileged to work with Helen Aikman QC challenging the constitution on electoral petitions. She was an incredible woman who died far too young. I'll never forget being in Samoa just after the 2009 tsunami. I'd never fully comprehended that a tsunami is much much more than just a big wave. We visited some of the affected areas with the then Minster of Works and the devastation was quite overwhelming.

Closer to home in New Zealand some of the cases that stand out to me are acting for organisations like Greenpeace, iwi and NGOs in the environmental space. I feel there has been a real sea change in the area of environmental law as judges start to take a longer-term view in their decision making. I would be really interested to revisit some of my early cases to see if we would get a different result now.

Evolving the law whilst maintaining the Rule of Law

One of the fundamental things about the law is that it doesn't stay still, and in fact it can change at a much quicker pace than other areas of society. I am particularly keen to see the details from the Supreme Court on the decision to allow former Christchurch Civic Creche worker Peter Ellis's appeal against charges of sexual offending to continue, despite the fact he died in 2019. This followed submissions based on tikanga.

I strongly believe that tikanga has a place in every aspect of the law, even areas where it may not be as obvious, such as trust law. This is an area of law built on principles that go right back to the Crusades – so how do you marry that to te ao Māori?

I strongly believe that tikanga has a place in every aspect of the law, even areas where it may not be as obvious, such as trust law. This is an area of law built on principles that go right back to the Crusades – so how do you marry that to te ao Māori? But it can be done. After all, every civilisation has needed to develop governance frameworks and has sought broadly similar solutions to societal issues. It's one of the things I have seen working across multiple jurisdictions – that essentially most cultures have built legal frameworks that have more similarities than differences.

One of the things I enjoy most about working in other jurisdictions

is seeing where legislation is similar but is being applied differently. A good example of this is that the Cook Islands has a waka jumping Act – although of course there it is vaka jumping. What was even more interesting with that is that I was involved in a case where the Crown actually said the law was unconstitutional – I'd never seen that before!

Ensuring we have the legal frameworks to be able to question and test the law and how it is being applied is critical to maintaining the Rule of Law. People must have confidence in the system, and a large part of that is having the checks and balances that allow fair opportunities for questions to be asked and behaviours to be checked.

A love of the arts fulfilled through legal knowledge

The law isn't always seen as the most creative of professions but what it has allowed me to do is to take my skills and experience to support organisations that I'm passionate about. I'm currently a trustee of the Royal New Zealand Ballet and a director of the Auckland Theatre Company.

▲ **Left:** Isaac Hikaka and his family **Right:** Isaac at the Privvy Council

It's been a wonderful way to stay connected with art forms I love. It's also allowed me to develop skills and experience in governance.

Like the law certain arts can seem a closed shop to large sections of society – I've been working in particular on how we can work more with Māori and Pasifika artists and communities. I'm really keen to see us tell our own stories but it's a slow process. As I've said, I think we can often make changes to the law quicker than we can in the arts – for example it's going to take years to train enough Māori and Pasifika ballet dancers to achieve cultural parity.

My whakapapa and a rather unusual childhood

I whakapapa to Taranaki, though was born in Wellington. My koroua was of the generation that was stopped from speaking te reo and told to abandon his culture. It was really sad as he often only ever really spoke te reo in his sleep. On the rare occasions I could hear him speak it was like listening to the te reo equivalent of Shakespeare's English. It's amazing how quickly te reo has evolved with new words and phrases.

My father became a police officer after studying law at university (although he did go into the law later on, becoming a judge in 2004). My mother worked as a nurse – she was originally from Ireland moving to New

▲ Isaac with Alice Cooper

Zealand as a child. I have a younger sister who has gone on to do far more exciting things than me like working in film and television and for charities in places like Yemen and Syria.

From Wellington we moved first to the Bay of Islands and then to Switzerland. I did correspondence school as I didn't speak any European languages. Switzerland was a very antiquated place. The laws in particular felt like they were stuck in the last century, if not the one before that. For example, in the Canton where we lived residents were not allowed to put laundry out on a Sunday – and this was a serious law where you genuinely faced penalties for breaking it! There was also this tradition of ringing the church bells every hour so people knew the time – though by the mid-nineties they had progressed to having someone go up the tower at night and call out the time rather than ring the bells. But in hindsight that was a really odd thing to do!

After Switzerland we moved to Ireland to reconnect with my mother's family. I went to school in Ireland. The main thing I remember was the horrendous bright orange uniform – troubling not only for the complexion but its historical connotations.

When we returned to New Zealand I was accepted into Auckland Grammar, and then got a scholarship to study law at Auckland University.

We need to have more people from diverse backgrounds at the top of the profession so that young people coming through can see someone like them. As a Partner it's my responsibility to ensure we use our hiring processes to bring in diverse candidates

Using my early experiences to support greater diversity in the profession

There is no question that we need greater diversity across the profession. As a section of society, we are not representative of the wider population. There are a lot of reasons for that. Supporting our Māori and Pasifika students better at university and earlier is one of the key things we can do to ensure that more students reach graduation. I have supported students through tutorials and moot coaching in the past and I've found that hugely rewarding.

I do worry about the culture of our profession and I'm pleased to see things like the new Rules coming in to really spell out what is unacceptable. Although we should know that already. What I'd really like to see is a change in how we treat young lawyers – there is no reason they should be consistently working such long hours. They should not be expected to do that.

One of the things I'm really interested in is how we upskill students from different backgrounds about all sorts of aspects of the law and general life – for example, some young people coming into the profession may never have come across a mortgage because their families have never owned a property.

We need to have more people from diverse backgrounds at the top of the profession so that young people coming through can see someone like them. As a Partner it's my responsibility to ensure we use our hiring processes to bring in diverse candidates. If we always appoint solely for the top grades then we will inevitably get people who work and think in a similar way. They are great minds and very hardworking but who are we missing out on? ■

HOW I PRACTISE

Working as a Partner whilst dedicating time to my family

Rebecca Graham, Partner at Cooney Lees Morgan in Tauranga

Deciding to study law really came down to my preference for writing over science. I went to the University of Otago to study law and history and upon graduating realised that I didn't really know what being a lawyer actually entailed. I joined Buddle Findlay in Auckland where I learnt a lot, but for me what I really got out of that experience was working alongside some great role models.

Since then, what's determined my career has been the people I work with – it was the same when I went to London to work at the Magic Circle firm Freshfields. I really enjoyed that experience because of the people I worked with, many of whom I am still in touch with.

I spent nearly four years in London before taking a year out to travel. In 2011 I ended up back in Tauranga where I'd grown up – something I hadn't expected! But the city had changed a lot since I'd been away and I could see the opportunities for me as I looked to move into the next phase of my life.

Joining Cooney Lees Morgan

Cooney Lees Morgan was the first firm I joined in Tauranga and I've been there ever since. I've had some great opportunities over that time working in the firm's Commercial team and more recently its Private Client and Trust team to support clients with their commercial and property transactions and

structuring their affairs.

I've acted on a range of work including some of the firm's most significant farming and orchard transactions and many of my clients are based outside of Tauranga. A lot of business is now done online and it's seamless. So, you can live in Tauranga with all the lifestyle benefits that brings, while working with interesting clients all over the place.

I went part-time after my son was born six years ago. I took time away from work and started back at just two days a week. Since then, I've had my daughter and another period away from work and have been gradually increasing the amount of time I spend working.

A leap of faith into partnership

Earlier this year I became a partner in the firm whilst maintaining my hours at four days a week spread over five. I decided that it was too exciting an opportunity not to take up – being an employer and running a business are new challenges for me, allowing me to appreciate the law from a whole new perspective.

I talked through the option to be part-time with my fellow partners, all of whom work full time. It was a new thing for the firm to have a partner join while working part-time but I was not prepared to work full time while my kids are still young. Like with most things, we talked it over and came to an arrangement that everyone was comfortable with. Any arrangement like mine has to work for both sides.

It's only been a couple of months but I have had some great feedback about the part-time arrangement. I really hope that this becomes more of the norm. It's not just parents who benefit from having the option of working part-time in a senior role, there are a lot people who would want to do this for a whole variety of reasons.

It's not just parents who benefit from having the option of working part-time in a senior role, there are a lot people who would want to do this for a whole variety of reasons

How I make it work

I've certainly found that being part-time is about doing the best job I can. In my experience part-timers smash out the work and are very efficient. You've got to make the most of the hours you have at work.

That also means that when I'm not working I need to be really disciplined with my time, making sure I'm not checking emails whilst looking after my children. I actually read a really good book on this – The Mother of all Jobs by Christine Armstrong. One of the top tips in there was to only check your emails when you can do something about them. So I'm trying to be really mindful of that.

I have a great set-up at home which means I can easily work from there or the office which gives me real flexibility. I had that before Covid, but it's even better now that everyone has had the experience of flexible working and can see the benefits.

Another really important thing is to have a supportive team around you who you can rely on when you're not in work. They also need to have a good understanding of when it's okay to contact you outside of your work hours, because sometimes that will be necessary, but we keep it to when its required.

I've found structuring my hours across five days means I'm more on top of what's happening. I also stick to a routine so that people know when I'm working and when I'm not.

I am also very lucky in that my partner also works part time. I think it's great for my children to see both their parents working but also sharing the parenting responsibility. I always like Ruth Bader Ginsburg's quote; *"Women will only have true equality when men share with them the responsibility of bringing up the next generation"*. I feel very lucky that I am able to do that and contribute to it hopefully becoming more of a norm. I look forward to a time when it's really normal for people to work part-time in senior roles across a range of professions. ■

Challenging for Change

Putting disability at the heart of diversity

In Aotearoa New Zealand one in four kiwis has a disability. Their experience is one of living in a world that systemically discriminates against them. But every single kiwi can choose to change that through our actions, especially when we work in the legal profession.

CHALLENGING FOR CHANGE

Being deliberate about disability

An interview with the Disability Rights Commissioner Paula Tesoriero MNZM

BY **MORWENNA GRILLS**

THE LEGAL PROFESSION HAS BEEN through a period of intense focus and discussion about diversity and inclusion. Whilst most conversations focus on gender and ethnicity, how often has disability been at the top of the diversity agenda?

Nearly a quarter of Aotearoa New Zealand's population is made up of disabled people 24%. That means that every fourth person you meet might be disabled – but will you be meeting those people in your workplace as colleagues or clients? Probably not, unless your diversity strategy includes disabled people.

Disability Rights Commissioner, and former lawyer, Paula Tesoriero is used to having conversations about diversity but finds all too often that disability isn't yet part of the kōrero.

"A number of organisations tell me that they're focussing on gender first and then something else and then they'll get to disability.

"But the truth is that if you're not doing disability then you're not doing diversity.

"If we want a truly representative legal profession and judiciary then it will be really important to think about how the profession takes deliberate steps to ensure there are disabled people in the profession and on the bench."

Lived experience

Paula has direct experience of what it's like working in the legal profession as a disabled person.

"I wanted to be a lawyer for as long as I can remember.

"It was about this idea of advocacy and wanting to ensure there was a voice for people who didn't have one. My own experience may have influenced that, spending time in hospital as a child. I came away with a sense of wanting to make sure the many disabled young people I saw around me had a fair go.

"I really enjoyed my time at Law School. The nature of my impairment is such that I didn't particularly need accommodations during my time there. I had a lot of friends and found it a rewarding experience."

After graduating Paula joined one of the big firms, spending time in different areas before going on secondment to the Ministry of Justice.

"The idea was to do that time in a public sector role and return to private practice, but I found that I really loved my time at Justice. It was a such a wide variety of legal, policy and justice related issues and I held quite a senior role supporting the operation of the Courts. After Justice I moved on to Statistics New Zealand before taking up the role of Commissioner."

Paula also held a number of governance roles in the sport and disability sector and was a paralympic cyclist.

Disabling barriers to enable participation

Shifting the way we all think about disability is a key part of enabling more disabled people to join the legal profession.

"Traditionally the way we think about disability places the burden to adapt on the disabled person. However what's known as the social model of disability recognises that a person is not disabled by their impairment – they're disabled by the environment around them as that places barriers in the way to full participation. Once you can start to think like that you realise that we all have a collective responsibility to remove the barriers to participation.

"Whether you're an employer

or working with a disabled client, ask about disability. Ask if there are ways that the person sitting in front of you needs support to exercise their legal rights, or to fulfil their potential in the workplace.

"Especially as an employer, don't assume that everyone needs the same thing. Employers make accommodations every day for a huge range of reasons so it shouldn't be different for disabled people.

"I have a lot of disabled people tell me about the flexibility that was afforded to them during the COVID-19 lockdowns when everyone else was restricted from travelling to the office. Let's make sure we hang on to those ways of working and don't go back to what for some was an impossible barrrier to work.

"Challenge yourself to be flexible, be mindful of what your staff need to be succesful and with a change in those kinds of mindsets I'm confident that we will bring about change. And we have to bring about change."

In talking about the concept of ableism Paula's passion for advocacy shines through. Her genuine desire to shift the conversation, to shift the way we think about disability is what she is striving for in her role.

"I want people to talk about ableism which in effect is discrimination or because the world was not created with disabled people in mind, the world we live in is inherently abelist.

"For legal workplaces it's thinking about the culture, the way in which you recruit. For example, are you working with recruitment agencies to deliberately find the vast amounts of talent there are in the disabled community?

"Because disabled people are talented – we're awesome problem solvers! There's a lot of evidence that disabled people are more loyal, take less sick leave and make fewer ACC claims.

"I also think that given 24% of the population is disabled then if you are a really progressive firm you would want to consider if the way you do your work

Facts & Figures

Around **one in four** New Zealanders experiences a physical, sensory, learning, mental health, or other impairment (about 1 million of us), and about **35 percent** of disabled people are over 65 (around 370,000 of us).

Disabled people are **more likely** to have lower incomes than non-disabled people.

34 percent of disabled women have no educational qualifications compared to **15 percent** of non-disabled women.

Disabled adults experience violence and abuse at about **1.5 to 2x higher** than non-disabled people.

Disabled children experience violence and abuse **3.7x more**.

Disabled people report feeling lonely most/all of the time at around **four times the rate** of non-disabled people (just over 11 percent for disabled and just under 3 percent for non-disabled).

and services responds to the needs of that 24%. There is no better way to design things and understand things for disabled people than having disabled people in your organisation."

Supporting people with disabilities in the justice system

"I think the whole justice system could be far more responsive to the needs of disabled people."

To illustrate her point Paula turns to a quote from Chief Science Advisor for the Justice Sector, Dr Ian Lambie:

"If either a victim, witness or offender cannot concentrate, process information, hear or grasp basic concepts let alone deal with stressful questioning or court proceedings, we have to wonder, is fair – and smart – justice being delivered?"

Paula says that question is pertinant – and the feedback she gets from disabled people and their whānau going through the justice system is that it is not a fair or a smart process for them. And that really concerns her given the disproportionate number of disabled people in the criminal justice system.

"We should be really looking to understand the drivers of people entering the system and focusing much more on early intervention. If we think about the way the system works it's about words and engaging with people, but if you don't understand the words or you have poor impulse control and other things that impact on your understanding then you're disadvantaged at every level."

If we think about the way the system works its about words and engaging with people, but if you don't understand the words or you have poor impulse control and other things that impact on your understanding then you're disadvantaged at every level

One thing that Paula has been told by some members of the judiciary is more lawyers could be using international legislation to strengthen their arguments when dealing with disability related cases.

"It's really important that lawyers are using everything they have to best support disability rights arguments. Raising international conventions such as the Convention of the Rights of Persons with Disabilities, means those rights can be considered by judges.

"I don't know why this is the case – it might be a lack of awareness so perhaps more training or education is required in this area."

Increasing diversity through doing disability

Returning to the start of our conversation Paula reiterates the onus there is on all of us to enable disabled people to thrive in the legal profession.

"If we want the legal profession at all levels to look and be like New Zealand then we've got to have disabled people there.

"If legal workplaces genuinely want to be diverse organisations then they need to be deliberate about getting there.

"We can't keep having conversations about being a socially inclusive nation if disability isn't part of the kōrero. I like to think we are all doing our part to nudge that along – but it's going to take all of us to be prepared to have challenging conversations to be the progressive country we can be." ■

CHALLENGING FOR CHANGE

Access all areas

The advocacy of Grace Stratton

BY **JAMES BARNETT** AND **BELINDA RYAN**

▲ Grace Stratton
📷 James Yang

"I was lucky to be raised in a home where I felt like my decisions were my own and I am privileged to access higher education as a disabled person. But as I looked at my options for law schools, which quickly dwindled to one, I wondered how many of my non-disabled peers had "flat footpaths" and "can roll between classes" at the top of their – "Must have at University" list. Probably very few.

Grace Stratton, 21, is currently nearing the end of her study for a double degree in law and communications at Auckland University of Technology, and tells this story about starting her university education. She runs a consultancy alongside firm SweeneyVesty, called All is for All, which helps to ensure that disabled people are understood, valued and given sovereignty over outcomes that affect them and stories that are told. The business, which is pan-disability, has provided countless opportunities for many disabled people and created jobs, changed minds and shifted systems. Grace is a supreme AIMES alumni, one of Forbes Asia's 30 under 30, and the ACC supreme winner of the Attitude Awards. She's also a proud life-long wheelchair user – having been diagnosed with Cerebral Palsy at age one.

Grace recently spoke alongside three other young people at the biennial conference of the International Association of Women Judges (IAWJ) in Auckland, where judges from around the world came together to share their vision for best practice in areas such as promoting human rights and combating domestic violence, discrimination and gender bias, both within the judiciary and the world at large.

Poorer outcomes for disabled people

"The reality of disability is perpetuated by society. Using a wheelchair brings about difficulties, but it doesn't disable me from participation. I'm disabled by the world, by the way that things are designed and by people's perceptions." Grace said. "When you look at outcomes for disabled people, you can clearly see this disabling culture illustrated: one in five disabled children live in material hardship, disabled people are much less likely to be in full-time employment and more likely

to experience sexual assault, with this hitting intellectually disabled persons the hardest. Global data by the Justice Department finds that they are seven times more likely to be survivors of sexual assault than non-disabled people."

Create a more enabling society

These statistics are directly at odds with the brilliance of the disability community and Grace is motivated in all she does, to create a more enabling society. This is done both through the law, and in communications. Grace has worked for almost three years with leading firm SweeneyVesty, to help people understand accessibility and how communications shape the world. She will soon begin clerking at DLA Piper, and says that the relationships she has built with communicators like Greg Fahey and lawyers such as Reuben Woods at DLA Piper and Tiana Epati at the Law Society, along with the leading example of CJ Winkelmann, have helped her to see a pathway towards entering the legal profession.

She says that while she is still figuring out her future in law, she has many interests in many sectors, from Corporate all the way through to Criminal Defence, having been greatly inspired to study law because of Greg King. Grace's passion is advocacy, access to justice, and working to create a system which functions for the many communities we should be serving. "This requires not only diversity, but a core understanding of the systematic barriers that communities face. It is the system, and its perceptions which often disable, more than any impairment."

The lived experiences of disabled people can lead to negative perceptions, and less willingness to interact with law, she says. Statistics New Zealand has highlighted that disabled people consistently reported significantly lower levels of trust in other people, and in key institutions, such as the health system, the education system, the courts, and the police, than non-disabled people. Grace suggests that by thinking about what is disabling them, we can improve these negative outcomes.

"Mine is a visual disability – people who meet me know that I am disabled because they can see it." This has positive and negative aspects for Grace. The positive is that visual cues will allow judges and others to make the court environment accessible. "It's general practice

Facts & Figures

Of disabled people aged 18–64:

23% reported not having enough money to meet every-day needs vs **7%** for non-disabled people.

30% experienced discrimination within the last 12 months vs **19%** for non-disabled people.

16% reported having a house/flat with a major problem with heating vs **6%** for non-disabled people

39% of disabled people aged 18+ have no qualification vs **16%** for non-disabled people.

23% of disabled 15+ year-olds are employed vs **70%** for non-disabled people.

22% of disabled 15+ year-olds are unemployed or underutilised vs **12%** for non-disabled people.

46% of disabled people aged 18+ reported having poor overall mental well-being vs **7%** for non-disabled people.

Source: Statistics New Zealand's Household Labour Force Survey June 2020

to stand when the judge enters, but obviously I get a pass on that!" she laughs. The negative side is that assumptions can be made about not being on the same level, because of what people wrongly associate wheelchair use with.

"This has the opposite impact on people with invisible disabilities or those who are neurodiverse. Unless the disability is disclosed, others are unable to make allowances. But the weight of that disclosure shouldn't be on disabled people." Grace says that many defendants in the court system and prison inmates may have neurological disabilities. "It's estimated that 10% of the New Zealand population have dyslexia, but up to 90% of prison inmates. In the United Kingdom between 2-4% of the population have a learning disability, but in prison populations this is 32%. Fundamentally courts and the law need to ask themselves whether we understand enough about neurodiversity to make informed decisions. I believe the continued high rate of neurodiversity in our system, and our history, such as in Teina Pora's case, shows us we do not know enough."

"Lots of firms have inclusion or accessibility policies. Every man and his dog has a policy, very few live it out." Her advice to firms is to make sure that they represent their policies. "...If everyone in your office looks like you, or a version of you then it's a sign that more work needs to be done"

It's important to recognise the intersectionality between disabling experiences and how they culminate, when people with impairments are also more likely to experience poverty, have difficulty gaining employment and are less likely to succeed in education, they are disabled far beyond their impairment. But, disability does not need to change. Rather, the expectation that disabled people should succeed in an environment that is not designed for their success, must.

Disability in the legal profession

Grace says that at a very base level, this could be improved by having more disabled lawyers, which would make it easy for the profession to hear disabled voices. She challenges organisations to live up to the high-minded principles that are often captured in policy, but not in practice. "Lots of firms have inclusion or accessibility policies. Every man and his dog has a policy, very few live it out." Her advice to firms is to make sure that they represent their policies. "People are aware of inauthentic inclusion, activism and tokenism. If everyone in your office looks like you, or a version of you then it's a sign that more work needs to be done." Mentorship can help, she adds.

She is hopeful that things will be easier for disabled people in future, as awareness improves and society responds. "Post-Covid it's common for people to work from home. Disabled people have been asking to do this for years! We make allowances when they're needed by the majority, but often if we stop and think, what one community is asking for may also be good for everybody."

Her advice to law practices looking to be more inclusive is to live their values and have a conversation. "Sometimes people don't talk about disability because they are afraid of getting it wrong. But, this leaves us without any way forward. It's the nature of life that taking a step and trying is going to get you further than doing nothing." Grace also mentions that she is not the only disabled person coming through the law, or working in it. She credits those before her and acknowledges Sophia Malthus and Krizel Pineda, her peers at AUT currently in their first and second years of study respectively.

"Historically and still today the law is used as a tool for exclusion, but the wonderful thing is there's also examples of law changing the world for the better. The law provides a framework for the rest of society. It's a mechanism to achieve inclusion and influence. The role of law is so fundamental, that if we're not valuing inclusion and access, then how can we expect others to? We need to set the tone." ■

CHALLENGING FOR CHANGE

Ki te ture hei matua mō te tangata whaikaha

NĀ **EDMOND CARRUCAN**

Edmond Carrucan

I OFTEN HEAR THE WORDS DISABILity and disabled. I am no expert in such terms. Nor am I someone who possesses intimate first-hand experience of the daily meaning of such terms. However, when I heard these words, disability and disabled, I am troubled because that is not how my iwi talks about people.

But before we dive deeper, I want to start with a brief reflection on words from Te Kooti. Most ironically perhaps because we call all Courts Kōti. This is ironic, because in my tribe we use tohutō (macrons) or double vowels interchangeably (at times).

Accordingly, for me, the name Te Kooti, is potentially immortalised in every Court in this country. I have often thought, even if unintended, that it is 'he kura huna' (a hidden treasure) of all our Courts. That perhaps even hidden right along with Te Kooti is hidden perhaps, his most widely known whakaaro:

> "Ka kuhu au ki te ture,
> hei matua mō te pani"
> *I seek refuge in the law, for it is a parent of the oppressed*

This whakataukī, if nothing else, evidences a powerful belief in law. It speaks to the very essence of law and access to justice. It articulates a belief that law will be honest, right and fair. That it will be a parent, in the sense that it will actively protect, consistently care and dare I say deeply love those under it.

This whakatukī envisions a law committed to relational accountability. A law that will enter into the experiences of those who suffer and struggle.

In other words, we are in a sense subject to the law and the subject of the law.

This is a law beyond 'black letter'. It personifies the law as a parent who can say "I understand" and when there is a problem for their children say "I'll handle this." It is also why the law has been called paternal in some legal traditions and maternal in others.

'Black letter' lawyers can know this 'parentalism', if you will, as the protection of rights that run so deep in legal precedents, that even Parliament may not be able to oust them. These include in exhaustively the right to a fair trial, a right to remain silent when arrested and although given perhaps little weight in practice, the presumption of innocence.

'Spirit of the law' lawyers can know this "parentalism", where Te Ao Māori knew a similarly overarching governance relationship of the world, in one form, through relationship with atua. This is not the only form, merely one form. I stress that there were many other such, spiritual and legal relationships.

For this article, I return again to the paepae of my marae. A seat beneath the great cosmos. I sit aside and beneath all my tūpuna. I have discomforting things to say, but they have told me:

> "Māu anō e tama, karawhiua"
> *It is up to you again tama, do it*

Atua Tama Kotahu

With deepest respect for them, I write this article.

I will first reflect on an atua (god) and then second explore concerns around what some term 'disability', 'disabled persons' and law or 'disability and the law'.

As indicated, I reflect first on the atua Tama Kohatu. I see him presiding over the process and product of when a natural rock (i.e. a toka) is subject to any external force, usually by a human hand, breaking it apart. This is why Māori often call unveiling of crafted grave headstones 'hura kohatu', not 'hura toka.' Tama Kohatu works in unison with his whanaunga to form the world of rocks that we know. He gives power, sacredness and potency to the rocks in what some would call a broken state. Unsurprisingly, he has a memory and he can be found in most urupā, upon the graves. He often bears the photo of a loved one.

> "Te kohatu te kaipupuri o mahara, te kaitohu o te tapu o te mate"
> *The stone is the holder of memory, the signaller of the sacredness of the dead*

The notion that disabled people have rights needing protection is not something I think any of us would dispute. What we sometimes need is signalling and reminding.

I consider the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) to be a success, particularly because in the preamble it first recognises "disability is an evolving concept" and second was concerned "about the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination." We need reminding that this is perhaps one starting point for us all. A truth across all practice areas.

Why do such terms as disabled trouble me?

As a lead in, the deficit connotation of such a word as 'dis-abled' troubles my mind for two reasons. First, 'the person' comes last in the words, 'disabled person.' For me, there may be no greater whakaaro Māori than "seeing the person first" and not merely with the eyes. For we are all people. We are all born and we all die. In such truths, we can achieve deep whanaungatanga.

If you won't take it from me, consider support for this view from Moana Maniapoto (Ngāti Tūwharetoa, Ngāti Pikiao, Tūhourangi Ngāti Wāhiao), a well-known singer-songwriter and political activist. She has written of tangihanga, in 2015, for E-Tangata as:

> "...a time to balance the ledger of kinship responsibility. And, at its heart, is *whanaungatanga* and manaakitanga." (emphasis added)

Secondly, the very notion of being dis-abled is not one I was raised to know. I learned it from state schooling. At the marae, what I heard was that there was instead always something being given. A gift. I heard many such

stories. One example included the blind being able to fall in love but not by what they see. This is something many of us will never know. To little Edmond, these stories were of superheroes, not disabilities.

Tangata Whaikaha

We have a popular kupu in my tribe Ngāti Hāko for a disabled person: "He Tangata." More broadly, the term "Tangata Whaikaha" is being used also. I suggest you use such terms. Both put the person first. I hope you remember them. I urge you to understand them by affording respect and remembrance to all people.

I had a cousin, called Little John, who some would call disabled. He was a loving boy and when I was little he was perhaps one of my very first friends. I look back fondly on such happy memories. Little John didn't have a violent bone in his body. He is a key reason for why I received one of my Māori names, "Tutu". I cannot express how much this has formed my identity. And yet, the term disabled will never feel right. He changed my life forever. If that's not a superpower, changing people's lives, I really don't know what is.

As a whānau, we all admired him for his strength, his mana and his ever-increasing tapu as he approached death, when he was young. He has long passed from this earth, but not from my memory, which I will describe as 'Te Pae o Mahara.' Nor has he disappeared from our sight, with his own whetu tapu (sacred star) that is celebrated by our whānau, each year.

I remember him and this story because my cousin was a tangata whaikaha. You might see that as normalising, but I see him when I close my eyes right now. I thank him and afford him the full respect I know he deserves.

> "Moe mai rā Little John"
> *Rest in peace Little John*

To be clear, I am not naive to the world, nor some of the more unsavoury types who live in it. You may have gained such an impression. I have seen some of the ways people mistreat the disabled, often just because they can. And some of those people then have the cheek to think the disabled person is the one with the problem. I disagree. I will not disown the teachings of my tūpuna. I know what is tika. I know who I am.

But do we know who we are, legally? Have we at times forgotten what is tika? I ask, because to know who you are within a Te Ao Māori lens is to have a sense of your 'world' and 'environment'. Two words. Two different concepts.

I signal that we must not forget this is the same legal world that only recently repealed Part 4A of the New Zealand Public Health and Disability Act 2000. Section 70C in particular, caused so much trouble for whānau and tāngata whaikaha of all ethnicities. This section prevented whānau members from being paid if they cared for a loved one. How did we get here?

You might remember the case of *Ministry of Health v Atkinson & Ors* [2012] NZCA 184, where the Court of Appeal upheld that the Ministry's policy of not paying parents where a non-family member would be paid was discriminatory on the basis of family status (at [139]). Further, the Court maintained that the discrimination against section 19 of the New Zealand Bill of Rights Act 1990 (NZBORA) was not justified with reference to section 5 (at [180]). The Court did not underestimate the cost implication of their findings (at [171]).

Shortly thereafter in 2013, Part 4A was introduced, under urgency. This is despite the then Attorney-General concluding that it limited rights and freedoms to an extent that could not be justified under section 5 of NZBORA. The amendment was introduced with the explanatory note that responding to the *Atkinson* case:

> "*...would result in unmanageable fiscal costs to the Government*. In the absence of legislation, the Government's policy would be unlawful and the Government could face a very large number of claims. The only feasible way of managing these risks is through legislation." (emphasis added)

What angers me most is that fiscal costs came before families. That is unacceptable. I further challenge that introduction of Part 4A never aligned with section 3(1)(b) or section 4 of the Act.

We need to learn to consider what matters most and our very purpose in society. I ask, "are we an honourable profession that seeks to protect those who need us and those who are most vulnerable?"

To think if affected whānau members had been caring for a stranger, before 30 September 2020, the government would pay them but not if they were caring for their own whānau is sickening. Worse, under that repealed section, the government would pay a stranger to care for their whanaunga instead of them. When you see laws like this I ask if our laws care to empower whānau in Aotearoa.

At times, for me, it is a no. And a shameful no. This is because, we know if some government agencies were inclined towards whānau empowerment their single goal would be simple: to become smaller and work themselves out of jobs. Yet, on only one occasion, have I ever met a government lawyer, who shared this exact concern.

I signal that the UNCRPD, in that same preamble, was "convinced that the family is the natural and fundamental group unit of society." Unless I have made a mistake here, it naturally seems nothing could be more fundamental than whānau empowerment by the law and lawyers.

What might lawyers learn from this?

We need to remove barriers for whānau and tangata whaikaha. We need to enter their experience. At times, we need to honestly admit as lawyers we might be the barriers too. We have all this knowledge, but what do we really have to show for it? We need to learn to consider what matters most and our very purpose in society.

I ask, "are we an honourable profession that seeks to protect those who need us and those who are most vulnerable?" Lawyers are certainly admitted to an honourable Court.

Or are we as some might ask "billing machines that live and die by six-minute increments?" We are humans, not robots. I accept we need to make a living. I want us to have jobs, just not at the expense of whānau and change that is beneficial to tāngata whaikaha.

Currently, although coming up for review, our ethical obligations are a starting point of sorts. There is no reason why tāngata whaikaha ought to receive a subpar service from any of us. But maybe, it is high time our obligations were made more specific. For those opposed, I challenge "Why wouldn't lawyers have an obligation to specific groups, including tāngata whaikaha?" Afterall, you don't have to be a lawyer. It's a loaded choice.

On that, I consider that few tāngata whaikaha will really care how many hours lawyers bill at all. Your firm might. But I think it more likely that people will remember the times lawyers let them down, by name, face and disgrace. This is because lawyers have a privileged (and at times profitable) position in society.

We hold tools others cannot use. We occupy a space others cannot enter. We can seek change others would struggle to. Oftentimes people listen to us merely because we are lawyers. This is a power I urge us to all wield responsibly and with an eye to change.

One such beneficial change could be the inclusion of a term like, "tangata whaikaha", into legislation, much like mana tamaiti being included into the amended Oranga Tamariki Act. Invisibility in law is a pain. It is felt. Including this term or one like it, is mana affirming, mana protecting and mana revealing.

I end this first reflection with this: We ought to be held to a high standard and not merely because it is in our client conduct and care rules.

I reflect second upon the atua Te Kūwatawata. I see him presiding over doorways everywhere I go. He is seated, watching over the doorway to some afterlife or to others an alternate realm some call 'Rarohina'. He gives power, sacredness and potency to doorways, passage into other realms and access to hidden knowledge. Unsurprisingly, he has a memory and he is tied to the experience of some matakite. Te Kūwatawata is, perhaps for lack of better English words, somewhat like a great librarian. In this 'library' is treasured knowledge, not in books, but first and foremost, all legacies of whakapapa. For it is to papa, that we return, in one form or another through the door of death.

"Te Kūwatawata, kei tō marumaru te uri kumea me te uri whakairo a Hine Titama"
Te Kūwatawata, under your protection are two daughters of Hine Titama

There is a common thread being woven into this article around rights. The aspect I seek to emphasise now is protection and enforcement.

I do not seek to add deeper commentary around our disability support system being too complex. The law reform of the New Zealand Public Health and Disability Act 2000 discussed much earlier ought to plainly highlight this for you.

To nobody's surprise, a 2016 report from Statistics NZ, found that Māori have higher-than-average disability rates. It also found that among Māori, a disability reduces the likelihood of being employed and educational achievement. As if systemic racism was not enough, life is even more difficult for tangata whaikaha Māori.

Tangata whaikaha advocate, Dr Huhana Hickey (Ngāti Tāhinga, Whakatōhea), when interviewed by Áine Kelly-Costello for a series called generations of change, made the following comments:

"I believe we have to have a tooth driven piece of legislation that is enforceable... we do not have that right now. And that is why so many people get away with so much abuse... For disabled people, I do not believe that it is good enough to just say that we should be voluntarily compliant. We must have mandatory rights... We do not get choice like the rest of society does... We don't have choice of housing... in education... in jobs... where we live."

"I think we need to be looking at that whole issue of Te Tiriti o Waitangi... What is Partnership? It means you stand alongside. We should have an indigenous parliament, to be honest that sits alongside the mainstream parliament... We don't have that."

These comments address the environment of who we legally are, right now. But, Dr Hickey is instead encouraging us to "start getting more disability rights based."

The key word is "teeth." This is in complete alignment even with Austinian jurisprudence that some argue underlies all sovereign-based legal systems. You might remember John Austin from law school, as keenly concerned with the consequences, the teeth, that makes us comply with the law. In his most famous 1832 text, *The Province of Jurisprudence Determined*, Austin remarks:

> "The greater the evil to be incurred in case the wish be disregarded, and the greater the chance of incurring it on the same event, the greater, no doubt, is the *chance* that the wish will *not* be disregarded." (original emphasis retained)

Now Austin accepts that there is no perfect threat, consequence or teeth. That is realistic. However, I submit that there is merit to the idea that further penalties for infringing the rights of tangata whaikaha would help ensure their rights are viewed more seriously. It is important that

public services are made accountable here also.

To be clear, if Hickey or I thought that the protection of tangata whaikaha rights should be left to criminal law alone, we both would have said so. Besides, in the criminal context, as a victim, being disabled will realistically be merely an aggravating factor of offending. Nothing more.

There was something that seemed inherently unfair about this to me when I was a Crown prosecutor, thinking back on one case in particular. Tangata whaikaha, in my humble view, ought to be represented by more than that. I have even wondered if crimes against them might warrant a new and separate offence, particularly in the context of violence. I leave this idea for those I believe are better positioned to comment, such as Dr Hickey.

What does this discussion mean for lawyers?

It means listening to what tāngata whaikaha want and what they are telling us. With brief reference back to around the time of my article in *LawTalk* 943 (re the End of Life Choice Act 2019) I wondered whether the public listened very well to unique tāngata whaikaha concerns.

Their concerns, like Tikanga, were on the periphery of the drafter's mind. I wonder if this is often the case. Austin would be proud as he did believe in a "law set by political superior to political inferiors". We ought to be ashamed. This style of lawmaking excludes and is painful to see.

Reread a counter position from Tikanga in the words of Te Kooti. You will see protection and empowerment.

Being on that periphery, I can only hypothesise results because law is misconceived as 'the play' of the able bodied, able minded and western person (whatever all that really means), when it is instead the very means by which *we all find refuge*. To remind us, Te Kooti called law: *hei matua mō te pani – a refuge for the oppressed.* Te Kooti has spoken of the law being like a parent. Remember this. It is impossible to write everything you need to know about tangata whaikaha and the law.

Some serious questions must become: Is law only for the benefit for some? How do we empower tangata whaikaha and whānau? What other reforms or thinking is needed to remove unhelpful barriers?

The best I can do in parting from this article is address that last question. I turn with a listening ear to comments around from tāngata whaikaha about Disability Rights and the Pandemic. These comments are contained in the report 'Te Whakatinana i ngā Tika Hauātanga i te wā o te Urutā', that:

"A number of people felt that their human rights had been breached, with tikanga being overlooked and, in some cases (such as tangihanga), banned."

"Serious concerns were raised at the possibility of Police being able to enter marae without notice, based on historical context."

"The 'bubble' in a Māori context (whānau, hapū, and iwi) was confusing to some, as people tried to negotiate who should be included in and excluded from their respective bubbles."

If you listen, including with the ear in your heart, that report holds an answer to each of these concerns, namely:

"Representative tāngata whaikaha Māori organisations need to be at the decision making table and actively involved in a meaningful way. This will ensure tikanga is protected and essential information is trusted."

Kia kaha rōia mā, it is amazing what we can all learn when we listen and when we ask. But these are two things, we can all do better. ■

Some serious questions must become: Is law only for the benefit for some? How do we empower tangata whaikaha and whānau? What other reforms or thinking is needed to remove unhelpful barriers?

Lawyer Edmond Carrucan (Ngāti Hako, Ngāti Pāoa and Te Whānau-a-Iritekura) is currently studying towards a Masters of Laws in Māori/Pacific & Indigenous Peoples' Law with a focus on exploring Pūrākau and Pakiwaitara as a growing basis for legal submissions before the modern Courts in Aotearoa. His work will help champion Tikanga Māori as the primary source of law in its own right. He notes that "telling only the stories of case law and statutes, will do nothing but continue to oppress my chiefly people and make fools of us all."

CHALLENGING FOR CHANGE

Accommodating disabled and deaf people to access justice

BY **MORWENNA GRILLS** AND **JAMES BARNETT**

Auckland Disability Law (ADL) is the only specialist disability law community law centre in Aotearoa New Zealand. Sue Plowman and her team provide free legal services to disabled people associated with disability related legal issues. They do this for people right across the country.

ADL also provides legal education on disability law in the community and within disability and legal organisations, as well as advocating for changes to legislation through law reform.

Not unsurprisingly the team is in high demand. Capacity is always an issue with the number of people wanting their support, insights or knowledge at any given time.

Sue Plowman has been the General Manager since 2015. She makes time on a busy Friday to speak to us about ADL's work and what the legal profession can be doing better to support Disabled and Deaf People.

"At ADL we see people who are involved in the legal process, whether it's a court process, the police process or the mental health system whose access needs are not accommodated, and it really impacts on their access to justice."

Creating an accessible legal service through changing attitudes and culture

All around us in the Mangere office there are examples of what ADL does to facilitate the access needs of disabled people. From the text line for communication with Deaf People and other groups in the community, to the business card Sue provides which has braille embossed details.

But before we talk about improving accessibility and how to understand what accommodations a client may need Sue is keen to talk about the need for changes in our culture and attitudes.

▲ Sue Plowman

"As a profession we need to be prepared to accommodate and provide support to disabled people so they can access justice just like anyone else.

"That will take a change of attitude, not just within the legal profession but across society.

And it's clear that things need to change. The outcome for many groups within the disability community is that they're disadvantaged. They have real problems accessing justice.

"I think the question all lawyers should be asking when seeing clients is not "do you have a disability?" or "what is your impairment?" but "how can we accommodate you?"."

Examples of accommodations

For the disability community to be included, people working in the legal profession need to consider how best to accommodate a range of access needs to ensure that people can engage in the legal process.

Sue provides some examples of the accommodations that will support disabled clients to overcome barriers to accessing justice.

I think the question all lawyers should be asking when seeing clients is not "do you have a disability?" or "what is your impairment?" but "how can we accommodate you?"

Taking extra time

"At ADL we spend more time in client meetings and providing advice. We don't do 15-20 minute client clinics. Our client meetings whether we meet in person, talk on the phone, Zoom or other means of communication are a lot longer than 20 minutes.

"That extra time is spent unpacking their legal problem and the legal process. I mean let's face it for most people outside of the law, the legal process is complex and confusing.

"For people with learning disabilities, cognitive impairments, or brain injuries, that complex legal process can be an even bigger barrier to understanding what their rights are and the legal options open to them. Time is key."

Providing information in the best format

One of the other important accommodations is to provide advice and legal documents in accessible formats. For example, Word documents for people who have braille readers or devices.

"We're really big in the profession about using PDF documents, but some readers and devices don't read them so it's a bit of a problem," adds Sue.

She also points to the need for information to be provided in plain language, and Easy Read formats.

For Deaf People having access to New Zealand Sign

Language interpreters is essential. Sue points to New Zealand Relay Service which they use with Deaf, hard of hearing, speech impaired and deafblind clients. They also use in person NZ Sign Language interpreter at meetings with Deaf clients.

Communication assistants are important for some clients with learning disabilities or cognitive impairments. Speech therapists can be equally important to work with for clients who have speech impediments, for example as a result of a stroke. Speech therapists, such as those provided by Talking Trouble, are really important for some people going through the court process and their access to justice.

Accommodating support people

"I know it can be challenging working with a third person due to the lawyer and client relationship," says Sue.

"We are used to working within strict confidentiality and authority rules. But not having the right support person, whether they're a professional or a whānau member can present a real barrier to a disabled person accessing legal services and ultimately justice."

Physical access

When thinking about physical access there are the obvious elements like ensuring offices have lifts and ramps. But Sue also talks about providing communication access.

For example, ADL provides a text-only mobile number for people who are Deaf or have a speech impairment because they're not going to be able to call the team. This is also important for people on low incomes as the cost of making a phone call, or even clearing voice messages, is another barrier to accessing legal services.

"A lot gets done on text actually," Sue says.

Real change will only come with law change

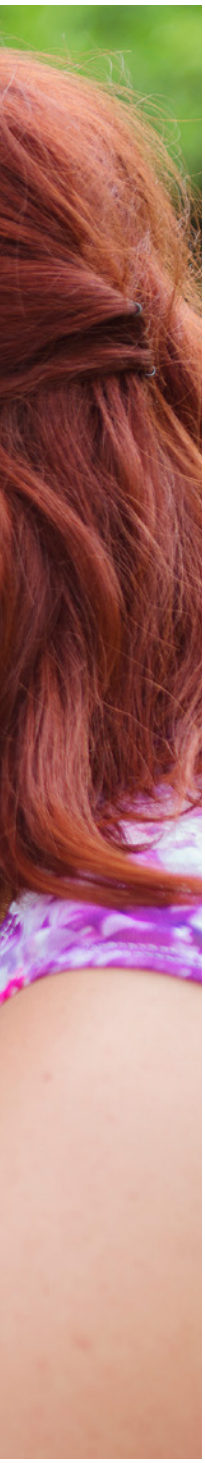
Whilst there are accommodations that legal professionals can make to better support the disability community to access justice, Sue says there are much bigger challenges that no individual alone can fix.

"If the problem stems from the law, it doesn't really matter what we do on the ground, it's the law that needs changing."

"That's why our law reform programme is really important to us. We can do all the cases in the world but if the law is the problem then law needs changing."

Examples that Sue points to include the first set of amendments to the Mental Health (Compulsory Assessment and Treatment) Act going through the House at the moment.

A text-only mobile number... is also important for people on low incomes as the cost of making a phone call, or even clearing voice messages, is another barrier to accessing legal services



"The legislation currently strips people of the majority of their rights, and the automatic rights that remain are very hard for them to access. But it takes time. We've been actively working on the reform since 2017 when the Ministry of Health began the most recent the community consultation. This was followed by the government's Inquiry into Mental Health and Addiction whose report, He Ara Oranga, recommended that the Act be repealed and replaced."

Legal aid is another area where significant change is needed.

"The data shows that for disabled people the cost of legal services is a significant barrier."

Labour Market Statistics from December 2020 show that 38% of disabled people aged 15-65 are employed, and that's compared to just over 78% of non-disabled people. And the unemployment rate for the same age group, 15-65 is 11.4% and that's compared to 5% for non-disabled people.

The median weekly income from all sources for disabled people, so that's employment, benefits, tax credits, superannuation is $402, and that's compared to non-disabled people where it's $713.

"The data tells a story about large groups of disabled people not being able to afford to pay for a lawyer or for legal service. And that's problematic. It's problematic because not only can they not afford to pay for legal service, but there's big problems with our legal aid system.

"The legal aid system is vastly under-resourced as we know. The hourly rate is really low, the hours which are assigned to cases are very low, the additional funding for providing accommodations is very low. Then there is the paperwork that needs to be done.

"And we know that more lawyers have stopped doing legal aid work because of all those things. Which makes it even more important that when a disabled client has overcome the barriers to access your services, you're as prepared as possible to support them to fully participate in the legal process and access justice." ■

Resources for increasing accessibility for clients

Accessible information

Content about how to provide accessible formats for information: MSD's "leading the way in accessible information" document. *www.cdn.auckland.ac.nz/assets/auckland/about-us/equity-at-the-university/accessibility-guide-web-MDS-2019-update.pdf*

New Zealand Relay

Provides services to assist people who are deaf, hard of hearing, speech-impaired and deafblind to communicate with others over the phone. *www.nzrelay.co.nz*

Advice and guidance for supporting blind and low-vision clients to access your services

www.blindlowvision.org.nz/how-we-can-help/services-for-business/

Information about supported decision-making:

www.aucklanddisabilitylaw.org.nz/wp-content/uploads/resources/Lets+Talk+about+Supported+Decision+Making+Leaflet.pdf

Specialised communication assistance in justice contexts

Speech-language therapists from Taking Trouble Aotearoa New Zealand have carried out court-appointed 'Communication Assistance' roles for both witnesses and defendants. *www.talkingtroublenz.org*

Let people know if you have skills in New Zealand Sign Language

You can let others know that you can use NZSL by updating your profile in the Law Society's Registry. This will mean that people can search for you on our Get Legal Help tool through the language selection.

Resources for increasing accessibility for employees

Advice and guidance from Employment New Zealand

5 steps developed by the Employers Disability Network to help you to become a disability confident organisation. *www.employment.govt.nz/workplace-policies/employment-for-disabled-people/plan-to-become-a-disability-confident-organisation/*

Free services and assistance available when hiring disabled people

www.msd.govt.nz/about-msd-and-our-work/work-programmes/initiatives/disabilityconfidentnz/index.html

Employment advice from the Office for Disability Issues

www.odi.govt.nz/employer-business-owner-government-agency/

GET INVOLVED

Mā te ture, anō te ture e aki

The Law Society's Law Reform Committees offer the opportunity to get involved in important work not only for the profession but for society as a whole. Applications to join the committees are now open for members and associate members of the Law Society.

BY **TIM STEPHENS**

The last 15 months have highlighted the importance of one of the Law Society's key statutory functions: assisting and promoting law reform for the purpose of upholding the rule of law and facilitating the administration of justice.

During the public health and social crisis created by Covid, societies and their economies around the globe have been impacted in an unprecedented way. In this country, the steps taken by the Government to respond to the pandemic have involved the most significant peacetime restrictions on the daily lives of New Zealanders in our history. The New Zealand public has generally recognised the need for the Government to act quickly and effectively in a public health emergency of this scale.

It is in this environment where the rubber hits the road for the rule of law. Widespread societal consensus and the dampening of the usual partisan political contest were a necessary and important part of unifying to defeat Covid, as they are whenever societies face a common enemy. But they also create the conditions for governments to overstep. And when they do so, it is usually the most disadvantaged in our society that are the most impacted.

Tim Stephens

It's the role of lawyers to speak up for the rule of law in this situation, so that governments remain accountable under the law and laws continue to be clear, publicised, stable, and just. At the end of the day, the rule of law is best protected by a cultural predisposition in favour of it. Māori lawyers tend to cite a saying from Te Kooti on this subject: Mā te ture, anō te ture e aki–only the law can be pitted against the law. By advocating for the rule of law when it matters and in the places that matter, lawyers ensure that the rule of law stays a fundamental part of our country's make-up. Since the early days of the first lockdown, the contribution from the Law Society's committees and Law Reform and Advocacy team has been immense in this regard, and we were uniquely well placed to make it.

The Law Society's committees and the Law Reform and Advocacy team have worked hard for many years to produce thoughtful, considered submissions to parliamentary select committees, the Law Commission, and government departments on a huge range of law reform proposals. A great many lawyers give generously of their time to serve on these committees, working to tight timeframes on difficult issues while still meeting the demands of their busy day jobs. We aim to help shape legislation so it is workable and practical and we seek to ensure that law reform proposals respect fundamental constitutional principles.

This is a significant public service.

Debra Angus

Public & Administrative Law Committee member

"The opportunity to contribute to making better laws for New Zealand is what led me to volunteer on the Public and Administration Law Committee.

I have been lucky enough to work on a variety of submissions including electoral reform, Crown leases, public service legislation and Covid-19 matters. More recently, I had the opportunity to present the Law Society's submission on the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill – a bill of constitutional significance with a range of rule of law issues.

Legislation does not stand alone – it involves the human dimension of interpretation and sometimes falls short of its intended outcome, or has unintended consequences. I believe that our laws are strengthened when Parliament is provided with a diverse range of views and they can be tested through scrutiny. So if you are keen to play a part in improving the law and want to make a difference, get involved in the Law Society's law reform work."

Dale Lloyd
Youth Justice Committee member

"For those of you who do Youth Advocate work, may I commend the Youth Justice Committee to you.

Perhaps the most exciting, important and influential role that we as lawyers can have as a member of the New Zealand Law Society is to be on one of these committees and make comments on draft legislation.

Recently I had the exciting opportunity of appearing before a Select Committee to deliver the Law Society's submissions on a members bill, which sought to impose a youth justice demerit points system. This was quite opposite to any of the progress that we have seen in the Youth Justice system, particularly arising out of the Family Group Conference process. It was a wonderful opportunity to see how our legislative process works and be in a position to influence decision makers. Appearing before a number of MP's (albeit via zoom) I could address our key points, answer any questions and ensure the Law Society's voice was heard. It's led to a positive outcome with the committee recently recommending the bill not proceed in line with our submission!"

It is also very rewarding. It's an opportunity to contribute directly to improving our laws, to be involved at the cutting edge of legal developments, and to work with like-minded members of the profession. It is a real privilege to collaborate with a group of such committed and enthusiastic lawyers.

Now others in the profession have a chance to participate–the call has gone out for applications to join the Law Reform Committee and specialist committees for the next two-year term. Information about our law reform work, and how to apply, are on the Law Society's website, and I encourage you to consider applying. Applications must be submitted by 5pm, Friday 23 July 2021. ■

Tim Stephens is the convenor of the Law Reform Committee. Tim is a barrister at Stout Street Chambers in Wellington, practising in the areas of commercial, regulatory and public law. He has been in practice since 1995, including time at a leading litigation firm in London, was a partner at Simpson Grierson 2006 to 2016, and joined the independent bar in 2017.

GET INVOLVED

Giving back to the profession

BY **NEIL RUSS**


Neil Russ

Playing a part in a specialist law reform committee is a crucial element of contributing to the development of New Zealand's laws and regulation in that specialist area.

Over the past two years, the Tax Law Committee has continued to work with practitioners, and key stakeholders, in the development of New Zealand's tax law. The Committee continues to work proactively on behalf of the profession to ensure robust, pragmatic tax law and administration outcomes, whilst advocating for fair outcomes for the entire New Zealand public.

I strongly believe that an important part of being a lawyer is to give back to the profession, and to society. The Law Society's specialist law reform committees are a great way to make a meaningful contribution. The Tax Law Committee is the largest, and busiest, of the Law Society's specialist law reform committees. We encourage and look for diversity in gender, practice area, practice type, firm size and geographical locations. We have some amazing practitioners with varied skill sets.

The Tax Law Committee works in three main ways. We are involved in consultations, submissions and select committee appearances in relation to policy formation and legislation as part of the generic tax policy process. We review and make submissions on technical interpretive matters including public rulings, standard practice statements, interpretation statements and revenue alerts. We liaise with the Commissioner and her senior officials in relation to operational and emerging technical issues. We are also frequently dealing with other important stakeholders in the New Zealand tax community, including CA ANZ and the Corporate Taxpayer Group.

Tax is a complex topic, and tax legislation and tax administration can sometimes have unintended consequences. During the early days of the COVID-19 pandemic, the Law Society, CA ANZ and Inland Revenue found new ways of working together, for the benefit of

CONTINUED FROM PAGE 39

all taxpayers, and it was rewarding to have a role in that.

In terms of time commitment: it is important to keep some balance between committee work and the day job! Fortunately, I have great colleagues at my firm, who are very supportive of my committee involvement. Each of the current members of the tax law committee make a meaningful contribution, and the law reform officers are very supportive and helpful, so that helps a lot. The knowledge and connections gained through tax law committee work is also directly relevant to my practice, and so that is a big benefit to committee membership. I encourage any practitioner to get amongst it with the specialist law reform committees. It is very rewarding. ■

Neil Russ is the convenor of the Tax Law Committee. Neil specialises in corporate and international tax issues, as well as structured transactions. In addition to his tax expertise Neil has a multi-jurisdictional background in banking and capital markets transactions. He has been a member of the Tax Law Committee since 2003 and was appointed convenor in 2013.

Nick Whittington

Deputy convenor, Law Reform Committee

"I was recently the lead drafter for the Law Society's submission on the Films, Videos, and Publications Classification (Urgent Interim Classification of Publications and Prevention of Online Harm) Amendment Bill. The Bill engages difficult constitutional and human rights issues, but to usefully comment I also had to upskill on the technology behind the internet. The result was a fairly robust submission on some aspects of the Bill and a recommendation that those aspects do not proceed. Because of this, the opportunity arose to present orally before the Select Committee. This was a fascinating clash of the legal and political, and a great experience. It was very rewarding to offer assistance to the members to help them understand the issues and I felt they appreciated that the assistance came from an independent standpoint, as opposed to individuals or organisations who have a specific barrow to push."

GET INVOLVED

Upholding the standards of the legal profession

Standards committees play a vital role in the co-regulatory model governing lawyers'conduct. Under the Lawyers and Conveyancers Act 2006, standards committees are responsible for investigating and deciding on the outcome of complaints made about lawyers.

There are 22 standards committees across Aotearoa New Zealand made up of lawyers and lay people appointed by the New Zealand Law Society | Te Kāhui Ture o Aotearoa. Everyone on a standards committee is a volunteer and appointed for their skills and experience. Law Society staff support the standards committees in carrying out their functions.

The reputation of the legal profession strongly depends on how well it is able to deal with the maintenance and enforcement of professional standards. The Lawyers and Conveyancers Act 2006 shifted focus from solely on lawyers' fitness to practice under the Law Practitioners Act 1982, to include and prioritise protection of the New Zealand public.

The committees make ethical determinations about the conduct of lawyers. Their decisions provide important guidance about what conduct is deemed unsatisfactory, or possibly misconduct and needs to be referred to the Lawyers and Conveyancers Disciplinary Tribunal. Only the Tribunal, administered by the Ministry of Justice, may make a finding of misconduct and suspend a lawyer or strike them from the Roll of Barristers and Solicitors.

Giving back to the profession

One way that Kevin Clay and Anthony Jackson have found to give back to the profession is through helping standards committees as Cost Assessors. From time to time, they will be asked by a standards committee to consider a matter involving costs of legal services and report to the committee their findings.

"I think it's part of our obligation as practising lawyers to give back to the Law Society and to give back to our profession," Kevin says.

"That part of it is certainly not onerous; after all, we're

providing a service to our community and our society."

Kevin's background is in litigation. After being a partner of a law firm for 10 years, he moved to the Bar in 2005, and now practises out of Clarendon Chambers in Christchurch. He often draws upon his experience in litigation practice when writing reports as requested by the Standards Committee.

"Practising as a barrister has been of assistance because you are considering disputes which have arisen between the practitioner and client, and then applying the criteria under the rules and relevant case law to arrive at recommendations in the report to the Committee."

Playing a role for the committees is also an opportunity to look after problems that crop up in the profession, Anthony says. For him, its a very rewarding experience.

"I'm driven by the general principle of being helpful, which is how I was raised. It's a privilege to do this kind of work for the profession, because if we weren't to do it, the regulatory responsibility would be handed elsewhere."

Anthony too has a background in relatively large litigation practice, often preparing estimates and cost estimates. "It opens your eyes as to what things actually cost, giving you a good idea on whether costs were necessary and if fees are justifiable."

Lawyers understand lawyers

Being part of the complaints process is a task not to be taken lightly, Kevin says. "You are asked to report on a practitioner's conduct in which clients are entitled to have professional standards met. On the other hand, the issues that clients raise may be unfounded for various reasons. Practising lawyers are in an excellent position to assess what has occurred. This is important because the reports can have significant implications for the parties.

Anthony Jackson

Kevin Clay

"On the other side of the coin the client is entitled to have standards met, balancing the two involves care and coming to a decision in the report which you are comfortable with. You have to be objective and apply the criteria, and through that process you come up with a decision or a report."

In applying the rules, it's understandable that lawyers enduring a complaint or investigation may not like dealing with standards committees. However, in both Kevin and Anthony's experience lawyers appreciate having a fellow practitioner carry out the assessment.

"It's generally a misnomer that a practitioner might be annoyed that another practitioner is looking into them" Anthony says. "Every time I contact practitioners, there's a moment where they're not sure what to say, but they're aware there's a delegated authority from the Act. But they realise they have someone who knows what it's like to be a lawyer."

Balancing commitments to professional standards

Becoming involved in the regulatory regime offers a lot of benefits. It is a new area of law to work on, so aids professional development. It contributes to the professional community – which is a question raised for those who seek to apply for elevated roles such as Queen's Counsel. It's also a way of helping find resolutions to difficulties lawyers face in practise, as not every investigation or report will result in a finding.

Assisting a standards committee takes time, which is undoubtedly necessary, Kevin asserts.

"It can involve a lot of work. It has impacted my practice on occasions but after all, I think that's just part of what we should be doing."

Anthony says he typically takes on one or two cases per year. While the case number may not be too onerous, the work involved can be, but he's able to choose his own hours.

"There is a a timeframe which is set by the Standards Committee, however that can be extended if required" Kevin says.

Playing a part in the co-regulatory environment is one way lawyers can make sure the profession continues to support the confidence members of the public have in their legal services. Operating the standards committees depends upon lawyers putting their hands up to work in this area to ensure the regulation of lawyers is kept in a close connection. The alternative is that another regulator steps in. As Kevin says, this can be another debate.

If you're interested in applying to sit on a Standards Committee, or like Kevin and Anthony, to help out with Cost Assessing work or investigations visit our website: *www.lawsociety.org.nz/get-involved* ■

LEGAL RESEARCH

Making a difference through the law

BY **THE MICHAEL AND SUZANNE BORRIN FOUNDATION**

▲ Borrin Foundation GSC and Staff (Chief District Court Judge Heemi Taumaunu not pictured)

At the heart of every philanthropist and grant maker is the desire to make an impact. At the Borrin Foundation we know it is a unique privilege to participate in distributing money to make the world a better place. And we are eager to create a powerful and effective result through our philanthropy.

We believe in making a difference to the lives of New Zealanders through the law. We also believe that law is essential to a flourishing society – one that is just, inclusive, tolerant, and free. Our vision is of an Aotearoa New Zealand where everyone understands the role and value of the law, and everyone enjoys the protection and opportunity that it provides.

The foundation was set up to support legal research, education and scholarship, and our current strategic focus areas are the criminal justice system and family law. These were also areas of deep concern to our founder, the late Judge Ian Borrin who established the foundation with a $38 million bequest.

Grant making decisions are made by the foundation's Grants and Scholarships Committee, who are leading members of New Zealand's legal profession. Among the factors that are considered in making grants is the potential of a project to: have a significant and enduring practical impact on the lives of New Zealanders; to be a catalyst for change; and to address systemic issues.

How does the Borrin Foundation approach the intersection of law and justice with philanthropy?

At the Borrin Foundation we see ourselves as an active participant in the business of solving social problems and seek to maximise the impact of our funding.

Like other philanthropies, one of our challenges is that there are many more worthy projects than we could possibly fund. However, we have chosen to focus on 'areas of profound concern'. These are areas where the law is not serving New Zealanders well. This involves tackling some hard issues and big challenges over a long time.

As we seek to be a proactive and focused funder, our approach is to fund a smaller number of grants that are of higher value and for the long-term.

How does the Borrin Foundation encourage leadership in the legal community?

Over the last three years of grant-making, our grants have primarily supported projects. However, we also want to support people in the legal profession develop on their leadership journey. Last year we ran our first ever fellowship round to invest in an individual who was passionate about using the law to deliver social justice and had a lifelong commitment to justice and service.

The inaugural Borrin Foundation Justice Fellow was Jennifer Braithwaite who will carry out research on access to justice for children and young people in Aotearoa, New Zealand.

More recently we launched a new Fellowship opportunity for Women Leaders in Law, to support women who are on a journey to becoming leaders in the legal world. A pool of $50,000 is available annually.

We also launched the Borrin Foundation-Community Law Fellowship with a pool of $80,000 available annually for lawyers working at one of the 24 Community Law network's centres. We are looking forward to announcing inaugural Fellows for these two new Fellowships in due course.

Later this year, we will also be announcing new opportunities for funding individuals, so, watch this space!

How does the Borrin Foundation support and amplify the aspirations of changemakers?

Although we are a legal philanthropy, people are at the heart of what we do. We seek to support the talented individuals and organisations who want to make a difference through the law, and improve the lives of people in Aotearoa, New Zealand.

As an organisation, our aim is to support our grantees, or as we call them the "Borrin Doers." These are the people who contribute to our shared vision. In this column we will aim to highlight and give profile to our "Doers" and their efforts to contribute to transformative change. ■

SOLE PRACTICE

Why now is the time to check in with your attorney

If you're a sole-practitioner or sole director of an incorporated law firm then you'll already have your attorney in place – but when was the last time you checked in with them?

Throughout the renewals period this year we'd like to encourage you to contact your attorney to update them on any changes that they need to know if they needed to step in to run your business. If you don't have an attorney then now is the time to put one in place – it is a requirement under the Lawyers and Conveyancers Act 2006.

It's also a good idea to check in with the person who is listed as your alternate. The alternate is the person who would step in if your attorney couldn't do it.

Why is an attorney and an alternate required?

First, as already mentioned, it is a requirement under the Act. Second, it's inevitable that you will need a break at some point. That may be for a holiday or for medical reasons, or it may be for disciplinary reasons or in the worst case a death.

If you need to step away from running your business, for any reason, then you need someone who can step in for you to support your practice during your absence, or if it needs to be wound up.

Who can be an attorney or alternate?

Both need to be a barrister and solicitor entitled to practise on own account so that either can step into your shoes at short notice if necessary. This means that if the lawyer is an employee, they cannot be your attorney or alternate.

If you are a trust account supervisor (TAS) your attorney and alternate also need to be TAS-qualified and have practised in that role within the last 10 years.

Truman Wee has been practising on his own account since 2003 and has been a member on the Law Society's Practice Approval Committee for several years.

▲ Truman Wee

"Ensuring you have the right person acting as your attorney is really important – it's a big decision about who to ask, and likewise you need to give serious consideration to the implications of agreeing to be an attorney.

"One of the most important aspects of the relationship you will have is to be able to trust the person. You will be entrusting your life's work to them, and any employees you have.

"It's always good to look for someone who is in the same type of practice area as you so they can pick up the work easily – although us sole-practitioners tend to cover a bit of everything.

"Finding someone local so you can meet regularly usually works best."

One of the most important aspects of the relationship you will have is to be able to trust the person. You will be entrusting your life's work to them, and any employees you have

What does your attorney need to know?

It's a good idea to keep your Attorney updated on a number of things:

- how many staff you employ
- if you take up any new practice areas
- where to find passwords to your files and keys to the office
- if you have any complaints against you
- if you change your office software
- which bank you use and the relevant accounts

What should you know about your attorney?

"There are some important things that you should regularly check. One of the most important is knowing if your attorney will be unavailable for a period of time," says Truman.

It's good to keep updated on the following:

- any complaints they have against them and potential disciplinary action
- if their health may impede them running your business
- if they are planning to move away from the local area or retire
- if they are planning to stop working in an area of practice, particularly if you are a trust account supervisor

What are the challenges to finding an attorney?

Truman understands the challenges facing sole-practitioners like himself in finding an attorney.

"It can be difficult to know who to reach out to, especially when you're just starting out as a sole-practitioner.

"I've also found that local networks aren't as strong as they used to be. I'd recommend attending events put on by your local Law Society branch or other organisations to meet fellow lawyers.

"It can also be hard in smaller towns as the only other practitioner is effectively your competitor. With new technology making it easier to connect this could open up opportunities for Attorneys to be further afield but I still think having a local attorney is best. Remember, they may need to step in at very short notice."

What are the opportunities of the attorney relationship?

Being a sole-practitioner can be isolating. The need to have an attorney is a link to a fellow practitioner who you know and trust so can help ease that sense of being alone.

"Knowing my practice will be good hands is a relief to me," says Truman.

"I've spent many years building up my clients and I don't want them left without legal help if something was to happen to me. The same with my employee. She's worked with me for years so it's only right that she is supported.

"We've also seen through Covid that the most unexpected things can happen, so whilst the law requires us to be prepared, 2020 has shown us from a more human perspective why we should be prepared."

How do I find out more?

There is more information about the requirements of being an attorney or alternate and appointing an attorney or alternate on the Law Society's website under entering sole practice as a barrister and solicitor. ■

CULTURAL AND LINGUISTIC DIVERSITY

The Supreme Court, Confucianism and Western values and the impact on the law

BY **MAI CHEN**

The Supreme Court recently granted leave to appeal the Court of Appeal's decision in *Zheng v Deng* (*Donglin Deng v Lu Zheng* [2021] NZSC 43 [14 May 2021] ("*Deng v Zheng (SC)*"), granting leave to appeal against *Zheng v Deng* [2020] NZCA 614 ("*Zheng v Deng (CA)*"). The Supreme Court stated that the appeal raises potential issues about the interpretation of documents translated from Mandarin and the cultural setting in an arrangement between two Chinese parties whose business relationship appears to have been conducted in Mandarin (*Deng v Zheng* (SC) at [1]).

The approved question is whether the Court of Appeal was correct to make a declaration that there was a partnership between the parties in which they were equal partners and to make orders that were consequential on that finding (*Deng v Zheng* (SC) at 1). The Court of Appeal had acknowledged that:

> "language is used in a broader linguistic and *cultural setting*, by reference to *background assumptions* about personal and business relationships and the ways in which dealings are normally structured, that *the parties will have shared but that the Court may not be aware of or understand*" (*Zheng v Deng* (CA) at [88] (emphasis added)).

The Court of Appeal was conscious of the need to be:

> "sensitive to the importance of *social and cultural context* and, in particular, to be cautious about drawing inferences based on our preconceptions about *'normal' or 'appropriate'* ways of structuring and recording business dealings" (*Zheng v Deng* (CA) at [89]).

The Supreme Court said it may be necessary to explore these issues in order to resolve the appeal, and invited the New Zealand Law Society to consider intervening in the appeal after consultation with NZ Asian Lawyers (*Deng v Zheng* (SC) at [2]).

The Supreme Court's move is emblematic of the growing awareness that in an increasingly culturally and linguistically diverse New Zealand an understanding of the intersection between law and culture is essential for judges and practitioners (see Mai Chen "Latest cases on CALD parties in litigation and lessons from the Court of Appeal in *Zheng*" (April 2021) Employment Law Bulletin).

Mai Chen

It is therefore timely to share reflections on Confucianism and Western values and the impact on the law by Professor Mindy Chen, who recently presented at the New Zealand Asian Leaders' Virtual Speaker Series 2021. Professor Chen-Wishart is the Dean of Law at Oxford University and an expert in contract, unjust enrichment and comparative contract law, and is leading a six-book project on the contract laws of Asian jurisdictions.

Professor Chen-Wishart identified the common "law on the books" but divergent "law in action", in undue influence cases decided in England and Singapore (see also Mindy ChenWishart (2013), Legal Transplant and Undue Influence: Lost in Translation or a Working Misunderstanding? *International and Comparative Law Quarterly*). She outlined three key differences between Confucianism and Western values that may contribute to our understanding of the divergence in application.

The Court of Appeal was conscious of the need to be "sensitive to the importance of social and cultural context and, in particular, to be cautious about drawing inferences based on our preconceptions

Undue Influence cases

The exemplar cases cited by Professor Chen-Wishart relate to the scenario where a primary debtor who is in financial trouble ("the debtor") gets a family member ("the guarantor") to guarantee a loan from the bank ("the lender"). When the debtor defaults on the loan, can the lender enforce the guarantee where

it is tainted by the debtor's undue influence?

According to "clear, simple and practically operable" requirements laid down by the House of Lords in *Royal Bank of Scotland v Etridge* ("*Etridge*") [2001] UKHL 44, [2002] AC 773, a guarantee is unenforceable if:

- some vitiating factor affects the dealing between the guarantor and debtor, most commonly undue influence;
- the lender knows that the guarantor is not acting commercially (i.e. for consideration) and knows that the transaction is for the benefit of the debtor or his or her company; and
- the lender has not taken reasonable steps to ensure that the guarantor was properly advised.

In usual situations without any special features (such as evidence that the lender knows of point 1 above, or the heightened risk of point 1), the lender is protected if it ensures that a legal advisor certifies that the guarantor understands what he or she is doing.

There are two categories of undue influence developed in *Allcard v Skinner* (1887) LR 36 Ch D 145:

- Where the guarantor can prove that the debtor's positive application of pressure induced his or her consent to the contract.
- Where undue influence is presumed from the guarantor's proof that he or she was in "relationship of trust and confidence" with the debtor and the resulting transaction is manifestly disadvantageous to the guarantor. It is then up to the debtor to rebut the presumption by proof that the guarantor nevertheless entered the transaction freely (usually by evidence of the presence of independent advice).

All of this has been accepted as the law of Singapore, yet a comparison of the reasoning and outcomes of English and Singaporean cases reveals a stark practical divergence.

Exemplar English cases:

- In *Allcard v Skinner*, the claimant, a young woman, took a vow of poverty, chastity and obedience and eventually joined a convent as a full member. The rules of the convent forbade the nuns from seeking outside advice without the permission of the Mother Superior and imposed the most absolute submission by the nuns to the Mother Superior who was to be regarded as the 'voice of God'. The claimant gave her very substantial inheritance to the Mother Superior. Years later, she decided to leave the order and sought the return of what was left of her transfer. The court found presumed undue influence from the relationship of influence and the "transaction calling for an explanation", which the Mother Superior could not rebut because the nun had not received independent advice before the transfer.

- In *Bank of Scotland v Bennett* [2001] UKHL 4, the husband used wounding and insulting language to accuse his wife of disloyalty in contrast to the loyalty of his relatives. He said she would be a "waste of rations" if she did not guarantee his business debt and would be splitting up the family. The judge found actual undue influence in the "moral blackmail amounting to coercion and victimisation" (*Etridge* at [312]).
- In *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 953, actual undue influence was found in circumstances where the parties were Iraqi Jews and observed customs according to which business was the husband's exclusive province; and the wife was confined to the domestic sphere and expected to obey her husband without question.

In contrast are these Singaporean cases:

- In *Overseas-Chinese Banking Corp Ltd v Chng Sock Lee* [2001] 4 SLR 370, the father/husband, a property developer, obtained the guarantee of his wife and 23-year-old son for the liabilities of the company he ran, amounting to some S$5.5 million. The court found the father to be a man of "ungovernable temper" and "exceptional harshness", who was occasionally violent to his wife and verbally abusive to his son. The father "had firmly told [his wife and son] to sign the guarantee without asking too many questions". Nevertheless, the court found no undue influence because:
  - **(a)** the father meant the best for family;
  - **(b)** the wife and son were the formal owners of the company;
  - **(c)** they knew what they were doing;
  - **(d)** the lender did need not advise the wife and son to obtain independent advice because the lender "did not witness any pressure"; "the transaction had no unusual features"; and there was no "manifest disadvantage".
- In *Bank of East Asia v Mody Sonal M* [2004] 4 SLR 113, the daughter signed the guarantee after her father became very angry and told her that, if she did not, "she would be responsible for the loss of everything he had worked for, and it would be her fault". The court found no undue influence because:
  - **(a)** "the father did not appear to be the imperious head of household that he was made out to be. Indeed, . . . he appeared to be more a lamb than a lion"; in any case, it would "be an exaggeration to castigate the father's conduct as undue influence" because "There must be ... some unfair or improper conduct, some coercion or some form of misleading";
  - **(b)** the daughter was a shareholder and so stood to benefit;
  - **(c)** the daughter knew what she was doing, she had an MBA from the US and was "no babe in the woods";
  - **(d)** the bank was not "put on inquiry" and need not have taken steps to satisfy itself that the guarantee was properly obtained since the daughter was a shareholder.
- In *Standard Chartered Bank v Uniden Systems (S) Pte Ltd* [2003] 2 SLR 385, the guarantee was enforced against the wife because:
  - **(a)** she was a director of the company and the husband's business was the source of the family income – it was in her interest to give the guarantee;
  - **(b)** the wife had a university degree and knew she was signing a guarantee; even if she had known that it exposed her to unlimited liability (she did not), she would still have agreed because "she willingly accepted [her husband] Tan's dominance of her, trusted Tan and had complete faith in him, and did not think that Tan would put her in a risky position"; and
  - **(c)** there was nothing out of the ordinary in the couple's relationship to warrant the Bank conducting further investigations before the signing of the guarantee; "the Bank's representatives did not perceive any intimidation or overbearing or bullying conduct".

The cases demonstrate that Singaporean courts are very reluctant to find undue influence in the family business context:

- Singaporean courts insist on a wrongdoing, requiring proof of bad conduct and bad faith. In English law, neither is necessary.
- Singapore law says there is no undue influence if the complainant knows what they are doing. English law recognises that undue influence is not about knowing what you are doing.
- Singaporean law says there is no undue influence if the complainant is a shareholder / director. English law recognises that these factors are inconclusive; they may be purely "on paper" for tax purposes, and the complainant may not even know about it.

So, what accounts for the difference in approach? Professor Chen-Wishart outlined three key and overlapping differences between Confucianism and Western values that may help to explain why the doctrine of undue influence manifests as it does in Singapore.

Three key differences

Professor Chen-Wishart explained that Confucianism is an integral part of Chinese culture and social organisation and synonymous with Chinese civilisation – "it's part of the DNA". Confucianism is a guide to proper behaviour – but more than that, it is all embracing, being built into the heritage of language, ritual and tradition. Some aspects like ancestor worship, and the strong preference for sons is declining. Some aspects of Confucianism are remarkably persistent, chiefly the core value of filial piety / submission.

Equality v hierarchy

In the West, social order and harmony is achieved by a system of rights that can be agreed by equals, and this is protected by law.

In the East, social order is achieved by observing a very comprehensive code of conduct based on a rigid hierarchy according to generational sequence, gender and age. Where you are in the hierarchy (and what this requires) is expressed in an elaborate

terminology of titles.

The core relationship is between father and son – fathers having almost absolute power over the child. The father-son relationship is generalised into all other relationships in the family, the community, country and universe. Violations are seen as ethically or morally evil.

Persons v roles

The West places primary importance on the person and his or her uniqueness. The person is the subject of its most significant ideas – such as freedom, salvation, reason, contract, and love.

Meanwhile, Confucianism puts primary importance on conformity to roles. Ritualised conduct is given an aesthetic dimension in the cultivation of the good life.

This reduces the importance and legitimacy of individual differences, and individual choice. The concept of an individual right is alien in the Chinese tradition.

In the West, love is the prescribed emotion between family members. However, in Chinese societies it is respect, which requires no personal involvement. Submission in the latter analysis is not to persons, but to a pattern of personal relationships that is held to have ultimate validity.

Individualism v collectivism

In the West, emphasis is on the moral worth and rights of the individual. Key concepts are freedom and autonomy.

Confucianism emphasises kinship relationships, and mutual dependence. Maintaining collective security and wellbeing is prioritised over individual interests. The individual is seen as insignificant without the family and the wider community. So the family, not the individual, is the basic unit of society.

This collectivism expresses itself in a call for self-sacrifice, self-restraint, self-effacement and the avoidance of conflict. Transgressions dishonour the whole family. The imperative to conform makes shame the effective control technique, rather than guilt, a more personal and Western concept.

These differences may explain how the equitable doctrine of undue influence has developed differently in England and Singapore. The Western worldview sees the parties as *individuals* rather than as part of the collective, and regards unquestioning obedience, trust and self-sacrifice not as virtues, but as conditions that may demand equity's protection. In contrast, finding undue influence in the family business context in Singapore runs against the informal legal order. It amounts to saying that a father does something wrong in getting his wife or children to support the family business. It impliedly supports patriarchal 'loss of face' by countenancing the disobedience of his wife or child. It would support conduct which is shameful and disgraceful.

The issue is not which is better – East or West. Rather it is the importance of understanding the underlying assumptions of different cultures and legal systems, and the impact it may have on what the judge expects to see, how they interpret what certain behaviours mean about intention and the credibility of witnesses

The value of understanding cultural context

The issue is not which is better – East or West. Rather it is the importance of understanding the underlying assumptions of different cultures and legal systems, and the impact it may have on what the judge expects to see, how they interpret what certain behaviours mean about intention and the credibility of witnesses.

Both East and West recognise and value different aspects of an ethical flourishing life: the good of belonging to the community and social responsibility (East), versus respect for the individual (West). Both East and West hold their dangers: failing to protect the individual's interests against the community's demands (East), versus an excessively 'atomistic' or 'individualistic' conception of human beings and ignoring their social nature (West).

To understand culture, and thus its impact on law, we have to step outside our own world and enter the world of the other. Even if we recognise differences, we may not be able to appreciate their appeal, share their beliefs, or place the same importance on them relative to other values that we hold. But, says Professor Chen-Wishart, we should try. ■

PRACTISING WELL

Sound advice helps lawyer take the leap in-house

BY **JAMES BARNETT**

Mentoring is an informal and voluntary way of networking and learning. As part of Practising Well, the New Zealand Law Society | Te Kāhui Ture o Aotearoa provides a free and virtual National Mentoring Programme to its members. We spoke with Justin Kim from the Office of the Privacy Commissioner and Sarah Retter from Fujitsu about their experience on the mentoring programme and what they got out of it.

Justin Kim

Sarah Retter

Justin Kim recently started his job as Legal Adviser at the Office of the Privacy Commissioner but he couldn't have made the leap without the helpful advice and guidance from his mentor Sarah. When he connected with Sarah as his mentor, Justin was working in a large national law firm. It was his first job after university, and the only environment that he'd worked in.

"I was looking for someone who could give me some insight into what its like working in a non-firm environment and I had heard from colleagues that it's good to get an outside perspective" Justin says.

"I was also looking for someone who was in the ICT side of the law, who worked with commercial contracts, particularly in the tech sector."

Justin logged in to the MentorLoop system administered by the Law Society and set up a profile.

"It was a really nice surprise when Sarah reached out a couple of weeks later."

Sarah says that she reached out to Justin because she saw that they had some common points across their profiles, and thought that it was a cool way to connect to people with similar interests. "His goals and aims aligned with what I wanted to put in and get out of the programme" she says.

"I chose to sign up for the Mentoring Programme because as a young lawyer I didn't really have anyone to talk to about my direction, where I was going and what I wanted to do."

Sarah and Justin arranged to meet up for a coffee at a cafe near their offices and hit it off instantly. Justin says that he appreciated the fact that Sarah had also started out her career working in a firm, before shifting to an in-house role.

"It was good to talk to somebody more senior than me to provide insights about what it was like to be working in a space that I was really interested in and someone who had gone through a similar past to me as well." Justin says that talking to Sarah helped him to make a decision on his career direction and take that jump from his first firm gig into an in-house role.

"Sarah's insights were really helpful in making that decision. She's been giving me guidance even after the move as well on how I can develop further in this specific context."

Sarah says that she thinks the experience has been rewarding for them both. "We intend to continue catching up beyond the end of the programme because we get along really well, we enjoy talking to each other – just swapping stories and having that shared experience can make people feel less alone.

"I think it's really good way for lawyers to firstly meet each other, because we don't get an opportunity

to do that often enough especially if we're in in-house roles which I am.

"Having someone independent to talk to also brings a level of independence so you can feel comfortable discussing problems you don't feel comfortable discussing in your own organisation."

It wasn't always easy but Sarah and Justin made time to catch up, and while they didn't have a strict schedule they did try to book time well in advance.

"I really liked the check-ins from the Law Society they helped give a good cadence and for us to remember to do something. And once we got that cadence Justin and I have been talking on a more regular basis, whether we do that by Zoom or in person or on Teams or whatever we can manage in our own schedules which I think has been really good."

Having online meetings has helped keep things going, as well as setting a topic for each session. "When we meet virtually we always talk with video on" Sarah says. "I think that's really important because the stuff that you pick up it's often not just in what people say, it's in the way they say it or their body language. We also set a topic to talk about or focus on for each session which keeps our sessions on point."

The opportunity to have these conversations helped Justin grow but it also helped broaden Sarah's perspective too.

"Sarah and I have covered a lot of ground. She told me what it was like to work in an in-house environment and specific advice on how to make yourself seen in an organisation like that – moving from private practice to in-house." Justin says that Sarah's advice helped him to keep an open mind about meeting people and seeing opportunities, and she also suggested some ways to cope with the pressures of working as a lawyer. "We also talked a fair amount about the sort of non-work aspects of it – so keeping a fairly regular exercise routine, doing mindfulness exercises. It's certainly something that's helped her, and I've tried to incorporate that into my schedule as well."

The benefits were not all one-way, with Sarah finding that she gained insight into people management from meeting with Justin. "In my case, it was good to hear from Justin how he likes to be managed, because we're in a different age group to one another and they're being taught in different ways to the ways we learned, so understanding that can be really valuable in terms of helping your own team."

Overall it's been an insightful and beneficial experience for both of them and one they would recommend to others. Sarah says that if you're considering being a mentor or mentee, you should just go for it. "It has been really valuable for me to go through this too. Justin has made a big shift in his career and it's nice to know that I supported him through that.

"We've all been young lawyers, and you never know you might learn something that will help you in your own management of staff as well so that's what I would say to someone considering it.

"You're there to help be a sounding board, not to have all the answers, and it being a shared experience makes it a richer experience as well." ■

If you're interested in joining the mentoring programme, either as a mentor or a mentee, it's free to join. To get started email *mentoring@lawsociety.org.nz* for more information.

GENDER EQUALITY

Delivering a different kind of society

Gender Equality and the Law

BY **JAMES BARNETT** AND **BELINDA RYAN**

"It should surprise none of us that the law continues to fail women." This robust assessment was delivered by veteran human rights lawyer Baroness Helena Kennedy QC, who delivered the keynote address on gender equality at the International Association of Women Judges' (IAWJ) recent biennial conference in Auckland. The IAWJ is a non-profit, non-governmental organisation representing all levels of the judiciary worldwide who share a commitment to equal justice for women and the rule of law. Held in early May, the conference was attended both online and in person by lawyers and law makers from around the world. The session was moderated by Tiana Epati, President of New Zealand Law Society | Te Kāhui Ture o Aotearoa.

Baroness Kennedy recalled that when she was admitted to the bar in the 1970s, only 6% of the profession in the UK were female. There were very few women on the bench at that time, she says, and some chambers had a no-women policy. "They actually said 'I just don't think that women are suited to the sort of work that we do'." In those days she says, "domestic violence was dismissed as not real crime, and rape was filled with myths and stereotypes about women telling lies, and falsely accusing men in droves and of asking for it by the way they appeared... or because they were the worst sort of women and had drunk too much and it was their own fault."

Raised in the tenements of Glasgow, Baroness Kennedy is now a leading barrister and expert in human rights law, civil liberties and constitutional issues. Currently a member of the House of Lords, she became a member of the Bar Council in order to champion women in the profession and promote equal opportunities for women at the Bar. She has written and spoken about the discrimination experienced by women in the law, both victims and defendants alike. Her 2011 book *Eve Was Framed* focussed on the treatment of women in the courts, where they were at the mercy of the prejudices of judges, the misconceptions of jurors, the arcane labyrinth of court procedure and the influence of the media.

Rocking the boat

She has said in the past that she was "often seen as a pain in the neck" and said that she sought to argue for more women in senior places, only to be accused of rocking the boat by the handful of other senior women. The problem was, "that many women had had to learn how to operate in the male way, to apply the thinking they'd learned at law school that would make them acceptable in courts." She says that when she spoke about the sexual harassment that women experienced, or bullying from senior members in their law offices and chambers, the response at the time was that if you haven't got what it takes to deal with predatory men, you shouldn't be at the bar. Disbelief is evident in her tone: "That's what we had to tell young women! I don't believe that. Because we know it's about abusing power."

She says supportive men are vitally important in the lives of women, especially those who are good mentors and provide opportunities. She encourages men to talk more about masculinity: "about what good masculinity looks like. And they have to start calling this stuff out."

Baroness Kennedy says that the notion of neutrality of the law which is taught in law school – was the whole problem as "the central actor in law was always a man." She sees her role as being to introduce the experience of women into the law.

Justice not delivering for women

Challenging the judiciary to shift its own internal culture, Baroness Kennedy urged her audience to play a role in developing justice that delivers for women and provides protection. She spoke of her work with the International Bar Association which has been involved with introducing specialist courts in Pakistan that will have specialist training for prosecutors and a cadre of judges who will deal with gender-based violence. Describing the previous practice of dealing with the stigma of rape by marrying off the victim to her rapist, she says "The collusion of the justice system in those failures to provide justice to the women, but also the failure to deal with domestic violence. And while those things have moved up the agenda in most of the developed world, they have by no means been sorted." In Britain, she says, this issue presents itself in low conviction rates for rape cases, despite one call a minute to police about domestic violence and two women a week being killed by their partners. To ensure that the law does not continue to fail women, she urged her fellow jurists to educate their colleagues in law about how they could deliver a different kind of society.

▲ Pōhiri at Orākei Marae starting the IAWJ conference. Ministry of Justice

One recent positive sign that she has observed is the recognition that domestic violence can take other forms, including mental cruelty and coercive and controlling behaviour. "Keeping people constrained from fulfilling their abilities and their aspirations – those crushing limitations put on a woman's life. That's misogyny. People seem to think about the classical, old-fashioned interpretation of the word, that it's really about hatred of women, but it's really about something much more subtle and nuanced. It's about keeping a woman in her place and about the sense of entitlement that they might have over the social arrangements and conditions."

Vital role of the law

Baroness Kennedy says that one of the big challenges now to the world of law is how we deal with digital media. She talks of the harms that can be caused, particularly to young people, women and people from ethnic minorities: "the suffering and the racism that is online and the harms that you see that are dished out to people who are gender non-conforming or trans people are really horrible, horrible vicious stuff." Those resisting legislative processes to deal with online harm are likely to describe it as freedom of expression, but it's "freedom of exploitation" she says. The solution lies in the developed world getting together and saying "this is not good enough". "The strong voices have to come together to stop what is happening."

Baroness Kennedy has observed that the challenges of dealing with Covid have arisen at the same time as a threat to democracy and the rule of law through the rise of populist authoritarian governments. She highlights the constraints on freedoms that have been put in place via a social contract with our governments, on the basis that the limits on rights are necessary for greater ends. "The test is always that the changes should be proportionate, and it should be temporary, and that they should be ended as soon as possible and not allowed to turn into permanent features of our legal systems.

However, she is concerned by the tendency for authoritarian governments to use the Covid pandemic as cover for chipping away at the rule of law. She cautions judges and law makers to protect their independence in the face of encroachment. "The challenge of authoritarians is that – sometimes wrapping themselves in notions of democracy – but insisting that they take no criticism from the media, accusing the media of fake news when they challenge some of the things that have been done by over-weening all powerful government. Going after the rule of law, going after an independent judiciary, pretending that it's all about modernising or reforming, but in fact getting rid of independent-minded judges. We know that one of the first things that authoritarians try to do is that they try to deal with the free media."

The way forward, she emphasised, was to imbue law with values which recognise the dignity and humanity of every human creature. "It's the vital duty of the state to protect human rights, and of the judiciary to act as arbiters." ■

WHY PRACTISE ACC LAW

ACC Fundamentals

BY **TIHO MIJATOV**

Tiho Mijatov

ACCIDENT COMPENSATION SEEMS TO BE one of those few areas of legal practice which affects the day to day lives of most people (including clients and their lawyers), yet at the same time is too often passed over as being too complex or uninteresting or otherwise outside the general legal practitioner's daily diet.

There is a public perception, and one which is held by some lawyers as well, that the uniquely New Zealand "no fault" ACC scheme means it is a "no litigation" scheme. That perception is both wrong and unfortunate.

By way of introduction, we offer just five observations as to why it is worth each lawyer knowing something of our homegrown ACC legal system and to encourage you to consider how you may incorporate ACC litigation into the practice of law.

There is no shortage of work

ACC accepts approximately 2 million claims a year, but it declines about 100,000 claims on cover or entitlements each year. Generally each of these decisions is amenable to review and appeal – first by way of an independent review mechanism which hears evidence and legal submissions, and secondly by way of a general appeal right to the District Court. As in general civil litigation, there are alternatives to formal dispute resolution including by negotiation, mediation, conciliation and other forms of resolution. There is scope for representing any or all of the various common participants in the ACC dispute process including claimants, the Corporation, and accredited employers who take on ACC's claims handling responsibilities. Plus, in more recent times, awards of scale costs have helped to make ACC practice viable at the appellate level.

The legal issues are interesting

Just to take a few recent examples from the courts, boundary issues or questions of jurisdiction often arise because the Accident Compensation Act 2001 contains express ouster clauses (known as the privative provisions). This can lead to significant public law arguments about whether a person is able to resort to the general courts (such as by way of judicial review), and international questions about extra-territoriality have also recently arisen. Questions about the legal meaning of the difficult concept of "causation" often also arise (as in what standard applies and what evidence will meet that standard), and it almost goes without saying that close attention to the principles and application of statutory interpretation is omnipresent as ACC is a creature of statute. Some of the cases which have made it to the Supreme Court by alternative routes have profoundly affected the substantive rights of claimants. For those with a taste for complex medico-legal issues, treatment injury and work-related gradual process claims offer significant and satisfying challenges.

The medical evidence leads to good witness work

It is almost inevitable that litigation about ACC matters will eventually require medical experts to weigh in by opining on the reports and counter-reports of colleagues from a vast array of medical specialties and across disciplines such as medicine, occupational therapy, and physiotherapy.

Debates are common about the relative expertise of highly-specialised consultants who, for instance, may have conducted a remote review of the file, versus the opinions of the general practitioner who has first-hand experience seeing the patient. The strategic decisions that are required to be made about who to call as a witness and when will hone the general skills of any lawyer. Learning about medical terms and procedures offers yet more challenges.

The opportunities for Court appearances are significant

The initial review stage is relatively informal and the rules of evidence are relaxed although not without its difficulties. This makes appearing at this level of this jurisdiction perhaps less daunting for the younger practitioner. The availability of a general appeal to the District Court as a matter of right means further Court advocacy opportunities for the lawyer who has had carriage of the matter from the outset are significant. The availability of further appeals on questions of law provides good appellate advocacy opportunities.

Legal assistance makes a real difference to the lives of ordinary people

The issues that lie at the heart of many ACC disputes are matters directly affecting the good health and ability to earn a living of a claimant. There is substantial public law good that arises from ACC making its decisions lawfully and fairly, albeit within the confines of the Act. Acting in ACC disputes has the potential to provide the client with sound and reassuring legal advice as they navigate what is a complex system in circumstances where a successful result can make a real or life-changing improvement to them. Most unrepresented appellants fail. There is accordingly a real public service component in boosting the ACC bar. ■

Tiho Mijatov is the Deputy Convenor of the Law Society's ACC Law Reform Committee. Tiho is a barrister with experience in both civil litigation and criminal law. He regularly appears in courts and tribunals around New Zealand.

This article was originally published in a booklet prepared for the NZLS CLE Webinar *ACC Fundamentals* held on 10 March 2021.

WHY PRACTISE ACC LAW

Why lawyers in larger law firms should consider specialising in ACC law

BY **ANDREW SHAW**

Andrew Shaw

In New Zealand's larger law firms, ACC law usually doesn't feature as a significant area of practice. However, ACC law can be a very rewarding area for lawyers in larger law firms to specialise in, whether acting for claimants or employers.

This article considers the drawcards of ACC law in general and why this area of legal speciality might be particularly appealing to larger law firms.

What are the main drawcards of ACC law work?

New Zealand's "*no-fault no-liability*" accident compensation system is a unique, fair and sustainable scheme for managing the personal injuries of people in New Zealand. Its purpose is to enhance the public good and be a social contract, minimising the impact of personal injuries on the community (including economic, social and personal costs).

The accident compensation system generally treats people in New Zealand the same, by fully funding the lifetime costs of an accepted injury claim wherever and whenever it occurs in New Zealand. The system focuses on achieving a proper quality of life for injured people in New Zealand by restoring their health, independence and participation in society by providing a range of entitlements.

The accident compensation system successfully tries to eliminate health care injustices in New Zealand. This is especially noticeable when looking at the health systems of countries such as America, where the cost of health care is very expensive, creating significant health inequalities in their society and leading to complex litigation.

So, while the introduction of the ACC regime into the New Zealand legal system effectively removed most of the previously lucrative personal injury jurisdiction, it has been replaced with a unique and equitable way to care for a vulnerable section of society. For lawyers practicing in this area, to assist either a claimant or an employer to ensure that the system is applied correctly, can be rewarding.

Whether acting for claimants who have a genuine claim for entitlement

under the ACC legislation, or accredited employers who face disingenuous claims from an employee, an ACC lawyer can add real value to the process when dealing with ACC, as the sole regulator of the regime, through negotiations or dispute resolution.

ACC work can be a fascinating area of law, in terms of the complexities of medical evidence that is often required in order for a claim to be assessed by ACC. As a lawyer involved in ACC work, you will read opinions and assessments from an extensive range of medical specialists, often competing and requiring careful analysis.

In New Zealand, there are currently few lawyers doing ACC law work. Therefore, it can be considered to be quite a niche area of law, and this makes this specialist area attractive as you will be part of a small pool of practitioners.

Why is ACC law particularly appealing for larger firms?

ACC law usually forms part of a workplace law offering, and it can be a good addition to an employment law team in a larger firm. This enables the employment law team to offer a more complete service to employer client, especially those who are accredited employers.

For employer clients, there are a number of ways that an ACC law specialist can enhance the employment law offering:

- For an accredited employer client, which has a dispute about ACC levies, in terms of whether they have been correctly assessed.
- An employer who faces a personal grievance from an ex-employee, who is on ACC at the time of dismissal, as this applies to remedies.
- An employer who has been over charged or who has not paid the correct ACC levies and enters into dispute with ACC.
- An employer who has multiple ACC levy classifications, and how to best structure its organisation to minimise costs.

Having ACC law expertise in your employment law team enables larger firms to not only ensure their employer clients get the right advice, but also adds valve to your service to clients by considering the impact of ACC on an employment law issue.

It is also possible for large firms to take on pro bono work acting for individual claimants. The claim process for accident compensation and potential subsequent dispute resolution processes can often be a very confusing and distressing experience for many people. Therefore, ACC pro bono work can be rewarding for lawyers in large firms to be involved with.

In addition, ACC work can be a good way to get dispute resolution experience. Firstly, through mediation or facilitation with ACC. But if these processes do not resolve matters, then through the independent formal review process. This is a legal process where ACC's decisions are independently reviewed, and involves the preparation of evidence, including expert evidence from medical specialists, presenting legal submissions and appearing at a review hearing.

Review decisions can be appealed to the Accident Compensation Appeals District Court and beyond. Such appeals can involve complex disputes, with an emphasis on evidence of causation and testimony from competing medical specialists. You often see ACC disputes appealed through to the High Court and sometimes the Court of Appeal, so good litigation experience can be gained by practicing in this area.

Whether you wish to act for claimants, employers or both, ACC law is an interesting and rewarding area to become involved in. For larger law firms, offering this area of specialist advice can enhance an employment law teams services to employer clients by providing a more complete offering. ■

ACC work can be a good way to get dispute resolution experience. Firstly, through mediation or facilitation with ACC. But if these processes do not resolve matters, then through the independent formal review process

Andrew Shaw is the Managing Partner of Lane Neave and heads the Employment Law Team. He is recognised as one of New Zealand's top employment, ACC and health & safety law practitioners. Andrew is currently on the New Zealand Law Society ACC Committee. Andrew is an experienced litigator and he has appeared in the Employment Relations Authority, Employment Court and ordinary Courts, including the Court of Appeal and advising on a Supreme Court appeal.

This article was originally published in a booklet prepared for the NZLS CLE Webinar *ACC Fundamentals* held on 10 March 2021.

WHY PRACTISE ACC LAW

Molly McCarthy

Barrister at Woodward Street Chambers

I WAS 14 WHEN I HAD TO ACCEPT THAT MY INTEREST IN medicine would never amount to a career in the medical profession. Pale, shaking, and on the brink of fainting, I was led from my high school's science lab by my best friend who had recognised, fortunately before I keeled over, that I was not coping well with the presence of sheep hearts in the lab. Any dream of attending medical school well and truly scuppered, I didn't think about medicine again until I wound up in my first law job as a litigation solicitor.

My introduction to the ACC bar in fact came through acting as external counsel for ACC. The firm I started at was engaged by ACC to act in respect of a number of appeals, both in the District and appellate courts. As a graduate lawyer, ACC files were a fantastic introduction to the litigation process, and to essential litigation skills including identification of issues, assessment of merits and prospects of success, researching legislative history and understanding the effect of transitional provisions, briefing expert evidence, drafting of submissions, and preparation for hearing. Grappling with those questions and demands in the context of the law as a whole can be overwhelming for a graduate; by contrast, learning the ropes within one statutorily defined practice area is a fast and effective way to build confidence and expertise.

The subject matter, of course, appealed to me too. While I was immensely grateful to be operating within the confines of a single statutory scheme, the variety in terms of medical issues, procedures and expertise was vast. The question that every ACC case boils down to is roughly the same: is the claimant entitled to cover under the Act, and if so, what are they entitled to? The answer to that question will depend on circumstances that are truly unique from claim to claim. Evidence in ACC reviews and appeals is generally by way of written expert reports and a claimant's medical file, which requires ACC practitioners to have a comprehensive understanding of the medical details and procedures in question. My interest in medicine had persisted since high school, and fortunately it turned out that reading medical reports and making submissions in relation to them was sufficiently removed from the medical frontline for me to be able to dive into the detail without feeling queasy.

Since becoming a barrister, I have acted for claimants in reviews and appeals of ACC's decisions. In addition to the benefits generally of ACC work, acting for claimants has the added benefit of being incredibly rewarding. Assisting a client impacted by injury to navigate the intricacies of our accident compensation scheme is important work, and it is a privilege to advocate for clients to ensure they receive what they are entitled to. Accidents, injuries and illness have a profound impact on people's lives, and I am always grateful to my clients for trusting me to ease that burden by advocating on their behalf.

I would recommend ACC work to any practitioner interested in litigation, at any stage of their career. From a professional perspective, the jurisdiction offers aspects of both first instance and appellate work, and the opportunity to develop a range of technical skills. Compared to other practice areas, matters are heard relatively swiftly, and there is no shortage of work, which means plenty of opportunities to get on your feet. From a personal perspective, ACC work is important; it feels good to make a real difference to people's lives, and to ensure they feel heard. ■

Molly McCarthy is a member of the Law Society's ACC Law Reform Committee. She is a barrister at Woodward Street Chambers in Wellington and has a particular interest in both civil litigation and criminal law, judicial review, and accident compensation.

This article was originally published in a booklet prepared for the NZLS CLE Webinar *ACC Fundamentals* held on 10 March 2021.

IN-HOUSE

Leveraging the strength of the Government Legal Network

BY **MORWENNA GRILLS**

THE LARGEST COLLECTION OF in-house lawyers in the country sits within the public service, presenting considerable opportunities when it comes to working together.

Under the leadership of Una Jagose QC, the Solicitor-General, the Government Legal Network (GLN) offers a shared pathway of legal expertise, professional development and service to the Crown and New Zealanders.

Katie Elkin, Deputy Chief Executive, System Leadership at the Crown Law Office sums it up well:

"The GLN exists to ensure that the legal services to Government are as good and as effective and efficient as possible and operate in a cohesive way, to enable the Government to manage its legal risk and pursue its objectives lawfully."

The GLN includes every government lawyer – that's any lawyer working in any of the 32 core public service departments, plus NZ Police, NZ Defence Force and the Parliamentary Counsel Office. In total that's a network of around 850 lawyers. Crown entity lawyers can also access some GLN resources and take part in some GLN activities, adding another 400 to the network.

This year marks ten years since the establishment of the GLN. Over that decade the GLN has evolved markedly. Key to that development has been the efforts of the Chief Legal Advisers and other GLN members to organise collaborative ways to work together, as well as a centralised programmes and capability function housed within Crown Law – the GLN Team.

In late 2019, Crown Law folded the GLN Team functions into a new System Leadership Group (SLG), led by Katie. The SLG continues to provide programmes, build capability and support the Network through the GLN Programmes and Capability Team led by Monique Esplin, but now also delivers legal advice, products and guidance across government through the System Advice Team led by Justine Falconer. Both Monique and Justine started their roles in early 2020.

"We'd literally just started in these new roles and then Covid-19 came along," recalls Justine.

"That immediately changed our focus to what can we do to help the GLN respond to the pandemic as it was all hands to the pump right across government."

"There was a lot of work being done at a very fast pace across government, and much of it relied on legal advice," adds Katie.

"One positive thing that came out of Covid was that we started an online catch up of Chief Legal Advisors. We were meeting every couple of days and running a system that kept key agencies' legal teams connected. We have ended up continuing this online catch up once a week."

Another evolution spurred on by Covid and the lockdowns has been the use of technology for facilitating events.

"We took our Practice Group seminars online and ensured there were events being held through videoconference as we knew that people may be feeling isolated," says Monique.

"We've carried on using channels like Microsoft Teams which is fantastic for government lawyers based outside of Wellington and people who just want to avoid the commute to a physical location on a busy day. It's been really empowering using technology in this way and has strengthened our ability to collaborate."

Products to improve legal advice across the public service

A major development for the GLN has been the SLG's move into delivering legal advice, products and

▾ From left: Monique Esplin, Katie Elkin, and Justine Falconer

guidance at a system level.

"There will be legal issues that occur again and again across different departments so it's more effective and efficient if we can pull together advice that can be used by many people," explains Katie.

"It means people don't have to start from scratch. We are now a source of advice on topics that are relevant across government so that lawyers in every department can benefit from the depth of experience and knowledge that exists across the Network."

A great example of this is Te Pouārahi | the Judge Over Your Shoulder guide (or JOYS for short). You can find it at *www.joys.crownlaw.govt.nz*. The guide and its accompanying video are aimed at public sector decision-makers and are designed to inform and improve the quality of decision-making in government.

"We've had some really positive feedback about this resource. It's available to the public so I'd encourage anyone who interacts with the public service at a legal level to access it," says Justine.

"This is a really valuable tool that removes the need for individual legal teams to start from scratch every time this topic comes up," adds Katie.

"With the video we've provided a resource for lawyers to use to educate others in their organisations. It's a really good example of how we're leveraging the strength of the Network, by not only putting together a resource like this but by making it available so widely."

Increasing diversity and inclusion across the public service

One of the key priorities for the GLN is to increase diversity and inclusion across the Network to better reflect the population of Aotearoa. This also includes a particular focus on strengthening engagement with Māori and Pasifika lawyers and law students; and enhancing the Network's knowledge of te reo and tikanga Māori.

"We are really clear that cultural awareness, a knowledge of Te Tiriti and te ao Māori, and a commitment to diversity and inclusion are attributes that we're looking for in future government lawyers" says Monique. There are various initiatives already in place designed to upskill people in these areas, and the Network is exploring what more we can do to meet any lawyer-specific development needs.

Developing talent across the network

The internship opportunities and graduate programmes that GLN offers are highly competitive, and rightly so. Students and graduates who have been selected for these speak highly of the level of support they receive through the structured programmes, training opportunities, seminars and networking events.

The Summer Clerk and Graduate Programmes provide a great introduction to being a government lawyer. Summer clerks are placed in a government legal team for 13 weeks over summer and graduates are placed in three different agencies each over the course of two years.

"The programmes continue to prove to be very popular – we received over 300 applications for the Summer Clerk Programme this year and almost 250 for the Graduate Programme. It's a tough job to select the top candidates from such a high calibre of applicants. But it demonstrates the strong interest in working as a government lawyer" says Monique.

Once lawyers are part of the GLN they can sign up to receive SLG communications including event notifications, a monthly newsletter, and a jobs and secondments newsletter that many managers use as a key recruitment tool.

"This is all part of our drive to develop career pathways in order to retain the knowledge and skills of our current government lawyers in government," says Katie.

"It's also really beneficial when people move around as they take their knowledge to new agencies."

Looking towards the next ten years

Now in its tenth year, the GLN is more relevant than ever. Encouraging public servants to work together, to share their expertise, resources and knowledge is at the heart of the Government's public sector reforms that came into force last year.

"As 2020 taught us, we don't know what the future holds", remarks Katie, "but together, we will continue to thrive as a world class public service with a world class legal network at its heart." ■

IN-HOUSE

ILANZ offers Voyage of Discovery at recent conference

BY **ANITA RHODES**

▲ Members of the audience discussing career options for in-house lawyers during the Unsessions

Almost 400 delegates gathered at the Museum of New Zealand Te Papa Tongarewa in Wellington last month for the 33rd Annual ILANZ Conference. The theme "Tuhura"/ Discover was fitting, given everyone is still discovering their 'new normal' in an uncertain time. After the cancellation of the ILANZ Conference in 2020 attendees were eager to reconnect with one another, make new connections and discuss issues, ideas and work related to the in-house legal community.

Megan Main, Deputy Secretary from the MIQ, Ministry of Business Innovation & Employment opened the conference with an engaging presentation on being involved in the process of building MIQ from a blank piece of paper.

The theme of Covid-19 followed on where panel members Mike Brooker, Phil Knipe, Prue Tyler and facilitator Katie Breatnach spoke about Covid-19 crisis management from different perspectives.

The conference streamed sessions proved popular with Dr Maria Pozza, Katie Rusbatch, Quentin Lowcay and Sophie Braggins speaking on the power of in-house counsel to drive change in the legal profession. Topics presented throughout the streamed sessions also included Alisson Whitney from NZME, who spoke on the importance of protecting yourself and your brand/ organisation on social media and what to avoid when responding online, whilst Herman Visagie from the Law Society's Board and Kirsten Patterson, Chief Executive of the Institute of Directors provided lessons on governance in a post-pandemic world with reflections on how Board operations have changed in the post-Covid environment.

Privacy Commissioner, John Edwards presented a very informative six-month check-in after new changes in the Privacy Law Act 2020 were implemented and how managing access to the correct information is imperative going forward. Former Facebook CEO Australia & New Zealand, The Digital CEO, Stephen Scheeler closed day one with his virtual presentation on becoming a disruptive leader in the digital age. He covered tips such as moving fast, leading from the top and being bold. Stephen shared with us the importance of the ability to apply data and analytics to the everyday as well as long-term planning and to assist with changing the game on decision-making in organisations at a leadership level.

Tania Te Whenua opened Friday morning of conference, speaking to the role as in-house lawyers in supporting their organisations to truly fulfil their commitment to the Treaty of Waitangi.

Fleur Knowsley, Director and Acting General Counsel at Google Fiber based in the U.S.A, shared with everyone practical ways in which we can re-invent the wheel to create a more diverse and inclusive workplace for the better of organisations, what works and what doesn't work and acting on the words we say. A key part of the session was understanding the importance of the difference between equity and equality. Fleur also shared with us in a second session on how feedback is a gift. It's not right or wrong. It's just information.

The Unsessions returned to conference this year where delegates were encouraged to think of a theme, idea or issue relating to in-house lawyers and join in with their peers for a group discussion. This year's most popular topics facilitated by ILANZ committee members included;

- Next steps you can take in your in-house legal career, what's out there and how to go about it
- Law in a political environment: The front page of the paper test

The 2021 ILANZ Conference wrapped up with an eye-opening presentation by Jehan Casinader who talked about how life is a story and the power of how a positive mindset can be so important when continuing to create pages to tell.

Speaking after the session ILANZ President Grant Pritchard thanked Jehan for his "insights energy and spirit. Jehan's message was captivating and practical in equal measure. Our 392 delegates were on the edge of their seats learning, laughing and reflecting thanks to his skills and talents."

Reflecting on the conference, attendee Andrew Dentice, from Hudson Gavin Martin was impressed with the excellent,

▲ Panel members Mike Brooker, Phil Knipe, Prue Tyler and facilitator Kate Bhreatnach

thought-provoking content, as well as many fun and interesting conversations.

"A big takeaway for me (as an ex-in-house lawyer attending) is that any perceived barriers between private practice and in-house practitioners are really melting away. Some of our best working relationships are with in-house counsel: working together, with mutual respect and in partnership, to get good things done for our clients. If we are doing our jobs properly in private practice we should be an extension of the in-house team.

"All the main themes of the conference (diversity, ethics, digital disruption, mental health, the Treaty partnership) were just as relevant to us in the private practice world. Plenty to think about and lots to do!"

ILANZ Awards

This year, we were very privileged to have ILANZ Patron of 30 years and attendee of 31 ILANZ conferences, Sir Ian Barker, judge the ILANZ Awards for 2021. Throughout the duration of judging Sir Ian pressed a number of times on the high calibre of nominations which, in turn, resulted in two Awards having split winners.

In-keeping with Tūhura | Discover, the theme for the dinner was: *Through the looking glass.* Many of the attendees donned costumes with a few Mad Hatters and Queen of Hearts to be seen around the tables.

Our Winners included:

- **AUT Community Contribution Award Winners:** Maria Sopoaga and Victoria Lee
- **MAS Young In-House Lawyer of the Year Award Winners:** Charlotte Moll and Nathan Watt
- **Artemis Executive Recruitment In-House Innovation Award:** Powerco Legal Team
- **Greenwood Roche Private Sector In-House Lawyer of the Year Award Winner:** David Milton Browne
- **ILANZ Public Sector In-House Lawyer of the Year Award Winner:** Simon Johnson
- **Chapman Tripp In-house Legal Team of the Year Award Winner:** Air New Zealand Legal Team

▲ Attendess in their best dressed costumers for the Alice through the looking glass theme

"The ILANZ Committee would like to congratulate all the winners for 2021 and thank everyone who nominated a person or team and all nominees for the Awards," says Ben Jacobs, ILANZ treasurer and committee member.

"We are so grateful for the role you play in leading, supporting and inspiring the in-house community.

"It was great to be back after a year's absence with one of our biggest conference ever, and to see so many of our members connect, learn and share ideas. We'd like to thank everyone who attended, spoke, ran around like mad organizing the event and, of course, those awesome organisations who supported their in-house lawyers to attend such a valuable, thought provoking and inspiring conference," adds Ben.

"As a committee, we are constantly looking for ways to help our 3,330 members and we will continue to work to strengthen and deliver on ILANZ's values; CONNECT, SUPPORT and LEAD the in-house legal community.

"We are already getting excited for our conference in 2022 which will be at the new Te Pae Christchurch Convention Centre."■

Save Precious Time!

EasyReference – *papers at your fingertips*

Did you know there are hundreds of NZLS CLE conference papers that you can have instant access to?

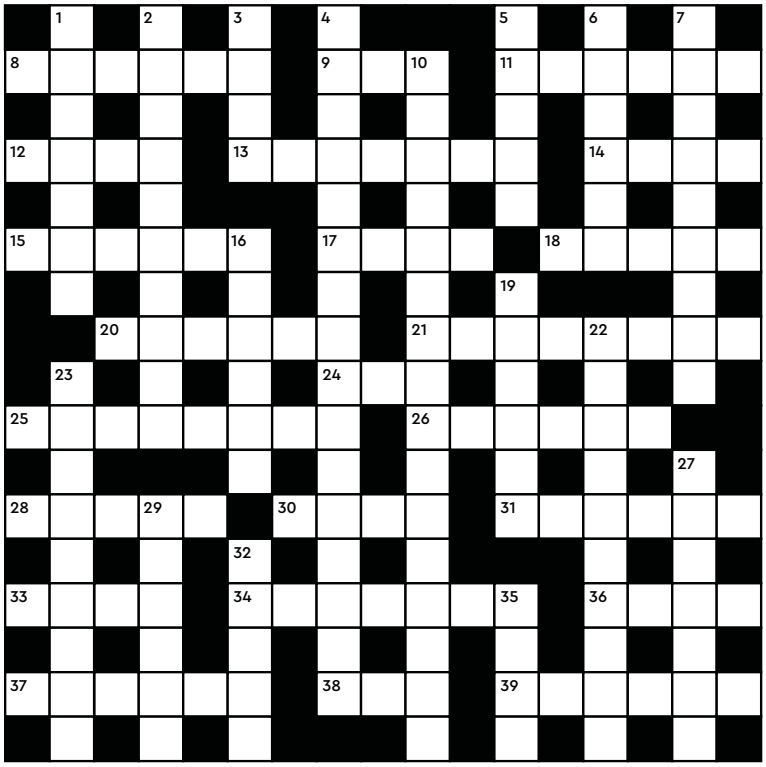
Research made easy – how you benefit

- 100's of papers to choose from
- Written by leaders in the field
- All practice areas included
- Searchable PDFs
- Instantly accessible and downloadable
- Saving you precious time

Check EasyReference out at www.lawyerseducation.co.nz and see how it can help with your research.

NZLS CLE Ltd
Continuing Legal Education
New Zealand Law Society

www.lawyerseducation.co.nz



NOTE: the source of all quotations is The 4

Across

8 Slight gin sling with mineral (6)

9 Female spacewalk? (3)

11 Enter backwards for a "natural measure of respectability" (6)

12 Grace left out infection (4)

13 I go live over to Gordon, author of The Riddle of Richard Pearse (7)

14 Just above organisation bridging river (4)

15 Allocate task to "this noble vertebrate" at half 8 (6)

17 A bed of fire? (4)

18 "Proponent of a new misrule" found amongst the harebells (5)

20 Rodent's mechanical mind taking in "the rheumatism of a rich patient" (6)

21 Excited to drill the 18s (8)

24 Annoyed cup got chip? (3)

25 Queen perhaps holds Yogi to be weird (8)

26 A tense negotiation for a "body charged with high duties and misdemeanours" (6)

28 Took the scarf (5)

30 Audibly restrained Norse god? (4)

31 Go back inside mobile home to get curdled milk (6)

33 Picture struggle to the west (4)

34 Note unruly mob pursuing Margaret, a writer (7)

36 Thanks to Ned Kelly's beginnings, "so distinguished a criminal should have been ducked in a __ of rosewater" (4)

37 Urchin to see about a horse (3,3)

37/26 Player of King Beryl to run NY? (Joke!) (3,7)

39 Instrument given to alien might be shrinking (6)

Down

1 All you've got is type displaying "low taste, more interested in himself than me" (7)

2 Smith holds fine rig "used in pointing out two malefactors" (10)

3 Lady's love for a British Grenadier, perhaps? (4)

4 I discordantly 33, almost 25, for the wit and wisdom of a 10, perhaps (6,10)

5 "Organ to be bilious with" being? (5)

6 A small volume – employ "to affirm another's guilt [often] as a justification for having wronged him" (6)

7 Cry of pain amidst glowing coal journalist put in leafy shelter (9)

10 I throw help back – liqueur (without a 'U') set before former Catholic church official (9,7)

16 Nervous announcing new mineral? (Not mine) (6)

19 Apply heat to yard – "only a 3 will venture to drink it" (6)

22 Cat getting injection: I tag it over "a machine which you go into a pig and come out a sausage" (10)

23 Rating marker for "one who yields to the temptation of denying himself pleasure" (9)

27 See 37 Across

29 Wife wearing coat is "one skilled in circumvention" (6)

32 Era of the commercial supplies "boned wisdom for weak teeth" (5)

35 English navy, without a sort of lashing, gives "emulation adapted to the meanest capacity" (4)

Answers from LawTalk 945, Autumn 2021

Across: **9** Colonel, **10** Christmas, **11** Chummy, **12** MacDonald, **14** Potential, **15** Rusheso, **17** Penetrating Oils, **19** The Twelve Days Of, **24** Rancour, **26** Suspender, **27** Kinswoman, **29** Ere Now, **31** Isinglass, **32** On Earth.

Down: **1** Icecaps, **2** Alouette, **3** One Man Went To, **4** Old, 5 Grocer, **6** Oslo, **7** Emma Peel, **8** Used For, **10** Cumulative Songs, **13** Fierce, **16** Stony Hearted, **18** Nudism, **20** Hangnail, **21** Ordinary, **22** Trekkin, **23** Growthe, **25** Rumbas, **28** Wags, **30** Mow.

ABOUT LAWTALK

LawTalk is published quarterly by the New Zealand Law Society | Te Kāhui Ture o Aotearoa for the legal profession. It has been published since 1974 and is available to every New Zealand-based lawyer who holds a current practising certificate.

DISCLAIMER

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

CONTACT DETAILS

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

PRINTING AND DISTRIBUTION

Blue Star, Petone, Wellington
ISSN 0114–989X (Print) · ISSN 2382–0330 (Digital)

PEOPLE

PRESIDENT Tiana Epati

VICE PRESIDENTS
Jacqueline Lethbridge (Auckland)
Herman Visagie (Central North Island)
Arti Chand (Wellington)
Frazer Barton (South Island)

CHIEF EXECUTIVE
Helen Morgan-Banda

COMMUNICATIONS MANAGER
Morwenna Grills
morwenna.grills@lawsociety.org.nz

SENIOR COMMUNICATIONS & MARKETING ADVISOR
James Barnett
james.barnett@lawsociety.org.nz

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

SENIOR ENGAGEMENT ADVISOR
Belinda Ryan
belinda.ryan@lawsociety.org.nz

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

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

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

frank.™
risk management

Solicitors Professional Indemnity

Fit for purpose, without breaking the bank.

Solicitors PI is a considerable overhead for all firms, and unfortunately, not all policies are created equal.

That is why working with a specialist broker who understands the latest NZLS disclosure requirements, the implications of policy limitations and what is available in the market will deliver increased protection and savings that can be reinvested into your practice.

Frank Risk are New Zealand's first broking and risk management company to provide full income disclosure to all clients. We are disruptors in the insurance industry and aim to create a more transparent and fair insurance industry by disclosing our income.

We do not operate on commission and are committed to providing our clients with top quality advice with no hidden fees. The concept is simple, you see the cost of your insurance and what you are paying as a professional fee for insurance advice. Frank Risk has no hidden commission, no kickbacks and no profit share agreements. It is just us acting for you, without any conflict of interest.

We invest heavily in our claims resources and have award-winning service and claims teams. Our team of highly experienced liability specialists include a former insurance litigation lawyer so you can trust that you will be dealing with a team that understands your profession.

Frank Risk is 100% New Zealand owned and operated with expert knowledge and unique insights into the insurance market.

If you want solicitors professional indemnity insurance that is fit for purpose, without breaking the bank, call Frank.

Frank Risk Management
E: professions@frankrisk.co.nz | **P:** (04) 333 0432 | **frankrisk.co.nz**