

WAIKATO LAW REVIEW

TAUMAURI

VOLUME 18, 2010

<i>From Privy Council to Supreme Court: A Rite of Passage for New Zealand's Legal System</i>	1
Professor Margaret Wilson	
<i>Challenges to Legal Education: The Waikato Law School Experience</i>	15
Professor Margaret Wilson	
<i>Principles of Professionalism in Law Teaching and Judicial Practice</i>	26
Judge Peter Spiller	
<i>A Pakeha Working-Class Mature Male Student's Recollection of His Legal Education: The Waikato Law School Experience</i>	40
Stuart Robertson	
<i>Studying the Law in Context: Exploring an International Dimension of New Zealand Law</i>	53
Professor Margaret Bedggood	
<i>Te Piringa</i>	66
Matiu Dickson	
<i>A Realistic Professionalism – The Next Step?</i>	72
Thomas Gibbons	
<i>Living with the Waikato Foundation Principles, 20 Years On</i>	83
Professor John H Farrar	

Editors in Chief: Juliet Chevalier-Watts and Associate Professor Claire Breen

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The *Waikato Law Review* is published annually by the University of Waikato, Te Piringa – Faculty of Law. Subscription to the *Review* costs \$40 (domestic) and \$45 (international) per year; and advertising space is available at a cost of \$200 for a full page or \$100 for a half page. Back numbers are available. Communications should be addressed to:

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North American readers should obtain subscriptions direct from the North American agents:
Wm W Gault & Sons Inc
3011 Gulf Drive
Holmes Beach
Florida 34217-2199
USA

This issue may be cited as (2010) 18 Wai L Rev.

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ISSN 1172-9597

EDITORS' IN CHIEF INTRODUCTION

We are particularly pleased to present the 2010 edition of the Waikato Law Review. This is a very special edition of the Review because it is a celebration of the 20th Anniversary of Te Piringa – Faculty of Law and commemorates the foundation of what was then the School of Law in 1990. Although the School of Law became Te Piringa - Faculty of Law in 2010, the principles of professionalism, biculturalism and the study of law in context remain the foundational principles of the Faculty.

The commitment of Te Piringa - Faculty of Law to professionalism requires continuous consideration of what this commitment entails in the light of developments such as the communications revolution, globalisation and the changing market for legal services. Biculturalism remains a foundational principle of the Faculty with the challenge being to further a bicultural goal within an increasingly multicultural society. The focus on law in context reflects a broad approach to legal education and legal scholarship enabling an examination of law in a social, cultural, political and economic context.

In order to celebrate the Faculty's Anniversary, submissions were invited from eminent scholars, the judiciary and practitioners, all of whom have valued connections with Te Piringa - Faculty of Law, to reflect upon how these founding principles have been, and may continue to be interpreted against a changing background of socio-economic and political change.

In this celebratory edition, we are pleased to present a compilation of articles that represent the insights, views and reflections of the authors in relation to the founding principles of Te Piringa – Faculty of Law; this anthology is collectively poignant, celebratory and reflective.

The prestigious Harkness Henry Lecture was given by the eminent Professor Margaret Wilson, who needs little in the way of introduction, and was entitled *From Privy Council to Supreme Court: A Rite of Passage for New Zealand's Legal System*. Professor Wilson's lecture was insightful and thought-provoking, as well as being very well received by the audience. We would like to extend our thanks to Professor Wilson for her valuable contribution and also to Harkness Henry Lawyers for its continued support.

This edition of the Review has involved the hard work of many individuals and thanks must first of all go to all the authors who provided such valuable contributions, and without whom this commemorative edition would not have been possible. We would also like to thank Janine Pickering, who, as ever, has worked tirelessly and with patience in order to bring this edition to fruition. Thanks must also go to Amanda Colmer from A2Z Design for all her hard work and efficiency.

Juliet Chevalier-Watts and Associate Professor Claire Breen
Editors in Chief

FOREWORD

BY PROFESSOR BRADFORD MORSE, DEAN OF LAW
TE PIRINGA – FACULTY OF LAW

Tēnā koutou, tēnā koutou, tēnā koutou katoa. It is a great pleasure and distinct honour to provide a brief Foreword to this special issue of the *Waikato Law Review* in my capacity as Dean of Te Piringa - Faculty of Law. Although I only left the University of Ottawa, Faculty of Law in August 2009 to become a part of the University of Waikato, I have been an interested, yet distant, observer of this unique institution since 1990. I followed Professor Margaret Wilson's vigorous efforts to overcome the many challenges inherent in the creation of any new law school that were compounded by the promise that legal education at the University of Waikato would be like no other. The University decided not merely to launch the first new law school in Aotearoa since the 19th Century, but it chose to create one that would be markedly different from the longstanding and rather traditional approach to legal education then prevailing in New Zealand. Te Whare Wānanga o Waikato instead felt it must bring its unique relationship with the iwi of central North Island, and of placing its commitment to honouring the Treaty of Waitangi along with its principles of Māori-Crown partnership and biculturalism, at the forefront of its approach to what the School of Law should be about. This approach was already evident in the initial law papers being delivered by Ruth Busch for several years before the then Deputy Prime Minister Helen Clark had even announced the Government's decision to support New Zealand's fifth Law School being established at the University of Waikato late in 1989.

From the outset, then, legal education at this University has been grounded in a belief that teaching and learning the law in Aotearoa should reflect the contributions of both tikanga Māori and the common law to the emergence of what is uniquely the jurisprudence of New Zealand. This goal was further buttressed by a commitment to foster the highest possible standards of legal professionalism and practice achieved in part through making Dispute Resolution a compulsory paper for all LLB students. Finally, the philosophy of legal education was grounded upon a belief that law does not exist in a vacuum and should not be learned as such; rather one must explore the important intersections of economic, social, political, cultural and racial dimensions of society with "the Law" in order to comprehend properly what the impact of jurisprudence and legislation may be and how it might change in the future.

The many teachers and students over the past two decades have struggled to continue to honour these foundational principles and to put them into effect. This has not been an easy path to travel nor has it always been smooth sailing in the face of fiscal limitations, broken Governmental commitments for a proper building, capped enrolment and inevitable differing views of how best to implement the shared vision. It has overcome skepticism in some quarters of the profession through its legions of stellar graduates that are now judges, senior partners, barristers and enriching society in many other roles. What appeared innovative in a curriculum in 1990, if not too avant garde for some, has now been frequently emulated both here and overseas during the intervening years.

Having now been a member of Te Piringa for only one year, I am still a neophyte who has merely learned stories about struggles of the past and gained glimpses as to what the future might hold. I believe my colleagues - both academic and general staff - are recommitting themselves to work even harder in striving to achieve these three principles. We are reaching out to form new partnerships, both within Aotearoa and overseas, through establishing new research centres, signing linkage agreements with other Law Schools so as to increase our global connectedness, expanding connections with the legal profession and the judiciary, and seeking new relationships with iwi and Māori organisations. The planning for a new building to meet the needs of the Faculty is now underway along with expanding our staff to meet the needs of a growing student body, especially in our LLM and PhD programmes. While tikanga Māori and the import of the Treaty are interwoven through many papers in a manner found in no other law school in the world, we will be taking a new step in 2011 by beginning to offer one stream in Legal Method in te reo Māori. Having come from a Law School that itself contained separate common law and civil (Quebec) law sections with their own staff and degrees, I am aware of both benefits and disadvantages from such an approach. On the other hand, I have witnessed nothing but success emanating from all efforts over the decades from teaching the law in both languages.

The future of Te Piringa, in my opinion, is a very bright one as it goes forward with its new name in te reo and its status as a Faculty rather than a School. It began as a truly unique Law School in New Zealand with the arrival of the first students in March of 1991. It remains unique 20 years later with an extraordinarily diverse student body unlike any other with only one-third being school leavers, 25 per cent Maori, 8 per cent of Pacific Island ancestry, and many other backgrounds reflected in students ranging from 18 to 72 years of age. The teaching staff is similarly talented with highly varied backgrounds. The Faculty of Law at the University of Waikato is recognised overseas as a genuinely distinctive Law School for possessing its founding principles and attempting to live them. The pages of this Special Issue and the stories that it contains from previous Deans, staff and alumni demonstrate how remarkable this institution has become - and will continue to be for decades to come.

As I began these brief remarks, let me return to state what an honour it is to be Dean of Law – Te Amokapua – at Te Piringa – Faculty of Law and to acknowledge with deep appreciation the hard work of so many over the years that has enabled the Faculty to achieve what it has to date. I would be seriously remiss if I did not particularly acknowledge the contribution of Ruth Busch, as the first law teacher at the University; Dr Anna Kingsbury as first law librarian before joining the teaching staff; Professors Barry Barton and Nan Seuffert as academic leaders throughout the two decades; then Vice Chancellor Wilf Malcolm without whose support the School would have died even before its official opening; Gerald Bailey; Justice Grant Hammond; and too many others to name, beyond those sharing their reflections in the pages to follow, who played vital roles in the early days of the School's creation and over the years since.

A special expression of gratitude must be given to Foundational Dean Margaret Wilson for her tireless efforts to establish such a distinctive and unprecedented Law School. Her return to the Faculty two years ago after years of tremendous achievement in Parliament has helped to reinvigorate the Faculty as well as vividly demonstrating the uncommon pull that this Law School and its goals continues to possess over those who spend time here as students or staff.

I trust that my successors in future pivotal anniversary issues will be able to celebrate even greater successes while noting how much closer we have come to implementing the vision of this remarkable Law School.

THE HARKNESS HENRY LECTURE

FROM PRIVY COUNCIL TO SUPREME COURT:
A RITE OF PASSAGE FOR NEW ZEALAND'S LEGAL SYSTEM

BY PROFESSOR MARGARET WILSON*

I. INTRODUCTION

May I first thank Harkness Henry for the invitation to deliver the 2010 Lecture. It gives me an opportunity to pay a special tribute to the firm for their support for the Waikato Law Faculty that has endured over the 20 years life of the Faculty. The relationship between academia and the profession is a special and important one. It is essential to the delivery of quality legal services to our community but also to the maintenance of the rule of law. Harkness Henry has also employed many of the fine Waikato law graduates who continue to practice their legal skills and provide leadership in the profession, including the Hamilton Women Lawyers Association that hosted a very enjoyable dinner in July.

I have decided this evening to talk about my experience as Attorney General in the establishment of New Zealand's new Supreme Court, which is now in its fifth year. In New Zealand, the Attorney General is a Member of the Cabinet and advises the Cabinet on legal matters. The Solicitor General, who is the head of the Crown Law Office and chief legal official, is responsible for advising the Attorney General. It is in matters of what I would term legal policy that the Attorney General's advice is normally sought although Cabinet also requires legal opinions from time to time. The other important role of the Attorney General is to advise the Governor General on the appointment of judges in all jurisdictions except the Māori Land Court, where the appointment is made by the Minister of Māori Affairs in consultation with the Attorney General. In this task the Chief Justice and the Solicitor General, who consult with the judiciary and the legal profession, advise the Attorney General.

The Supreme Court Act of 2003 was given assent on 17 October and came into force on 1 January 2004. It is a Court of five judges, including the Chief Justice. The Act established the Supreme Court as New Zealand's final Court of Appeal and in doing so by necessity ended appeals to the Judicial Committee of the Privy Council, though rights of appeal before 1 January 2004 were preserved.

In this paper I thought it would be useful to explain a little of the various attempts to abolish appeals to the Privy Council, before I comment upon the political process that resulted in abolition. It is useful because it identifies that the arguments for and against abolition were consistent over time. They had been well rehearsed by those interested in the issue and an explanation of the process will also help give understanding to the provisions of the Act. The influence of various pressure groups will become apparent. As lawyers, we are often trained to look at the outcome of

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political decision making when it results in legislation but an understanding of the process however, gives some insight into why we end up with the legislation that we do.

II. PRIVY COUNCIL IN NEW ZEALAND CONTEXT

The first recorded judicial displeasure at the oversight by the Privy Council of New Zealand court decisions appeared in the *Commonwealth Law Review* of 1904¹ where Robert Stout noted: “At present we in New Zealand are, so far as the Privy Council is concerned, in an unfortunate position. It has shown that it knows not our statutes, our conveyancing terms, or our history.” Or as Williams J said more plainly:² “That Court ... by the ignorance it has shown in this and other cases of our practice ... has displayed every characteristic of an alien tribunal.” This theme of lack of local knowledge was one of the most commonly heard criticisms of the Privy Council. Whatever outrage the judiciary may have felt by the comments of the Privy Council, the reality was the young colony did not have the judicial or legal resources to establish a local court of final appeal.

The Judicial Committee of the Privy Council was established for precisely this purpose – to assist colonies with judicial decision making. Its other motive was, of course, to continue the influence of Britain at a time when the Empire was disintegrating with the reality of the colonies asserting their independence.³ The common law was seen as a link that would bind the countries and ensure the rule of law was established and maintained in the colonies. This desire to continue the legal relationship was later expressed in the idea of a Commonwealth Court.⁴ Chief Justice Sir Michael Myers raised the idea of a tribunal in the 1940s⁵ but it was Lord Gardiner, the Lord Chancellor who seriously suggested the possibility of a Commonwealth Court of Appeal at the 1965 Commonwealth and Empire Law Conference. Although initially supported by the then New Zealand Attorney General Hanan, it did not find support from other Commonwealth countries and shortly after even Hanan changed his mind and declared the notion of appeals outside New Zealand was outdated.

The idea of an international tribunal was raised again during the debate on abolition in 2000. On this occasion it appeared as a Pacific Court, with the Select Committee seeking submissions on the matter.⁶ It is interesting to note this shift from the notion of preserving the common law with Commonwealth links to seeking an outside body within the region. This was not recognition of New Zealand seeking to develop a unique legal identity but more a statement by Māori that they wanted a final Court of Appeal that reflected their cultural and political aspirations. Again there was little support for this notion for a variety of reasons including a lack of qualified judges from South Pacific countries. It is interesting to note that the Commonwealth Law Association is now the remaining common law institutional link together with meetings of Commonwealth Law Officers conferences.

While not supporting a Commonwealth Court, New Zealand was more relaxed than other Commonwealth countries about judicial intervention from London. With the Caribbean countries,

1 Robert Stout “Appellate Tribunals for the Colonies” (1904) 2 *Commonwealth Law Review* at 3-13.

2 BS Cameron “Appeals to the Privy Council – New Zealand” (1970) 172 *Otago Law Review* at 176.

3 Maurice Kelly “Leaving Their Lordships: The Commonwealth Experience” (1994) 101 *NZLJ* gives an interesting account of the history of the Privy Council and the Commonwealth countries process of abolition of appeals.

4 Dr AM Finlay paper to the First Fiji Law Conference in Suva, reported in *NZLJ* (1974) at 493.

5 (1950) 26 *NZLJ* at 119.

6 Report on Supreme Court Bill, Justice and Electoral Select Committee, 2003 at 1.

New Zealand had been the last to establish its own final Court of Appeal.⁷ This reluctance to assert independence was also reflected in the fact it took 16 years after the Statute of Westminster of 1931 for New Zealand to declare itself fully independent in the Statute of Westminster Adoption Act 1947.

The reasons for this reluctance to formally assert independence are complex. A combination of economic and security dependency provide much of the explanation but also a singular lack of interest in constitutional formality is a characteristic of New Zealand's constitutional arrangements. It was this lack of constitutional formality that also made it difficult to situate the abolition of the appeal within a constitutional context. Was it a major constitutional change as proclaimed by some media and academics, or was it a matter of judicial administration with little constitutional significance? For my own part, the creation of a final Court of Appeal must be seen as having constitutional significance but in the given context of the change, it could not be judged to be a major event requiring a referendum like the adoption of the MMP electoral system.⁸

It is important to note that abolition of appeals to the Privy Council has never been a significant political issue. It is also fair to observe that there was relatively little criticism or comment about the Privy Council until after World War II. The little debate about the Privy Council that could be detected was amongst legal and academic elites. Even amongst these groups there has always been the assumption there would be the abolition of appeals at some stage. The question was when, and an even more important inter-related question, what would replace the Privy Council?

III. PRIVY COUNCIL – ATTEMPTS AT ABOLITION

The first serious attempt to address the question came in 1987 when the then Attorney General Geoffrey Palmer announced that the Government would abolish appeals to the Privy Council to coincide with the 1990 150th Anniversary of the signing of the Treaty of Waitangi in 1840. In 1989 a Law Commission Report on the Structure of the Courts reported on the basis that the Government had announced appeals to the Privy Council would be abolished.⁹ It therefore concentrated on the consequential structure of the courts which included a District Court, a High Court and a Supreme Court to which there would be appeals from the Court of Appeal and, in matters of exceptional importance involving a public interest, an appeal with leave to the Supreme Court, which was to be the final Court of Appeal.

On the matter of the Privy Council the Commission stated:

The underlying motive for ending Judicial Commission appeals is that the final New Zealand court responsible for clarifying and developing the law of New Zealand should be composed of senior New Zealand judges who are part of our community and closely familiar with our historical, social and legal history. Moreover they should be part of a permanent court, made up of judges regularly working together as a collegiate group. To repeat the point, it is now 30 years since we accepted in a broad way the proposition that we should have the final court actually sitting in New Zealand with permanent New Zea-

7 Although the Caribbean countries have agreed on a final Court of Appeal, each country must ratify that decision before appeals to the Privy Council are abolished.

8 For comment on this issue see James Allen "A Latter-Day Portia" (2003) NZLJ at 18 who supported a referendum and BV Harris "The Constitutional Future of New Zealand" (2004) NZLR at 285 who argued against the need for a referendum.

9 I declare an interest in that I was a member of the Law Commission at that time as was Sian Elias QC, now Chief Justice. Sir Owen Woodhouse Chaired the Commission.

land members. A court with occasional members and drawn from outside New Zealand would contradict both the purposes.¹⁰

The issue of overseas judges sitting on the final Court of Appeal was a variation of the argument of an off shore court. The assumption that New Zealand judges needed such support for the credibility of the court has been a recurring theme.¹¹

Although there was some academic comment on the Law Commission Report,¹² the matter of abolition was not progressed at the time. There was division in the Cabinet with the then Minister of Justice Hon Bill Jefferies opposing abolition. This attempt highlighted the need for political unity on the issue and even though the Government would have had the numbers in Parliament, internal division in Cabinet to such reform proved fatal.

The second serious attempt came less than ten years later when the National Government decided in principle to abolish the appeal and requested the Solicitor General to write a report on the implications of this decision. In an excellent report, the Solicitor General recommended that the Privy Council be replaced by an appeal to the full bench of the Court of Appeal, in other words that there would be one appeal only. The subsequent discussion on the report highlights two major areas of opposition – the legal profession that wanted two appeals and the Māori community who saw this as an opportunity to address their concern at the treatment of Māori by the legal system generally.¹³

There appeared to have been no internal political division however and a Bill was introduced to Parliament in 1996. However an election intervened before the Bill could be progressed. This election was the first held under the new MMP electoral system and resulted in the National Party entering coalition with the New Zealand First Party which opposed abolition of appeals to the Privy Council so the Bill did not progress. The Labour Opposition had also expressed concern at the mounting opposition to the Bill from Māori. The attitude of Māori to the Privy Council is another recurring theme and deserving of a paper in itself. Māori opposition may best be understood in the context of the special relationship Māori believe they have with the Crown because of the Treaty of Waitangi, and with their deeply felt criticism of the legal system's treatment of Māori and the therefore the desire for their own legal institutions.¹⁴

IV. PRIVY COUNCIL – ABOLITION SUCCESSFUL

The third attempt at abolition came in 1999 with the election of the Labour-led coalition Government. The Labour Party manifesto included a commitment to abolish appeals to the Privy Council. Its coalition partner, the Alliance Party, supported abolition also, as did the Green Party. As

¹⁰ Law Commission *The Structure of the Courts*, (NZLC R7, 1989) at 166.

¹¹ At this point I must declare an interest in the Law Commission Report. I was a member of the Law Commission at the time, as was Sian Elias QC, now the Chief Justice, and Sir Kenneth Keith, now a member of the International Court of Justice, Jack Hodder, a Wellington lawyer who made influential submissions on the Supreme Court Bill in 2003, and Sir Owen Woodhouse, former President of the Court of Appeal who chaired the Commission.

¹² Phillip Joseph opened his article on the subject with the unequivocal observation that “The right of appeal of the Privy Council from New Zealand is unnecessary and unresponsive to our national way of law and demeaning of our sovereignty.” (1985) *Canterbury Law Review* at 273.

¹³ *Appeals to the Privy Council* (prepared by the Māori Committee for the Law Commission 1995). This paper addresses issues of Māori sovereignty and other options for a court outside New Zealand.

¹⁴ *Ibid*; National Hui *Seeking Solutions: A review of New Zealand's Courts System* (prepared to discuss Law Commission Consultation document, 2003).

Attorney General and Associate Minister of Justice I was given the task of implementing the policy. At the outset I must state I had always supported the abolition of appeals to the Privy Council. My reasons were both political and legal. On a personal level, I was at school when the debate surrounding the possibility of the United Kingdom entering the European Economic Community and thus fundamentally affecting New Zealand's market access was underway. It seemed to me this fundamentally changed whatever relationship there was between New Zealand and the United Kingdom and it was time for New Zealand to grow up and take responsibility for its own future. In many ways New Zealand has done precisely that. It has developed more trading partners through a free trade policy, diversified its economy and developed an independent foreign policy. It seemed only natural then in this reform context to question whether the legal system was also developing to meet the needs of a rapidly changing community.

When reviewing the legal needs of the community appeals to the Privy Council seemed increasingly anomalous. It was anomalous because of the narrow range of cases that actually were appealed to the Privy Council. The Privy Council itself recognised that some cases it considered were better settled by a New Zealand court and referred back for decision.¹⁵ Its precedent value was therefore quite limited. Few cases got to the Privy Council because of the costs involved, and because in some areas, such as employment and environment law, the statutes barred such appeals.¹⁶

The Court of Appeal was effectively the final court for most citizens.¹⁷ This may not have been a problem if it was not for the fact the Court of Appeal was overworked and under resourced and various attempts to remedy the situation had been unsuccessful. They had been unsuccessful in my view because there was a structural design problem with our court system. The architecture of it did not allow for a final Court of Appeal. In reality we had two final Courts of Appeal, one underworked and one overworked. One off shore and one on shore, with little real communication between them. For me then the whole question of abolition of appeals was really a question of reform of the court system.

I was conscious that a reform of the courts is a large task and that previous attempts had not met with a great deal of success.¹⁸ A combination of institutional interests, lack of resources and a changed political environment by the time the review is released all combine to make change in this area very difficult politically. Nevertheless in May 2001, in my role as Minister Responsible for the Law Commission I agreed terms of reference for another review of the structure of the courts.¹⁹ This review was partly a response to the issues that were raised with me during the rounds of consultation on abolition of appeals to the Privy Council, especially from Māori who expressed serious concern about the adequacy of the legal system to fulfil their needs. Just as in the 1989 review, the Law Commission did not address the question of appeals to the Privy Council because a separate process was already underway to address that issue.

15 Andrew Beck "A New Appeal System" (2001) NZLJ at 53.

16 In recent years on average there had been 11 to 12 appeals a year.

17 In 2002 the Court of Appeal heard 665 appeals.

18 See Royal Commission on the Courts 1978, and the Law Commission Report on the Structure of the Courts 1989.

19 See Law Commission *Delivering Justice For All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004).

V. THE ROLE OF CABINET

As Attorney General and Associate Minister of Justice I was the Minister responsible for implementing the Manifesto Policy. I was very conscious of the lack of success by my predecessors, as was the whole Cabinet. Those initiatives provided valuable lessons for us. The Cabinet therefore adopted a cautious approach as was seen in their reaction to the first paper submitted on 16 October 2000 seeking agreement to develop a public consultation paper with options for the new appellate structure. The paper was deferred until the coalition Alliance Party caucus had had an opportunity to consider the proposal. Political unity on the issue was essential. Also the Cabinet wanted to ensure there had been extensive consultation with Māori, the legal profession and the business community before it committed to the policy.

Whilst I agreed with the need to ensure political and sectoral support for the proposal, I was conscious of the fact that the next election was only two years away. Most Ministers feel the constraint of time on policy development that is imposed by a three-year election cycle. It was therefore important that the process be kept moving at an appropriate pace, which allowed full consultation and participation, but no slippage. I therefore proceeded with what may be termed cautious haste.

The first step was approval by Cabinet on 7 December 2000 to the content and release of a Discussion Paper for consultation with a closing date for submissions on 30 March 2001.²⁰ In addition to the Discussion Paper consultation the Attorney General agreed to continue consultations with the legal profession, the business community and Māori. The Cabinet also approved a group of Ministers to work with the Attorney General on the paper and the process. This group included the Prime Minister, the Deputy Prime Minister, Minister of Justice, Minister of Māori Affairs and other Ministers to be added as appropriate. An official group was also set up to assist the process. The Discussion Paper was designed to provoke public discussion by setting out the arguments for abolition and for retention as well as factual information about the Privy Council. Specific reference was made to issues for Māori and guiding principles for restructuring the appeal system were identified. Considerable thought and promotion had gone into the paper.

It was therefore disappointing when only 70 submissions were received and they were evenly divided between abolition and retention, with a preference for a new separate and independent final Court of Appeal if the decision of abolition was implemented. It was obvious this was not an issue that attracted a great deal of public concern and what concern that was expressed was amongst the elites. It was also obvious that minds were set on the issue and there was little scope, if any, for compromise. While there was an inevitability about appeals being abolished, those who supported retention were not going to concede this was the time for change. It was important however to try to address the concerns of the opposing groups and develop a model for a final Court of Appeal that achieved as wide as acceptance as possible. It was equally important to separate out the two issues: abolition and the new court. While agreement may not be gained on the first issue, it may be gained on the second.

The Cabinet, when it considered the matter again on 13 August 2001, again took a cautious approach. Further consultation was directed but this time it was directed toward the structure of a new final Court of Appeal. Importantly, a cross ministry officials group was set up to work on the project. No decision by Cabinet was made on abolition but the Attorney General was directed to report back to Cabinet on 30 September 2001. On 8 October 2001 the Cabinet approved the estab-

²⁰ *Reshaping New Zealand's Appeal Structure* (Office of the Attorney-General/Te Toa Ture Tianara, 2000).

lishment of an advisory group of representatives of key stakeholders, including Māori, the legal profession and the business community, to develop a detailed proposal on key elements of the final Court of Appeal and the costs. This was a major breakthrough in terms of progress because it enabled a specific proposal on which to be consulted and provided the basis for drafting instructions on a Bill if that were approved. It also enabled a discussion to take place in the context of a specific alternative to the Privy Council.

The Ministerial Advisory Group was chaired by the Solicitor General²¹ and was not concerned with the issue of abolition, but only of the structure of the new final Court of Appeal. On 25 March 2002 the Cabinet considered the Report, which recommended a new stand alone Supreme Court as the final Court of Appeal.²² After consideration of the Report the Cabinet agreed in principle for the first time to abolish appeals to the Privy Council and subject to more detailed work on the proposal to the establishment of a new Supreme Court. It also noted that the Attorney General intended to introduce a Bill before the election but not to progress it until after the election. A public announcement of this decision was released in April. The purpose was to give the electorate notice of the proposal and time to discuss the issue.

VI. EXTERNAL INVOLVEMENT

It is important to note that while this internal process was being undertaken, I felt it was appropriate to inform the Lord Chancellor of progress towards abolition. There was no special procedure required to effect abolition beyond an ordinary Act of Parliament. I felt however that courtesy dictated a meeting with Lord Irvine, who expressed his appreciation at the contact and wished us all the best. I repeated this visit in 2002 and was about to visit him again in 2003 when on the day I arrived there was the announcement of a new Lord Chancellor, Lord Falconer and a new Supreme Court and judicial administrative structure. Lord Falconer, at short notice, was kind enough to see me and again wished us good luck. I also communicated with him just before the legislation was enacted so it would not come as a surprise that after so much time New Zealand had finally established its own final Court of Appeal.

Two other external events were quite helpful during this period. In November 2002 I attended a Commonwealth Law Ministers Conference in St Vincent and the Grenadines. It provided an opportunity for both the Caribbean countries and New Zealand to discuss their proposals and the Commonwealth Secretariat agreed to host a seminar in London where the details of the proposals could be discussed. This seminar took place in June 2003. A late change in the arrangements by

21 Other members were Richard Clarke (Chairperson of Legislation Advisory Committee), David Collins QC (President, Wellington District Law Society), Christine Grice (President of the New Zealand Law Society), Stuart Grieve QC (President New Zealand Bar Association), Cheryl Gwyn (Deputy Secretary for Public Law, Ministry of Justice), Jack Hodder (Partner Chapman Tripp Sheffield Young), Shane Jones (Ngāi Takoto, Te Aupōuri, Chairperson, Te Ohu Kai Moana – Treaty of Waitangi Fisheries Commission), Dr Ngatata Love (Te Ātiawa, member Law Commission, Professor of Māori Business at Victoria University of Wellington) Adrian More (President, Otago District Law Society), Joanne Morris (Member of Waitangi Tribunal and Board of the Legal Services Agency), Hon Bruce Robertson (President Law Commission), Maui Solomon (Mōriori, Kāti Huirapa (Ngāi Tahu), Solicitor and member Te Ohu Kai Moana – Treaty of Waitangi Fisheries Commission), Archie Taiaroa (Te Āti Haunui-a-Pāpārangi, Ngāti Tūwharetoa, Ngāti Apa, Ngāti Maru (Taranaki), Convenor Māori Congress, member Te Ohu Kai Moana – Treaty of Waitangi Fisheries Commission).

22 The Advisory Group Replacing the Privy Council *A New Supreme Court* (Office of the Attorney-General/Te Toa Ture Tianara, 2002).

the Secretariat meant I missed the crucial sessions but the report indicated the New Zealand proposal appeared to present no issues for the rule of law.²³

I should note that there was little knowledge or understanding of the constitutional changes taking place in Britain at the same time New Zealand was struggling with the establishment of a new court. There was no concern that such events could have some effect on New Zealand. The assumption was business as usual and I was given assurances that the facilities of the Privy Council would still be available to New Zealand litigants. There was also little understanding of the effect the European Union and courts were having on the common law. Only Jack Hodder raised this issue in his submission to the Select Committee and queried whether New Zealand jurisprudence should be so influenced. The lack of interest by most in this issue however was confirmation that a great deal of the arguments advanced in the debate were driven more by emotion and sentiment than facts and reality. This did not make it any less difficult politically, in fact emotional arguments are always more difficult to deal with in a rational way in the political context.

VII. THE PARLIAMENTARY PROCESS

An early election in 2002 intervened so no Bill was introduced before the election. The Labour Party formed another coalition government after the election, with a different set of partners, which required further negotiation on the proposal that was referred back to Cabinet on 11 November 2002. At that meeting, the Cabinet confirmed its decision to abolish appeals to the Privy Council and to proceed with a Supreme Court and agreed that the Associate Minister of Justice (also the Attorney General) introduce the Bill to Parliament. It was introduced on 9 December 2002 and read for the first time on 17 December 2002 when it was referred to the Justice and Electoral Committee.

The Select Committee reported back on 16 September 2003 that 312 submissions had been received. The written submissions were evenly divided between retention and abolition but the majority of oral submissions supported retention of the Privy Council. It was apparent that there was little public interest in the issue but those who were engaged felt strongly about the issue. The submissions did raise some issues that were considered by the Cabinet and amendments were recommended to the Bill. The substantive amendments related to the purpose clause and the criteria for leave which were designed to accommodate the concerns of Māori and the commercial community. I think it may be useful at this stage to set out both clauses in full because they clearly illustrate the influence of the submitters on the final wording of the Bill:

3 Purpose

(1) The purpose of this Act is –

- (a) to establish within New Zealand a new court of final appeal comprising New Zealand judges-
 - (i) to recognise that New Zealand is an independent nation with its own history and traditions; and
 - (ii) to enable important legal matters, including legal matters relating to the Treaty of Waitangi, to be resolved with an understanding of New Zealand conditions, history, and traditions; and
 - (iii) to improve access to justice; and
- (b) to provide for the court's jurisdiction and related matters; and

23 Commonwealth Meeting of the Expert Group to Examine the Removal of Appellate Jurisdiction from the Judicial Committee of the Privy Council by Member Countries (Marlborough House, London, June 2003).

- (c) to end appeals to the Judicial Committee of the Privy Council from decisions of New Zealand courts; and
 - (d) to make related amendments to certain enactments relating to courts or judicial proceedings.
- (2) Nothing in this Act affects New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament.

This purpose clause clearly rejects the notion of overseas judges sitting on the Supreme Court, which had been strongly advocated by some, including the late Lord Cooke who used the Hong Kong Final Court of Appeal as an example of this practice. Rt Hon E W Thomas QC is quoted as saying such an idea was "inconsistent, anomalous, impractical, and anti-collegial". The Select Committee had asked me to look closely at the possibility of including overseas judges on the Supreme Court and I appeared before the Select Committee to justify the provisions of the Bill and to explain that I had raised the matter with the Chief Justices of Canada, and the United Kingdom, both of whom explained to me the difficulties of administering their own courts without the added burden of releasing sitting judges to sit on another court. The logistics were just too difficult as I explained to Members of the Select Committee who had little knowledge or understanding of realities of judicial administration.

The purpose clause also sets out the expectation that the Supreme Court will be a New Zealand court addressing the needs of the community. The specific reference to the Treaty of Waitangi was another legal acknowledgement of the importance of the Treaty to New Zealand's constitutional arrangements. The final reference to the rule of law and the sovereignty of Parliament was a response to the concern that the new Supreme Court may usurp the authority of Parliament to make the law. It was not in the original Bill but inserted by the Select Committee. In many ways for me it was the most significant constitutional statement but seems to have passed without much comment.

The other clause of significance in this context is that relating to the criteria for leave to appeal. It also reflects the influence of the submitters on the final wording of the legislation. It reads in part:

13 Criteria for Leave to Appeal

- (1) The Supreme Court must not give leave to appeal to it unless it is satisfied that it is necessary in the interests of justice for the Court to hear and determine the proposed appeal.
- (2) It is necessary in the interests of justice for the Supreme Court to hear and determine a proposed appeal if -
 - (a) the appeal involves a matter of general or public importance; or
 - (b) a substantial miscarriage of justice may have occurred or may occur unless the appeal is heard; or
 - (c) the appeal involves a matter of general commercial significance.
- (3) For the purposes of subsection (2), a significant issue relating to the Treaty of Waitangi is a matter of general or public importance.

Again the influence of the Māori and business communities is reflected in the provision, as well as those sections of the legal community which were concerned to ensure that the Supreme Court had jurisdiction to hear matters of public importance or in matters where a miscarriage of justice had occurred. The original clause had included a reference to the Treaty of Waitangi and tikanga

as a specific ground for appeal. The Committee removed this reference after objection from several submitters including Māori.

The majority of the Committee supported the Bill as amended so the Government proceeded with the second reading on 7 October 2003, the Committee of the whole House on 8 and 9 October and the third reading on 14 October with the Royal Assent on 17 October 2003. Almost unprecedented media opposition and promises to repeal the legislation from opposition Members of Parliament accompanied the final stages of the Bill.

VIII. ARGUMENTS – POLITICAL AND LEGAL

The main argument against such a court amongst legal critics appeared to be that the Privy Council, and only the Privy Council, could ensure the maintenance of the purity of the common law. A critical assessment of this argument however revealed that legislation was frequently enacted to clarify and provide certainty to the common law, for example in the contract area, but also to respond to specific local circumstances. Obvious examples include the development of a Treaty of Waitangi jurisprudence, social legislation such as the Accident Compensation system, the Resource Management Act 1990, Employment Relations Act 2000, and the Property Relationships Act 2002; and rights based initiatives such as the Bill of Rights Act 1990 and the Human Rights Act 1993.

The introduction of neo-liberal economic policies in the 1980s and 1990s had also raised new questions about the relationship between the citizen and the state. New commercial legal frameworks were introduced with state owned enterprises and public/private partnerships. While these instruments were not unique to New Zealand, the context within which they operated was. Any legal resolution of such matters seemed best dealt with within the New Zealand community by judges familiar with that community and responsible to it for the maintenance of the rule of law. The introduction of the new MMP electoral system also raised the possibility of constitutional issues requiring legal resolution. I was not therefore surprised that the first case decided by the Supreme Court involved electoral matters.²⁴

An argument associated with the preservation of the common law has always been that New Zealand needs the distance and expertise of a Privy Council to ensure the rule of law is maintained. The Privy Council, it is argued, has a well-qualified independent judiciary that is removed from the pressures of the local community. A variation on this argument was that New Zealand's commercial interests would be detrimentally affected without the superior judging provided by a Privy Council. The business community with the assistance of the large accountancy firms, Māori business and insurance interests, all argued strongly that local judges deciding cases would seriously affect New Zealand's business credibility.

Whilst I respected their right to advocate their special interest, it was a special interest that took no account of the argument that many others in the community were denied the privilege of access. There was also no evidence to support this argument. In this context the question was often asked: what makes New Zealand judges worse than those of countries of comparable size such as Ireland that at the time was held up as a model economy? The business lobby lost some credibility with the argument that it was more cost efficient to go to the Privy Council because the British taxpayer paid for it.

²⁴ *Prebble v Huata* [2005] SC 18.

The issue of judicial competency and independence is important because it goes to the heart of judicial legitimacy. The facts did not support the assertion of a lack of competency as was noted by many commentators. New Zealand has had over time developed a highly skilled judiciary and legal profession, who were very aware of legal developments outside New Zealand and were often participants in international conferences and seminars. Senior judges also sat on the Privy Council from time to time. Lord Cooke in his submission to the Select Committee noted it was time for New Zealand 'to take charge of its own judicial destiny' and that New Zealand law would be best decided by judges who are 'soaked' in it and not occasional to it.

Likewise a lack of judicial independence was also not evidenced by the facts. The Privy Council considered very few cases and their precedent value was often limited. The Rt Hon Sir Geoffrey Palmer noted in his submission that the Privy Council did not get enough cases to exercise the function of an appellate court, namely to clarify and develop the law of New Zealand as far as is appropriate for the courts. Francis Cooke, a Barrister, also noted the trend of the Privy Council to decline to overturn the New Zealand Court of Appeal in cases where there was a policy component.²⁵

There was no evidence that New Zealand judges had not decided cases without influence from the executive or members of the community with money and influence. Nor had the judiciary been intimidated by media pressure, especially on matters of sentencing. It is true that from time to time judges would suggest the legislature should clarify the law, and Ministers or Members of Parliament would express disagreement with a particular decision. These incidents are not common however. The real threat to the independence of the judiciary in my experience comes from a lack of resources. This is rarely raised in debate but in practice is more important.

The perception however that a judge is not impartial in a small community because of knowledge of people or events is a real one. I had established a Judicial Conduct Commissioner to ensure there was a transparent process for complaints against judges to be investigated.²⁶ There is a counter argument that local knowledge leads to better judging and that ignorance is not always the best criteria of judicial decision-making. Knowledge of the community is an essential factor in the judiciary retaining the confidence of the people. Again there was no evidence of judges corruptly favouring one party over another. In fact New Zealand judges are very conscious of the need to recuse himself or herself if there is a conflict or perceived conflict of interest. The debate is an old one about the impartiality and neutrality of judging and cannot be explored in detail in this context.

While I am happy to debate the issue as an academic, as the Attorney General it did not seem to me to be an argument of sufficient merit to stop the reform. I was also conscious that it is important to try and make evidence based decisions and not those on what might be. It is always a risk assessment in such situations and in this case the risk of creating a corrupt incompetent judiciary through the establishment of a Supreme Court seemed slight measured against greater access to a final Court of Appeal.

25 *Lange v Atkinson* (1999) [2000] 1 NZLR 257; [2000] 3 NZLR 385.

26 Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004.

IX. APPOINTMENTS

There was an aspect of this argument that did achieve prominence during the final stages of the process and that related to the appointment of judges to the Supreme Court. Once it was apparent that the legislation was likely to be enacted, the focus of the attack shifted to the appointment process. The normal appointment process of the Attorney General on the advice of the Solicitor General and the Chief Justice, after they have consulted with the profession and the judiciary, recommending appointment to the Governor General was criticised as not being transparent and leading to political corruption.²⁷ Again there was no evidence for this assertion but the media and the opposition politicians speculated at length on the likelihood of my political corruption. At the time I noted that in 1957 when the permanent Court of Appeal was established, the then Attorney General Hon (later Sir) John Marshall nominated the judges.

The appointment process of judges in my view could be improved. I had initiated a review to explore the establishment of a Judicial Appointments Commission, but work on this issue was slow however and fraught with difficulty in terms of achieving a majority view. I noted the establishment of such a Commission in Britain. It will be observed with interest in New Zealand where I am sure the issue will be raised again. My only concern about judicial appointments is that they are made on judicial merit and that the ‘clone’ theory of appointments is avoided to ensure the community, which is judged by these men and women, has confidence in them. Continuing to appoint middle aged to elder men of European descent is no longer acceptable when other candidates of merit are available. A balance is required. This point was made in the submissions to the Select Committee, where it was noted that “if the judiciary continues to be seen or drawn from a narrow demographic group, public confidence is likely to be undermined.”²⁸

In the event, the appointments of the most senior members of the Court of Appeal as judges to the Supreme Court were recommended after advice was taken from the Chief Justice, the Solicitor General and a former Governor General Sir Paul Reeves, whose task was to ensure the interests of Māori were protected. Māori interests had argued for a Māori judge to be appointed. The reality was that there was no Māori judge of sufficient judicial merit to make such an appointment and therefore the panel resolved that judges should be recommended for appointment in terms of their seniority on the Court of Appeal.

I duly informed the Cabinet of the recommendation and consistent with my previous experience there was very little comment or discussion and the matter went straight to the Governor General. I had insisted that merit should be the primary criteria but the media furore surrounding the appointments made this an impossible argument to sustain so seniority prevailed. The two arguments are not mutually exclusive I hasten to add and I had no difficulty with the decision to appoint on seniority in the circumstances of the first appointments. It made sense to me to ensure continuity and confidence. It will be interesting to see if this precedent will be followed in the future.

27 See Judicial Appointments Officer, Attorney General Judicial Appointments Unit, <www.justice.govt.nz> for a detailed account of the process for judicial appointments that I revised in May 2003.

28 Select Committee Report on the Supreme Court Bill (2003) HR 16 – 2.

X. ARGUMENTS - NATIONALISM

For the sake of completeness, I should note that the advocates for retention also argued that abolitionists were nationalists who wanted a republic and this was another step on that road. On this point it is true that New Zealand will eventually become a republic but it is not a high priority for any political party or the community. It was true however that Labour-led Governments were consciously developing a sense of identity through support for the arts, sports and recognition of the importance of commemorating New Zealand's involvement in various 20th century wars. While abolition of appeals to the Privy Council was part of New Zealand's development to independence, it was not the primary motive for the initiative. It was more a natural outcome of an evolving community confident in itself to make decisions for itself.

XI. PROCESS

I have described the Cabinet decision making process in some detail for several reasons. The first is that some supporters of retention considered the process was unconstitutional and more time should have been taken, including the holding of a referendum. While delay is always a tactic for opponents of a proposal, especially in New Zealand where the prospect of a change of government after three years offers the hope of a change of policy, I believe the accusation requires attention. The process of consultation, discussion and decision making took three years, including the intervention of an election where the proposal was clearly signalled in the Manifesto. The Government was aware of the 20-year debate around the issue. It was a debate however that was conducted essentially amongst some small elite lobby groups, who themselves were divided on the issue. The history also showed there was fundamental cross party support but the politics of the moment would require the Opposition to oppose the proposal.

There was never then likely to be total agreement, so the Government had to assess whether a greater good than harm was likely to result from the abolition of appeals to the Privy Council and the establishment of a new Supreme Court. The Cabinet undertook a cautious approach and wanted to be assured that what replaced the Privy Council would be to the benefit of all New Zealanders. It was not only sensible to have the full facts before a decision to abolish appeals was made, but it also made the decision more publicly defensible. The decision to abolish appeals could not be made in isolation, but rather where the people could see what was replacing the Privy Council and why. I personally found it interesting that in the numerous meetings I attended on this issue, especially with lawyers, the focus was always on the new Supreme Court.

It must be noted again in this context that there was little political capital to be gained from establishing a new Supreme Court. The truth was this was not an urgent matter or one that attracted or detracted voters. However once the media discovered the issue quite late in the process, there was a prospect that the matter could be again deferred. The media induced pressure of the moment was considerable and the need to maintain cross party support was essential. The Green Party and Progressive Party Members withstood the pressure while the United Future Party did not. The Government decided it had the numbers so would proceed. I would argue subsequent events proved this to be the correct decision. The Labour Party formed a Government after the subsequent election with the issue rarely being raised. The then Opposition National Party and now the Government has stated it will not repeal the legislation. I suspect the prospect of abolishing the

Supreme Court would have proved to be politically contentious with accusations of the executive interfering with the independence of the courts.

The question of whether a referendum should have been held is a serious one. New Zealand has no tradition of holding referenda with Parliament being recognised as the body to make decisions. Between 1919 and 1997 there were ten referenda – three on liquor use, one on betting, one on compulsory military training, one on superannuation, two on term of Parliament, and two on the voting system. As came to be seen, this was the usual method of political decision making. The Select Committee acknowledged this and did not recommend it. The call for a referendum has become more common however and is a useful political tactic to characterise the decision making as undemocratic.

The prospect of a three-year election is seen as the best referendum as it provides the opportunity for the people to express their view on issues. The referendum is also a somewhat blunt issue to determine complex matters. The experience of the MMP referendum and use of considerable financial resources to sway public opinion has raised the question of the need for better guidelines for such referenda. There is however a small and maybe growing section of the population that seeks more direct input into decisions and if New Zealand ever gets around to serious discussions on constitutional issues, this matter will be raised.

XII. CONCLUSION

In conclusion, that is a brief account of the process undertaken to establish the Supreme Court and some of the debates and arguments surrounding that decision. I have not done justice to all the arguments but hope I have provided you with an idea of the issues and parties driving those issues. On a personal level I am grateful for the opportunity to have been part of that decision and look forward with interest like so many others to observing the progress of the Supreme Court.

CHALLENGES TO LEGAL EDUCATION: THE WAIKATO LAW SCHOOL EXPERIENCE

BY PROFESSOR MARGARET WILSON*

I. INTRODUCTION

On 1 July 1990 the Waikato Law School was formally established. On 19 December 1990, the then Minister of Education, Dr Lockwood Smith, faxed the University of Waikato notifying it that the Government had withdrawn the \$10 million funding for the establishment of New Zealand's new Law School. In March 1991, the Waikato Law School admitted its first students for the LLB degree, who graduated in 1994. These simple facts belie the traumatic events that accompanied the establishment of New Zealand's fifth Law School, some of which have been recorded elsewhere.¹ Regardless of the circumstances surrounding the foundation of the School, it has survived and thrived and this year celebrates its 20th anniversary. Although in legal institutional terms, 20 years represents infancy, it is appropriate to assess how the Law School has survived the challenges of the past 20 years that has seen almost continuous changes in both tertiary education policy and the delivery of legal services.

The School was established at a time when the neo-liberal policy paradigm of substitution of funding of public institutions with private sector funding was being introduced. The withdrawal of funding for the Waikato Law School signalled the intention of the Government to withdraw from the responsibility of totally funding tertiary institutions and to introduce private sector funding, primarily through increasing fees and enabling loans to students to fund their education. The policy shift has also been accompanied by the commercialisation and commodification of tertiary education. The emphasis on research for profit and courses that contribute to economic growth are examples of this trend. These developments have taken place over the past 20 years, the life of the Law School, and have been well documented and analysed so it is not the intention of this article to re-tread that territory.² It should be noted however that the policy continues today with the recent announcement of the extension of the policy of performance based funding for tertiary institutions.³

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1 Margaret Wilson "The Making of a New Legal Education in New Zealand: Waikato Law School" (1993) 1 Wai L Rev at 1; Margaret Wilson "Waikato Law School: A New Beginning" (1990) 14 New Universities Law Review at 103.

2 Rob Crozier (ed) *Troubled Times: Academic Freedom in New Zealand* (Dunmore Press, Palmerston North, 2000); Ruth Butterworth and Nicholas Tarling *A Shakeup Anyway: Government and the Universities in New Zealand in a Decade of Reform* (Auckland University Press, Auckland, 1994); Wilf Malcolm and Nicholas Tarling *Crisis of Identity? The Mission and Management of Universities in New Zealand* (Dunmore Press, Wellington, 2007).

3 Steven Joyce, Minister of Tertiary Education "Tertiary Tuition Funding to be Linked to Performance" (Press release, 9 March 2010).

An understanding of the evolving public policy context within which the Waikato Law School has developed is the focus of this article. I shall first briefly analyse the original purpose for the founding of the Law School, which was mainly to fulfil the demand for legal professionals in the region. The article will then outline the original mission of the School to achieve three primary objectives, namely: to deliver a professional legal education that would qualify students for the practice of law; to teach law within the legal, social, economic and political context of the time; and to develop a bi-cultural approach to legal education. The considered statement of intent for the new Law School reflected the interest and circumstances surrounding its establishment. It is also a distinctive feature of the School and defines its identity of a distinctive provider of legal education. The article will then analyse the changes in the public policy environment on the delivery of a legal education that is consistent with the original objectives of the School. For example, the neo-liberal public policy paradigm has influenced the practice of law as is reflected in the Lawyers and Conveyancers Act 2006 which requires not only the professional studies programmes but also for it to be reflected in law school courses. The policy paradigm is also reflected in regulatory frameworks that govern every aspect of legal studies. Finally I shall consider the impact of the performance-based model of funding on the delivery of legal education at the Waikato Law School.

II. WHY A FIFTH LAW SCHOOL?

Since the establishment of the University of Waikato in 1964, there had been a lobby led by members of the legal profession in the region to establish a law school. It is sometimes easy to forget the value provincial New Zealanders place on education. It is not only a way to increase the prosperity of the region but it also makes a contribution to the cultural and intellectual life of the community. The dedication of a few advocates in Hamilton for a law school started to be rewarded when the unfulfilled market demand for lawyers in the region in the 1980s became too obvious to ignore. The Waikato/Bay of Plenty region had found it difficult to attract young lawyers to legal practice. The case for a fifth law school at Waikato University was formalised in a report prepared by a committee representing Waikato and Auckland Universities and the Auckland and Hamilton District Law Societies.

Te Mātāhauriki: The Report of the Law School Committee⁴ sets out the case for a new law school and foreshadows the character of the future Waikato Law School. The title Te Mātāhauriki:⁵

conveys in a literal sense, the horizon where earth meets the sky; in a practical sense, a meeting place of people and their ideas and ideals; in a spiritual or metaphysical sense, aspiring towards justice and social equity.

The Report itself addressed four questions: the demand and supply of lawyers in New Zealand; the role a law school would play in enabling the University to serve more adequately the needs of the people of its region; the character and philosophy of the Law School; and the resource issues associated with the creation of a law school. It not only established that there was a demand for more legal practitioners in the region, but also highlighted the developments in the law that reflected changes in society, such as the importance of the Treaty of Waitangi, the development

⁴ University of Waikato, February 1988.

⁵ *Ibid.*, at 1.

of administrative law, environment law, labour law, human rights, commercial practice, and international trade law. Apart from the local demand for law graduates, it also identified the rise of the mega law firm that created a demand for new legal specialists in banking, finance, intellectual property and computer and information technology.

The Report also described the University of Waikato region as having the lowest proportions of retention, matriculation and participation rates of any university region – 4.1 per cent of males and 4.2 per cent of females aged between 18 and 24 years – yet it was one of New Zealand’s fastest growing areas. Of those students from the region attending universities, only 54 per cent are enrolled at the University of Waikato because of the limited range of professional programmes. The low participation rate was also attributed to both the rural nature of the region and the high proportion of residents of Māori descent. In 1986, 21.7 per cent of the population of the region identified as Māori and 30 per cent of the New Zealand Māori population lived in the University of Waikato region. The University of Waikato had deliberately attempted to create a cultural and intellectual environment that was supportive of Māori tertiary study so the Report noted the establishment of a Law School would enable the University to “...reaffirm its commitment to biculturalism and will have an opportunity to give new meaning to the notion of partnership of good faith, a concept central to the Treaty of Waitangi.”⁶

The Report also endorsed the notion of the new Law School adopting a new approach to legal education and the structure of the law degree. All the law degrees at that time required a first year course of legal system and a selection of non-law courses, with the succeeding three years consisting of the core subjects of contracts, torts, criminal law, public law and property law and a selection of optional law courses that varied from law school to law school. The Council of Legal Education determined the courses required for admission as barristers and solicitors so any Waikato law degree would need to gain the approval of the Council. Although acknowledging the final structure of the degree was a matter for the foundation Dean and the Council of Legal Education, the Report stated a preference for any degree to include extra-legal subjects at not only stage one level but also stage two and three level. This preference was advocated to ensure the Waikato law degree enabled students to study law in the context of the society in which it functioned. The Report stated:

We understand the law and society perspective to be an approach that recognises that law and the personnel of the legal system operate not in vacuo but within a social, political and economic environment, and can only be understood as such. Law is both a product of these forces and a force in its own right affecting their development. ...In this context, we would note that a law and society perspective is both a consequence of a commitment to establishing a law school that seeks to become bi-cultural as well as a further reinforcement of the importance of that desire.⁷

When making the case for the new Law School, the Report acknowledged the need for the school to be well resourced, particularly the Library. It is interesting to observe that a total student enrolment of 460 with a teaching staff of 19 was projected for the Law School once fully established. Twenty years later the Law School has graduated over 2500 students, and in July 2009 enrolment exceeded 600 EFTS with a staff of 25.⁸ The Library was of particular concern to the Committee that prepared the Report because while law is considered relatively inexpensive to produce as a university degree, the mark of a credible law school has been its Library. While then the

6 Ibid, at 17.

7 Ibid, at 23-24.

8 Faculty of Law – Current Position and Future Vision, April 2010.

Report concluded that the case for a law school at the University of Waikato was unanswerable, it required a commitment of public funds. This meant a case had to be made to convince the University Grants Committee, the funding agency, and the Government to allocate the funds for the purpose.

The Report was referred to the University Grants Committee (UGC), the funding agency that negotiated with governments for university funding. Progress in the case was made in 1989 when the Government announced it would ask the Council of Legal Education to advise it on the issue. While the Government funded the university system through the UGC, the Council had control over the professional curriculum to be taught by the law schools so this was the appropriate process. The Council was asked to address the following issues: whether there was a need for funding of more places at universities for law students; whether the existing four law schools could accommodate increased demand; and an assessment of the bids from Massey University and the University of Waikato for a new school. Both universities presented very different proposals – Massey sought a business focus to its law degree, while Waikato sought a law in context approach to its degree. Both intended to provide a professional qualification however.

The Council of Legal Education concluded that the demand for student places in all law schools substantially exceeded the places available; that the existing law schools had no plans to increase places for law students; and identified the issues that would need to be addressed by any law school that was awarded the funding for a new law school, including: adequate funding for staff and a library; the need for a multipurpose degree that fulfilled professional qualification standards but also prepared students for careers outside the legal profession (it estimates a third of law graduates did not remain in legal practice); and the need to ensure there were more opportunities for woman and Māori to study law. The Report is worth rereading because most of its observations remain relevant today, including the relatively inexpensive cost of a law degree. The Report was referred to the Government and the UGC, and the Government announced on 30 October 1989 that funding of \$10million over four years had been awarded for a new law school at the University of Waikato.

From its beginning then, the Waikato Law School was intended to challenge the existing traditional approaches to legal education. It recognised that a law degree had to prepare the student for a changing profession and society and that many students would pursue careers outside the law. As the Foundation Dean I was conscious when I took up the appointment in July 1990 of the need to fulfil the expectations expressed in the Te Mātāhauariki Report. In this task assistance was sought from a group of legal academics and law practitioners to ensure the degree met the competing expectations of the Council of Legal Education, and the local legal profession.⁹ The wider community's concern focussed on access to the opportunity for a legal education not only for school leavers but also those older people, especially women, who for a variety of reasons had

⁹ The meeting was held on 24 March 1990 and attended by myself as Dean of the School but convened by Sir Kenneth Keith, then Law Commissioner, now Justice of the International Court of Justice, Professor Richard Sutton, Otago Law School, Professor Grant Hammond, then Dean of Auckland Law School, now President of the New Zealand Law Commission, Margaret Mulgan (now Margaret Bedggood), then Chief Human Rights Commissioner, later Dean of Waikato Law School, Professor Don Gilling, School of Management and long term advocate of the School, Mr Gerald Bailey, Waikato Law Practitioner and member of Waikato University Council, Denise Henare, law practitioner, Georgina Te Heu Heu, then law practitioner and now Minister of Courts, Sian Elias QC, now Chief Justice and President of Supreme Court, Ruth Busch, then and now member of the School academic staff, Graham Lamont, then Academic Registrar, University of Waikato, and Don Kerr, Law School Administrator.

been denied the opportunity of a legal education.¹⁰ There was also an expectation that the first students would be admitted at the beginning of the 1991 academic year. This required the process of degree approval and hiring of staff and preparation of classes by the end of 1990.

The end of 1990 saw the completion of preparations for commencement of the degree programme, but it was external events that intervened to place the whole project at risk. The 1990 general election returned a National Government and a new tertiary education policy. Among the early Government announcements was the withdrawal of the \$10 million allocated to establish the new Waikato Law School. Several other tertiary institutions also had withdrawal of funding at the time that clearly signalled a change in policy. Although the Government had removed the capital funding from the University of Waikato, the income from student fees remained and enabled the University to fund the law school. The final decision was therefore left to the institution to determine if it would continue with the project. The commitment of the Vice Chancellor and support from key staff and the community leaders ensured the necessary support and the focus returned to preparations for receiving the first students.

At the time it was an interesting legal and constitutional question whether such government action was legitimate and whether liability had been incurred and compensation should be paid. There was no question that a new government is not bound constitutionally by the decisions of a previous government. This principle lies at the heart of New Zealand's constitutional arrangements and accounts for radical swings in policy with the election of new governments. The question of liability and compensation for actions taken in reliance on a previous government's decision is a more interesting one. Unfortunately in this instance the University decided not to pursue legal action and settled for a payout of \$1million. The decision of the University was understandable in the context. Universities generally are reluctant to have direct confrontations with governments because they fund them. There had also recently been a clash between the universities and the previous Government over amendments to the Education Act 1990 that were designed to bring universities into conformity with the neo-liberal public policy paradigm introduced by the Fourth Labour Government.¹¹ Both institutions have generally tried to respect each other's jurisdiction, though governments have the greater power through its control of funding to influence what is taught or not taught in universities.

III. TERTIARY PUBLIC POLICY

The challenge faced by the universities in an age of economic rationalism and market theories is how to reconcile the reality of decreasing public funding with the delivery of a university education that is open to all who are qualified to enter and which teaches its students not only specific professional skills but the capability to think independently, or as Butterworth and Tarling have expressed it "Universities are for thinking."¹² The Waikato law degree was designed to achieve both a market objective, that is, prepare students for employment, and an intellectual objective, that is, teaching students to think analytically and independently which are professional characteristic of the lawyer. Ironically then although the Waikato approach to legal education was criticised by some in 1990, it was well suited to prepare the students for the new environment. Teaching law in context and placing an emphasis on emerging areas such as environmental law and the Treaty

¹⁰ The structure of the degree is set out in Margaret Wilson above n 1 at 6.

¹¹ See Butterworth and Tarling above n 2.

¹² *Ibid.*, at 251.

of Waitangi, and making courses such as corporate entities and dispute resolution compulsory prepared students for the reality of the consequences of the new policy environment.

As public funding was withdrawn from public services and previously regulated services were de-regulated people sought new ways to resolve their disputes and new advice and how to negotiate their way through a constantly changing regulatory environment. For example, employment law became part of mainstream legal practice after the Employment Contracts Act 1991; the decision in 1986 to recognise land claims under the Treaty of Waitangi from 1840 created a new area of legal practice as public funds were made available to fund the claims; the regulation 'lite' approach to the construction industry contributed to a leaky building problem that consumes many legal services; the changing nature of relationships and the incorporation of all relationships within a legal regime such as the Property Relationships Act 1976 has changed the nature of family law; and so the list could continue as New Zealand has experienced a period of rapid legal change to accommodate the changing economic, social and cultural environment. This accommodation is evidenced in the rise of courses on human rights, reflecting the increasing emphasis on individual rights as the state redefines its responsibility as being primarily economic management; courses relating to international trade and institutions as New Zealand endeavours to compete internationally to improve economic growth; and intellectual property courses that highlight the dominance of technology in restructuring relationships.

While more than a knowledge of legal rules was always expected from lawyers, the regulatory scrutiny of legal services now requires a much more professional approach by lawyers, as is seen in the provisions of the Lawyers and Conveyancers Act 2006. The events surrounding the passage of this legislation that took over ten years are an interesting case study of the struggle between traditional notions of professionalism and the new managerial practices that are now required in all law firms. The recent Government inquiry into legal aid and the provision of legal services is another example of more changes to come that will impact on the delivery of legal services.¹³ The changing nature of the legal profession itself is reflected in the number of students who undertake double degrees to prepare themselves for an ever changing market place.

Overall the objectives of the Waikato Law School as outlined in *Te Mātāhauariki* as it relates to the character of the Law School are still reflected in the degree programmes that are offered 20 years later. The School has endeavoured to reflect the changes in demand that are part of studying law in its economic, social and cultural context. This is seen in both the content and delivery of the programmes. The academic staff are still primarily responsible for the courses offered and the content of those courses. It is their academic experience and judgement that enables some level of intellectual independence to remain. In this context the Council of Legal Education is an important element of quality control in the teaching of law.

The delivery and structure of the programmes however is more directly affected by changes in funding and policy. As the universities are funded less to do more, compromises must be made in the delivery of the courses. An early example of this process was the requirement to teach full year core legal courses in three semesters. This practice is now taken as normal as are the intensive courses of two to three weeks. Lack of resources has also been a factor in the reduction of the number of small group teaching and the encouragement of staff to substitute their teaching with casual practitioner teachers to enable them to publish which brings in money for the School.

13 Dame Margaret Bazley "Transforming the Legal Aid System – Final Report and Recommendations" (prepared for the Ministry of Justice, April 2010 and Simon Power, Minister of Justice) "Government Details Further Changes to Legal Aid" (press release, April 2010).

From the outset the School had placed a great deal of emphasis on the quality of its teaching programme. The focus of the programme was small group teaching, with an emphasis on oral and written skills training. Advocacy, negotiation and technology skills were seen of particular importance. The reason for the emphasis on quality teaching was twofold. First, it was a branding strategy to attract students and prepare them for practice. It was recognised that there would be reluctance by some law firms to employ Waikato law students so in many ways they had to be better than other students. The programme was new and innovative and therefore within a conservative profession it was sensible to anticipate a suspicion to embrace the new product.

Second, it was anticipated that most of the students would be recruited from the local region and that many of those students would be Māori. The Waikato Law School was also the only law school not to have a quota for Māori students. There was also a strategy to attract Pacific students, especially those funded by the government. It was therefore realistic to expect most students would not come from tertiary educated families or a professional environment. Also the country was experiencing redundancies and high unemployment in the early and mid 1990s which resulted in an influx of mature students either seeking retraining, or new skills to re-enter the labour market. The result was a great diversity of students who required special teaching skills to ensure that the necessary technical legal skills were imparted as well as ensure the law in context approach to their education was intellectually well grounded and integrated into the degree programme. Face to face direct contact with students was seen in the 1990s as the preferred method to deliver quality legal education and that was the approach adopted by the new law school.

The method of teaching from the beginning was also influenced by the early adoption of technology. Waikato was the first law school to establish a computer laboratory within the School with the assistance of funding from the local law society. From the beginning then it had positioned itself to be a leader in law and technology in recognition of the fact that technology would increasingly influence the delivery of legal services. This emphasis has been maintained by the School but the decline in funding is now influencing the delivery of legal education in ways that were not anticipated in 1990.

Students today who under the pressure of servicing student loans are working part or full-time while studying full-time. The result has been they now turn up less for classes and rely more on the online materials and occasional one to one sessions with their teachers, often through email. While traditional academic teachers may not consider this practice desirable, the student behaviour is consistent with the economic rationalist approach to tertiary education. It also raises the question of what is the real value of the teacher to the delivery of knowledge and more importantly under the current policy, how can this value be judged?¹⁴

Traditionally it has been the legal professional employers generally and clients who judge whether the graduates meet the market demand for qualified legal services. Apart from the ups and downs of the economy, there is no evidence that Waikato Law School graduates have any more difficulty than others in obtaining employment. The recording of more accurate information on the destination of graduates would be useful however in these times where proof of performance is required for funding. On the traditional measure then it could be argued that the business case for the Law School has been vindicated. This however is not the current test for satisfactory performance.

14 See Emeritus Professor David Barker AM, "Learning and Teaching in the Discipline of Law", (Paper presented to ALTA, Australia, 2010).

Since the establishment of the Law School in 1990, tertiary policy has developed to make it explicit that the primary objective of economic growth is reflected in the funding of tertiary institutions, including universities. There are some who may argue that this policy could conflict with the objectives of the Education Act 1989 in particular s 161 relating to academic freedom. It is clear however from a series of amendments to the Act that the shift towards greater economic accountability and objectives has been incorporated in the legislation. The role of the university is now set out in the Tertiary Education Strategy 2010 - 2015. The Strategy clearly identifies the core roles of the universities in New Zealand as follows:¹⁵

Universities

Universities have three core roles:

To undertake research that adds to the store of knowledge

To provide a wide range of research-led degree and post-graduate education that is of an international standard

To act as sources of critical thinking and intellectual talent.

The Government expects universities to:

Enable a wide range of students to successfully complete degree and post-graduate qualifications

Undertake internationally recognised original research

Create and share new knowledge that contributes to New Zealand's economic and social development and environment management.

While there is little to disagree with in the academic or intellectual intent of the above statement, the reality is that the overall purpose of the Strategy makes it clear that public funding of tertiary education is to be seen as an investment for the purpose of promoting New Zealand's economic growth. The language, values and techniques of economic management pervade the strategy. This is clear in the Strategy's concluding statement: "In the long term, we would expect that shifts in these indicators would lead to innovation and productivity improvements that drive economic growth."¹⁶ The indicators in the statement are the key performance indicators to determine the level of funding for each tertiary institution.

Before the performance indicators are discussed, it may be useful to describe briefly the tertiary education funding policy. Funding is allocated on an annual basis in the budget. There are two public sources of funding – one for funding research, including performance-based research funding (PBRF), the Foundation for Science Research and Technology (FoRST), and the Marsden Fund; and one that essentially funds activities relating to students, the Student Achievement Component (SAC). A system of performance indicators and review is already in place for research funding. The Government has announced a system of performance indicators for funding related to students and the Tertiary Education Commission (TEC) is currently in the process of finalising the implementation of that policy. The TEC is the agency responsible for devising the key

15 Tertiary Education Strategy 2010 – 2015, Ministry of Education 2010. <<http://www.minedu.govt.nz/theMinistry/Policy/AndStrategy/TertiaryEducationStrategy/PartThreeExpectations.aspx>>.

16 Ibid.

performance indicators and after a round of consultation with the tertiary institutions has recently reported as follows:¹⁷

The educational performance indicators for SAC funding are:

- *Successful course completion*: measure by the EFTS-weighted successful course completion rate.
- *Student retention*: measured by the student continuation or completion rate.
- *Qualification completion*: measured by the EFTS-weighted qualification completion rate.
- *Student progression*: measured by the completion progression rate.

Although it is too early to judge the impact of these performance indicators on the Law School's ability to deliver a professional legal education, it is apparent that the quantitative nature of the indicators means little credit will be given to the quality of the teaching received by students. Undoubtedly the implication of the policy will be followed by the need for a review similar to that which occurred with the PBRF funding policy.

The PBRF system of research funding was introduced in 2002 and has had a significant influence on the delivery of academic research including legal research. The primary purpose is "to ensure that excellent research in the tertiary education sector is encouraged and rewarded."¹⁸ The method employed to achieve this objective was to allocate 15 per cent of the funding amongst the institutions on the basis of external research income; 25 per cent on the basis of weighted research degree completions; and 60 per cent on the basis of the quality evaluation of academics. Briefly, eligible staff are assessed individually on the basis of an evidence portfolio containing information on their research that was assessed in 2003 and 2006 and will be assessed again in 2012. Each staff member is individually graded by a peer review panel and graded from R (research inactive) to A (highly innovative or original research that ranks amongst the best in the world and esteemed by the international academic community).¹⁹

Few academics would argue with the encouragement to produce excellence in research or that it is appropriate there should be accountability by academics to fulfill this part of their contracts. Concern has been expressed however over aspects of the scheme including what qualifies as being within the definition of research, the implementation of the system of the assessment system through the peer review panels, and unintended consequences of the use of PBRF as a staff appraisal substitute. A review of the quality evaluation was set up by the TEC with the appointment of the PBRF Sector Reference Group in 2008; an independent review of PBRF undertaken by Dr Jonathan Adams; and a series of consultations with the tertiary institutions. The independent review of PBRF concluded that the Government's objectives for PBRF were being met on most counts, though some improvements could be made.²⁰ The final results of this process are awaited later in 2010 in time for preparation for the 2012 PBRF process.

Although the PBRF system of research funding has only been in force for seven years, it is having an impact on the research practices of academics. As part of the evaluation of PBRF a symposium was held by the Institute of Policy Studies at Victoria University of Wellington in

17 "Revised Educational Performance Indicators for SAC Funded Tertiary Education Organisations" (Tertiary Education Commission, March 2010) at 3.

18 *Performance-Based Research Fund* Tertiary Education Commission <www.tec.govt.nz/Funding/Fund-finder/Performance-Based-Research-Fund-PBRF/>.

19 *Ibid*, see *Performance-Based Research Fund User Manual*.

20 A summary of the Independent Report is found on the TEC website <www.tec.govt.nz>.

collaboration with the Ministry of Education and the Tertiary Education Commission to examine the most recent research available on the PBRF.²¹ Although all aspects of the scheme were considered, in this context it is the impact on the teaching-research nexus that is of interest because in professional schools there is an emphasis on teaching to prepare students for entry to the profession. It was also apparent that such an emphasis financially disadvantaged professional schools unless they could find a way to accommodate the professional demands with the requirements to publish within the criteria set out in PBRF.

Sue Middleton, whose research on the impact of PBRF on the tension between education academics' construction of their identity as "researchers" under PBRF and that of "teacher-educator" as required by the regulatory framework to qualify teachers, is of relevance to other professional schools such as law. She notes that:²²

But teaching (and other professional) degrees *must* include practical curriculum courses to gain accreditation as qualifications, and to be credible with student teachers and their employers. A professional degree's practicum or clinical components are intrinsic parts of the degree qualification and to maintain professional credibility they and their teachers must be given status.

It is also of relevance in the context of the Waikato Law School to note the concerns of Māori academics on the effect PBRF has on the construction of knowledge and intellectual autonomy of Māori scholars. In a recently published article Māori academics identified 14 problems that stem from PBRF for Māori scholars and noted "We believe that an unintended consequence of PBRF is the creation of significant barriers to increasing the volume, scope and quality of environmental research for Māori."²³ The most insightful and considered assessment of PBRF for legal education was written by the late Professor Michael Taggart who concluded that "The PBRF push to publish in international fora has the potential to disengage legal scholars from the needs and concerns of the local legal community and the broader society, and to discourage research and writing aimed at practical law reform or that speaks directly to practitioners."²⁴ He identified not only the threat to local legal scholarship because its publication is not rewarded in career terms for the scholar, but also the perils of rewarding a short term view to research that prefers the quantity of publications over the enduring quality of legal scholarship that comes from experience. The rewarding of what he terms "selfish and self-regarding behaviour" also has the potential to weaken not only the teaching programme but also the academic institution. Hopefully the current review of PBRF will address many of these concerns for professional schools.

Of greater concern however is the current policy's primary focus on economic growth and the undervaluing of a liberal tertiary education on the quality of the public and private sector governance. A balance of objectives is required if serious damage is not to be done to democratic institutions. Martha Nussbaum, Professor of Law and Ethics at the University of Chicago, recently

21 The research presented at the symposium was published in Leon Bakker, Jonathan Boston, Lesley Campbell and Roger Smyth (eds) *Evaluating the Performance-Based Research Fund: Framing the Debate* (Institute of Policy Studies, Victoria University of Wellington, Wellington, 2006).

22 Sue Middleton "Researching Identities: Impact of the Performance-Base Research Fund on the Subject(s) of Education" in Leon Bakker, Jonathan Boston, Lesley Campbell and Roger Smyth (eds), *ibid* at 493.

23 Tom Roa, Jacqueline R Beggs, Jim Williams and Henrik Moller "New Zealand's Performance Based Research Funding (PBRF) Model Undermines Māori Research" (2009) 39 (4) *Journal of the Royal Society of New Zealand* at 233.

24 Michael Taggart "Some Impacts of PBRF on Legal Education" in Claudia Geiringer and Dean F Knight (eds) *Seeing the Whole World: Essays in Honour of Sir Kenneth Keith* (Victoria University Press in association with NZ Centre of Public Law, Wellington, 2008) 250 at 259.

commented in the context of similar research funding schemes in the United Kingdom and the United States that: “Resistance to the bureaucratisation of academic scholarship and teaching will be difficult, but it is essential if the culture of the mind and heart that protects both knowledge and citizenship is to survive.”²⁵ It may be some comfort to New Zealand legal academics to know they are not alone in facing the constant pressure of reconciling the demands to publish in terms of PBRF values and at the same time delivering a high quality professional education and service the legal profession. The challenge is for the universities and their academic and administrative managers to create the environment that produces both quality research and teaching while negotiating with governments a funding policy for universities that is accountable to governments and the people. This is the reality of the struggle to preserve academic freedom and independence. A greater challenge may lie for governments achieving their objectives of economic growth under such policy regimes. A recent analysis of the relationship between economic growth and a variety of well being factors revealed the limits of economic growth to achieve social well being.²⁶ It may be time not only to develop evidence based policy but also “Evidence-based Politics”.

IV. CONCLUSION

Given the fundamental public policy and consequential managerial changes within the universities, the Waikato Law School has survived not only a traumatic birth and the curse of being born in interesting times. The School has had the advantage from the outset of a clear vision and purpose of the type of legal education it was committed to deliver. The consultation that accompanied the formation of the School was forward looking in terms of the needs of various communities for legal services. The fact that many of those needs have become more obvious over the past 20 years would indicate the benefit of an inclusive community approach to constructing a legal education programme. The challenge for the School is to continue in this innovative tradition however difficult it may be in the current policy environment. For better or worse the persona of the School was formed at birth and its fate and survival will depend on its capacity to take an independent, edgy, innovative approach to legal education.

25 Martha Nussbaum “Critical Faculties” *New Statesman* 31 May 2010 at 40.

26 Richard Wilkinson and Kate Pickett *The Spirit Level: Why Equality is Better for Everyone* (Penguin Books, London, 2010).

PRINCIPLES OF PROFESSIONALISM IN LAW TEACHING AND JUDICIAL PRACTICE

BY JUDGE PETER SPILLER*

I am pleased and honoured to have been asked to write an article for the Waikato Law Review edition commemorating the 20th Anniversary of the University of Waikato Law School. In my article I shall reflect on the concept of professionalism, which is one of the key goals of the School. I shall do so in the context of my memories of the Law School and the principles of professionalism which I developed while teaching in the School. I shall conclude by considering the implications of these principles for judicial practice.

Professionalism is derived from the Latin word *profiteri*, which refers to a public declaration. The term profession came to refer to the exercise of a calling or vocation requiring specialised knowledge and expertise. A central objective of the Waikato Law School has been to provide its students with a professional legal education. In the strict sense this objective means that Waikato's law graduates are eligible to practise law in terms of the legal profession's requirements. Yet from the outset the School set itself the broader goal of educating a "new legal professional", with generic legal skills which could "be used in a variety of contexts and environments".¹ Informing this goal were the other two objectives of the School, namely, biculturalism (reflecting the growing Māori dimension in the law) and law in context (reflecting an understanding of the environment in which laws are made and administered). A further dimension to the Waikato Law School's concept of professionalism was the idea that "the essence of being professional is to consider matters beyond the individual alone", with a view to providing competent and ethical service to members of the community.² It was in the context of these notions of professionalism that I arrived in the Waikato Law School.

I. MEMORIES OF THE NEW PROFESSIONAL SCHOOL AT WAIKATO UNIVERSITY

I was one of the initial appointees of the School. I came to the School after 12 years as a law academic at Natal University in South Africa and four years at Canterbury University. During my academic life preceding my appointment at The University of Waikato I had studied at the Universities of Natal, Cambridge and Canterbury.

I well remember the day in September 1990 when I came from Christchurch for my interview. I met the new Dean, Professor Margaret Wilson. The staff of the School comprised her, Ruth Busch (who had been teaching Legal Systems before the start of the School) and some administrative members, and the facilities were still rudimentary. But there was a palpable sense of hope and enthusiasm for the new School.

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1 Margaret Wilson, "The Making of a New Legal Education in New Zealand" (1993) Wai L Rev 1 at 18.

2 Ibid at 3.

A key figure in support of the School was the Vice-Chancellor, Professor Wilf Malcolm. From the time that I met him I was struck by his fine qualities of leadership. He had that rare gift in a leader: the ability to inspire self-belief in those whom he led. Another important figure was Gerald Bailey, a local lawyer who went on to become the Chancellor of the University. Both Wilf and Gerald (as well as Margaret Wilson and other staff) were on my appointment committee. I was thrilled to be offered the position of Associate Professor. I delayed taking up the appointment until December 1991, as my son was completing his primary schooling on a scholarship in Christchurch.

Two months after my appointment in 1990 there came the news that the Government had decided to remove the external funding provided for the establishment of the new Law School. I remember the real distress that was caused, especially to those new members of staff who were newly arrived from overseas. Through the courage and determination of Margaret Wilson, Wilf Malcolm and influential supporters, the School was allowed to survive. In the first half of 1991, I was grateful to be included in the Māori orientation course and the official opening of the School. By the time I arrived to take up my position at the end of the year, I felt part of the new team.

In my first teaching year I was assigned the teaching of Torts and Criminal Procedure. In subsequent years I dropped the latter and replaced this with Contracts and Dispute Resolution, and later replaced these subjects with Legal Systems and Fair Trading and Consumer Law. From the beginning of 1992, the School was kind enough to accommodate my part-time commitment as a Referee of the Disputes Tribunal (formerly Small Claims Tribunal). My roles as law teacher and Referee proved to be complementary and mutually enriching: my teaching and research benefitted from my practical judicial role, and the latter benefitted from my growing knowledge of relevant areas of the law. Meanwhile the School continued to expand beyond the teaching of the early years of the LLB and established Honours and later Masters programmes.

In late 1993 I was privileged to be the founding editor of the *Waikato Law Review* (a position from which I retired at the end of 2004). Coincidentally, I became Acting Dean of the School. This role was succeeded in early 1994 by my three-year tenure as Chairperson of the School, and I was also appointed Professor. I remember my leadership years of the School as exhausting, demanding and also fulfilling in many ways. In my 34 years of academic life, The University of Waikato stands out as the university which most challenged accepted boundaries in a wide range of areas, including those relating to Māori and women's rights. Trying to reconcile at times fiercely competing interests was challenging and interesting. Within the School and the wider University there was, amongst the staff and students, a wide diversity of backgrounds and approaches. As with any human institution, there were at times some difficult personnel issues to address. Meanwhile the young School continued to grow, and the staff and I developed quality assurance manuals and other measures to systematise and professionalise the work of the School.

The years following the end of my Chairpersonship in early 1997 were for me devoted more fully to the development of my teaching and scholarship. I am grateful to the School for the opportunity and support it gave for me to complete a number of publications which I hope and believe have been of wider benefit. In between the departure and arrival of succeeding Deans, I took on the role of Acting Dean three more times, and was thus also involved in the broader life of the University.

At the start of 2005 I took leave from The University of Waikato to become Principal Disputes Referee, which role followed on from my part-time position as a Referee. During the succeeding years I was pleased to be asked to take on some part-time teaching, notably in Commercial

Transactions and Torts. In August 2009 I was appointed to the District Court bench and from the beginning of this year I have been an Honorary Professor of the School.

Looking back over my 20 year association with the Law School, I retain a sense of excitement about having been part of the creation of a new professional body. I was honoured to be one of the guardians of the infant School and to contribute to its emergent growth and development. For both individuals and social bodies, their formative years leave a lasting imprint, and it was a privilege and a responsibility to be part of the School's formation. Through the challenges, frustrations and achievements of the School, the vibrancy and commitment of the School's staff and student body provided sustenance for its leaders. The School also provided the setting for the development and refinement of my own views of what it meant to be a teacher of law, as I shall now outline.

II. PRINCIPLES OF PROFESSIONALISM IN TEACHING LAW AT WAIKATO UNIVERSITY

As far back as 1976 I had discovered that I had a vocation to be a teacher of law. However I was given no training as a teacher and was left to devise my own teaching methods. Over the 16 years before my arrival at Waikato I made efforts to improve my teaching methods. But it was during my teaching years at Waikato Law School that I most consciously reflected on my practice of teaching law and tried to develop a model of professionalism in my teaching. There were various reasons for this.

One reason was the stimulus of working in a new law school in which the value of effective teaching was recognised. An important part of this recognition was the support given to providing small-group teaching in key courses. I shall always treasure my years with the first-year Legal Systems students in particular. Each week I would meet with my seminar groups of around 25 students each for a double-period session in which we would explore the readings and themes for the week and develop legal skills. Accompanying the seminar was a weekly lecture, which provided a useful framework for the week, but it was readily apparent that it was in the weekly seminar that the most valuable learning took place. I was able to develop a close personal tie with each student, who felt recognised in a human way and accountable for his or her progress. The advance in understanding and skills by many students during the year was considerable and gratifying for them and for me.

Another reason for my increasing reflective practice was the presence of the University's Teaching and Learning Development Unit, which provided active support for staff teaching. My close ties with this Unit culminated in my completion of a Certificate in Tertiary Teaching. The Unit's support and guidance were invaluable in my continuing efforts to reflect and improve my teaching.

Yet another reason for the energy I put into my teaching at the Waikato Law School was the student body itself. The first class that I taught comprised the pioneering students of the School, some of whom had waited in the Waikato and nearby areas for years before having the opportunity to study their chosen field at their local university. These students showed courage in the face of the early setbacks for the School. They and subsequent classes included more so-called "mature age" students than I had encountered at my previous law schools, and the confidence and broader life skills that they brought to bear on their studies benefitted their fellow-students and me. The Waikato Law School also attracted a significant number of Māori students, and I greatly valued the warm and vibrant dimension that they brought to the student body. I have been proud to see

teaching content in an accessible manner. The feedback from students was that they appreciated teaching which was based upon a clear structure: it has rightly been observed that the human mind works best in patterns of meaningful connection,⁶ and that effective teaching is conveyed in a way that makes learning accessible.⁷

Related to my efforts at clear, structured communication was my focus on depth rather than breadth in teaching and learning. I would far rather my students properly learnt and integrated ten new skills or insights from my course than they acquired a tenuous awareness of 100 features. Thus, I divided each of my courses into a selected number of themes, and all the activities of each week (lectures, seminars, readings, and other learning exercises) were devoted to reinforcing the necessary skills and insights related to a particular theme. Palmer, in encouraging educators to “teach more with less”, remarked that “each discipline has an inner logic so profound that every piece of it contains the information necessary to reconstruct the whole”.⁸ The resultant emphasis on depth rather than breadth did, I believe, facilitate deep rather than surface learning.⁹

2. *Alignment of teaching and assessment*

Whereas the provision of clear and structured teaching was an instinctive part of my teaching endeavour from the outset, linking assessment with teaching was not. In my early years of teaching, I paid inadequate attention when compiling my teaching materials to what would be examined. In fact, when the departmental secretary asked for examination papers before the end of the academic year, I would react with the bewildered question: how could I set the examination before I had completed what I was to teach? While I tried to gear my assessment to what had been taught, there were indications from my marking that there was a gap between the teaching and the assessed learning in the course.

In response to this problem, I decided to remodel my teaching to make it expressly assessment-based. Before the start of the academic year, I formulated the questions that I would set in the internal assessment and examination, and I incorporated similar questions in the materials provided for each module of the relevant course. Each week students were required to read a section of the materials in the light of the questions set, and in class I would model the process and the students would practise the skills required to answer these questions. The merits of this new approach were immediately apparent. First, the alignment of assessment with the teaching activities of the course appeared to be a much fairer and more constructive way of operating than the former approach where assessment was tagged on at the end of the teaching. I was now actively helping the students to succeed in terms of the measurable outcomes of the course.¹⁰ Secondly, the new approach dramatically improved the level of engagement of the students in my courses. This shift reflected the fact that student perceptions of what is recognised for assessment purposes have a substantial impact on their learning behaviour.¹¹ It has been rightly observed that assessment is the “senior partner in learning and teaching”.¹²

6 Palmer, above n 3, at 127.

7 John Biggs, *Teaching for quality learning at university* (SRHE and Open University Press, Buckingham, 1999) at 93.

8 Palmer, above n 3, at 122-123.

9 Paul Ramsden, *Learning to Teach in Higher Education* (Routledge, London, 1992) at 13.

10 Biggs, above n 7, at 11.

11 H Fry, S Ketteridge and S Marshall *A Handbook for Teaching and Learning in Higher Education* (Kogan Page, Wakeford, London, 1999) at 58.

12 Biggs, above n 7, at 160.

However, by the late 1990s, I increasingly became aware of further difficulties in my teaching. One problem was the uneven engagement of students in preparation for and participation in seminars. This problem was linked with the increasingly heterogeneous nature of the student body and the financial (and consequent time) constraints increasingly being placed on students. The other problem that I experienced was the lack of formative assessment which would provide mutual feedback between the students and me. Issues that needed to be clarified sometimes surfaced during class discussion, but otherwise I was left to make judgements on student work only in summative (final) assessment. Students were not alerted to areas in their work that needed to be improved, and I was not attuned to recurrent difficulties which needed to be rectified in my teaching.

In response to these problems, I introduced incentive-based preparation exercises in courses where I was the convenor. In the week before each seminar class, students were required to prepare answers to assessment-related questions on course materials, and at the start of each seminar class students handed in a one-page written summary of their responses. The preparation exercises were read by me and returned at the following class. A percentage of the final mark was assigned to students who completed the preparation exercises and attended the seminars. The exercises were ungraded so that students were not penalised for initial failures in understanding, but contained qualitative feedback to assist students to improve.

The introduction of the preparation exercise technique resulted in a significant improvement in student engagement, reflected in improved class discussion and higher student achievement. The technique also provided effective formative assessment for the students and me. Through completion of the weekly exercises, students furthered the understanding and practised the skills required for the graded internal assessment and examination. It has rightly been observed that formative assessment should play a key role and should help to enhance the confidence and lessen the anxiety of assessment for students.¹³ There should also be incentives for formative assessment that reward the intrinsically motivated students and encourage students who are motivated by external rewards.¹⁴

The further problem with which I then grappled in my assessment-related teaching journey was related to the criteria used by me in marking assessment tasks. While, by the end of a module of a course, most of the student body appeared to grasp what standards and guidelines would be used by me in assessing student work, there still appeared to be a level of uncertainty in this regard.

To try to overcome this uncertainty, I began each module of my course by telling students what key competencies I would be seeking in their work. I then also provided the students with the criteria that I would use to assign grades in the A, B and C ranges. During ensuing small-group teaching in the module, I involved the students in exercises to make these criteria more meaningful. For example, I presented three made-up student scripts, representing work in the A, B and C grade ranges, and asked the students to assign an appropriate grade and give reasons in the light of the criteria that I provided. It has been pointed out, in relation to assessment requirements, that “exemplars convey messages that nothing else can”.¹⁵

The placing of explicit guidelines and criteria at the heart of student learning, together with clear, structured, assessment-based teaching techniques, represented my attempt to act justly to-

13 Ramsden, above n 9, at 212.

14 H Fry, S Ketteridge and S Marshall, above n 11, at 80.

15 P Schwartz and G Webb *Assessment: Case Studies, Experience and Practice from Higher Education* (Kogan Page, London, 2002) at 136.

wards my students. This was in line with the philosophy that teaching should be based upon a relationship of trust which is developed through open, consistent and honest action.¹⁶

B. *Humanity*

The Hebrew word *chesed* (חסד) means loving-kindness, virtuous giving with a focus on the recipient. This quality had two dimensions in my teaching journey, namely, the forging of personal connections with my students and the fostering of ongoing dialogue with them.

1. *Personal connections*

From the outset of my teaching career, I was keen to establish a close personal rapport with my students. To this end, I learnt the names of all the students in my classes so that I could interact with them individually when they asked or were asked questions. This practice appeared to motivate the students to engage better in my courses. Learning the names of my students continued to be a feature of all my small-group teaching. I compensated failing memory powers with devices such as seating plans in which I inserted student names while I called out names on a roster or returned work handed in the previous week. In this way each and every member of the class was recognised and affirmed as an individual in his or her own right, and was made to feel more accountable in the learning enterprise. This practice was in line with my view that the student in the educational process should be seen, not simply as a mind waiting to be trained, but as a whole person, including his or her affective (emotional) dimensions. It has rightly been said that students should have a sense of being seen and heard.¹⁷

The large-group lecture format has played a major role in law schools, and the Waikato Law School was no exception. I recognise the value of this format in conveying frameworks and themes to large groups of people. But this format inevitably restricted the personal links that I could develop with the students. In the Waikato Law School my belief in student-centred learning meant that my teaching was primarily seminar-based. In Legal Systems, I reduced lectures to one at the beginning of each week and (as indicated above) divided the remaining classes into seminars of which the students had to attend one per week. The effect of this change was remarkable. I was able to monitor the progress of each student in a way that was not possible in a lecture format. This personalised involvement, and the opportunity to acknowledge continually the achievements of each student, became important means of encouraging growth in self-confidence amongst students.¹⁸

My personalised contact also meant that I was directly appraised of the diverse nature of the student body, and the resultant need to extend the range of my teaching activities. Teaching practice should enable the teacher to understand the variations that exist in student understanding, and to respond to differing student misunderstandings and needs.¹⁹

2. *Ongoing dialogue*

During the course of my teaching career, I came increasingly to the view that teaching should essentially involve a conversation between teacher and student. To this end, the teaching activities preceding each assessment exercise encouraged the students to convey to me their growing un-

¹⁶ S Brookfield *The Skillful Teacher* (Jossey-Bass, San Francisco, 1990) at 131.

¹⁷ Palmer, above n 3, at 151.

¹⁸ Brookfield, above n 16, at 157.

¹⁹ M Prosser and K Trigwell *Understanding Learning and Teaching* (Society for Research into Higher Education and Open University Press, Buckingham, 1999) at 135, 169.

derstanding of the work required. The weekly one-page summaries allowed students regularly to set out in succinct form their responses to questions set, and I responded to these with qualitative feedback. In courses where weekly summaries were not required, each week students handed in a short written commentary which I read and returned with comments at the following class. The student commentary might be a two-sentence summary at the end of class as to the gist of what was covered, a statement of the most obscure point and/or the clearest point of the class, or a suggestion as to what difficult areas should be covered at the next lesson and how these could best be presented. In the seminars, I divided the students into small groups or pairs to discuss a set topic and to report back to the group as a whole. Such reporting might relate to matching exercises in which the students had to link together complementary sentences on two lists, or might cover the pros and cons of a debateable area of the law.

These activities addressed the reality that the student occupies a central role in the educational process.²⁰ It is ultimately what students do that determines whether changes in their understanding actually take place.²¹ A course of learning should be designed to engage rather than engage students: good teaching should mean that the student integrates knowledge and skills and makes them his or her own.²²

The regular interchange that I had with my students in small-group classes, built upon the personal connections that I fostered, was in line with the philosophy that teaching should be a co-operative activity in which talk passes between teacher and students. In the words of Katz, one should teach as though students mattered.²³ The student voice should be listened and responded to with respect, and it has been recognised that affirming students' self-esteem is crucial to sustained learning.²⁴

C. Humility

The Hebrew word עֲנִיָּה (hatznea) means humility or modesty, being cognisant of a spiritual force or good greater than one's own. Micah's focus on humility had two implications for my teaching: the need to recognise my own frailty and the need to respond to something greater than myself.

1. Recognising personal limitations

Teaching is a career that requires a great deal of the teacher in terms of emotional and intellectual energy. There are ongoing demands to acquire the best possible understanding of the subject-matter and to ensure that students can experience the best possible learning of this subject. Being the educational leader of a group of people, whether they be assembled in numbers in the hundreds or in small groups, is a test of courage, resilience, agility of mind and stamina. In the quest for doing the right thing in a kind manner, there was a danger of me forgetting my own needs and depleting my energies.

In attempting to address this issue, before each class I tried to set aside quiet time, to focus my thoughts and energies on the teaching ahead of me. In this way I tried to gather strength to be the kind of teacher that I was called to be, and to renew the enthusiasm that a teacher needs to bring to

20 Palmer, above n 3, at 31.

21 Ramsden, above n 9, at 131.

22 Palmer, above n 3, at 133.

23 J Katz *Teaching as Though Students Mattered* (Jossey-Bass, San Francisco, 1985).

24 Brookfield, above n 16, at 95.

teaching.²⁵ During discouraging times when, despite my best efforts, students were unresponsive or performed poorly, I tried to bear in mind that there were limits to what I could achieve with all the people in my class. I was called to accept that each person is on a unique path of life, and that I have to grant some students the right not to learn.²⁶

2. *Responding to the greater being*

Humility assisted my teaching career by continually pointing away from my narrower preoccupations with self-interest and my human tendencies to take the easier path. Humility pointed towards my need to strive at all times for the life-enhancing qualities of integrity, trust and good faith. The effective teacher is, after all, required to be a mentor figure, modelling what is taught through his or her actions.²⁷

Humility continually reminded me of how much I could learn from my colleagues and my students, each of whom had a unique contribution to make. Humility also reinforced for me that teaching is an unending journey of learning, about one's craft as a teacher and about one's subject-matter.²⁸ Palmer eloquently expressed the latter dimension when he remarked that "at the center of our attention is a subject that continually calls us deeper into its secret, a subject that refuses to be reduced to our conclusions about it".²⁹

Responding to the greater being certainly did not require me to proselytise for one faith form or another. Indeed, when teaching some areas of the law I would have been hard-pressed to evangelise even if this was appropriate. I saw my role as a law teacher in a secular university as being to present matters in a balanced form with a view to encouraging informed debate and understanding. This approach was in line with my view that teaching should be geared towards developing critical thinking.³⁰ This quality is especially important in the teaching of law, where true understanding requires an appreciation of contesting viewpoints and an openness to alternatives.

Modern academics in New Zealand and elsewhere are now subject to powerful influences to devote more of their working time to research, so as to produce the publication "outputs" now seen to be necessary for career advancement. Humility reinforced my calling to serve my student community, and helped me make ongoing efforts to teach with credibility and authenticity in my fields.³¹

III. IMPLICATIONS OF PROFESSIONAL TEACHING PRINCIPLES FOR JUDICIAL PRACTICE

I was a Referee of the Disputes Tribunal for 19 years, including the last five and a half years as Principal Disputes Referee. The Tribunal hears civil cases up to a monetary limit which has increased over the years to the present level of \$15,000 (\$20,000 by consent). Since August last year I have exercised the duties of a District Court Judge, with civil and criminal jurisdiction.

25 Palmer, above n 3, at 90-91.

26 Brookfield, above n 16, at 162.

27 I Shor and P Freire *Pedagogy for Liberation* (Macmillan, South Hadley, Massachusetts, 1987) at 160.

28 KE Eble *Craft of Teaching* (Jossey-Bass, San Francisco, 1988) at 9.

29 Palmer, above n 3, at 105.

30 Brookfield, above n 16, at 20.

31 *Ibid.*, at 134.

As occurred at the start of my teaching career, I approached my duties as Referee with enthusiasm but with no training in processes and procedures. I well remember the sense of trepidation and near-bewilderment which I felt during my early hearings of cases. I was required to dig deep into the skills and knowledge that I had gained as a law teacher, and into my own value-system. More recently, on my appointment as a District Court Judge, I received limited training and guidance, and I was keenly aware in my early court appearance of how much I had to learn.³² During my years as a Referee, and now as a District Court Judge, I have had the opportunity to consider the links between the principles of professionalism in law teaching and those in judicial practice. I shall now reflect on how the three elements of my teaching practice resonate with judicial practice.

A. *Justice*

New Zealand judicial officers are sworn to “do right to all manner of people after the laws and usages of New Zealand without fear or favour, affection or ill will”.³³ The judicial officer, whether Referee or Judge, has great power over the proceedings, and can have considerable impact on the lives of those who appear. It was therefore essential that I conducted my hearings in as open-minded and even-handed manner as possible.³⁴ As I soon discovered, this laudable objective faced challenges in the presence of inarticulate, long-winded, obsessive, close-minded and/or repeat disputants.

From the outset of my time as a judicial officer, I became aware that the key requirement of doing right was to follow fair and transparent procedures.³⁵ In the Disputes Tribunal, lawyers are not allowed to represent parties, and so disputants have to present their own case. An increasing phenomenon in the court system is the presence of self-represented lay litigants. It was therefore important for me to give lay parties in my hearings clear guidance as to the processes that were to be followed, so that people could have a greater sense of safety and confidence to do justice to their own position.³⁶

For both the judicial officer and the disputant, the hearing process is a journey of discovery. Lay disputants are immersed in the realities of their dispute but have little notion of the relevant law or sometimes even the issues at stake. The judicial officer has little prior knowledge of the facts, apart from those which emerge from the file, but is required quickly to grasp these facts and then discern a path to their resolution.³⁷ It was therefore important for me to have at hand materials in the form of procedural guidelines and legal resources which I could use in the hearing. Where

32 “To the outsider, the newly appointed judge comes to the Bench fully armed, so to speak, equipped with a judicial philosophy and matching professional skills to discharge his judicial responsibilities. This vision of the new judge is, measured by my experience, a mirage.” Hon Sir Anthony Mason, “Judicial Method”, (paper presented to Judges’ Conference, Nelson, March 2004).

33 Oaths and Declarations Act 1957, s 18.

34 “The right to a fair hearing in the courts is an elementary but fundamental principle of British justice” (*R v Burney* [1989] 1 NZLR 732, at 734, per Richardson J).

35 “The legitimacy of judicial decisions depends in large part on the observance of the standards of procedural justice” (*Black v Taylor* [1993] 3 NZLR 403, at 412, per Richardson J).

36 “[T]he primary responsibility of the courts [is] to provide informed and just answers” (*Fletcher Timber Ltd v Attorney-General* [1984] 1 NZLR 290, at 295, per Woodhouse P).

37 “[T]he evidence will provide ready answers to issues which at present appear, at least to a mortal mind, unusually difficult to define and determine” (*Sew Hoy & Sons Ltd v Coopers and Lybrand* [1996] 1 NZLR 392, at 408, per Thomas J).

for example a dispute related to the Fencing Act 1978, I would photocopy the relevant provisions and discuss these with the parties. Most people respond well to visual cues, and my use of the whiteboard was at times of great assistance in clarifying matters for the parties and me.

The end point of most Tribunal and Court proceedings is the decision of the judicial officer hearing the matter.³⁸ In a judicial decision, the judicial officer makes an assessment of the material relevant facts, the law that applies, the issues that emerge from the facts and the applicable law, and then proceeds to make findings on the key issues. As with my teaching, I wanted my hearing process to align with the culminating assessment.³⁹ It was therefore essential that I carefully gathered the material facts and applicable law with the parties in the hearing, clarified the issues with them, and then shared with them the embryonic findings that I was developing. In this way I could test the accuracy and validity of the decision that was emerging in my mind, allow the parties the opportunity of responding to my thoughts, and help ensure that the final decision and its elements would not be a surprise to the parties.⁴⁰

B. *Humanity*

For most lay disputants and litigants, the tribunal/court environment is an alien world, and parties appear for hearings with considerable apprehension. For lawyers, the hearing can represent the culmination of many hours of anxious effort, and for those appearing at or near the start of their legal career the hearing can be an ordeal. It was therefore incumbent upon me, as the leader of my tribunal or court, to foster and preserve a humane legal environment.

The achievement of this objective was always assisted by my regular use of people's names, respectful listening and courteous interchange. The judicial officer sets the tone of his or her court, and people will generally follow the role model set by the presiding officer. I have observed behaviour by judicial officers that is bullying, belittling and sarcastic, and seen that this behaviour did not reflect well on the officers concerned or assist the administration of justice. I have always been determined to facilitate an atmosphere in court that preserves human dignity and allows the participants to contribute in as open and constructive manner as is possible.

Preserving the humanity of litigation tends to be more challenging in the court environment, where (unlike in the Disputes Tribunal) proceedings are usually conducted by lawyers on behalf of their clients. In the summary criminal jurisdiction hearing-days, scores of people are faced with criminal charges or sentences and there is pressure on the judge to "process" all the cases on the list. I have observed that in this process the person facing the charge or sentence appears as a bewildered onlooker, often in a state of distress or even trauma as to what dire news is in store. I made it an inflexible rule on my part, that, at the end of each discussion with counsel, the prosecution or other key participants, I turned directly to the individual most concerned and explained at

38 In the Disputes Tribunal there is provision for the proceedings to end in an agreed settlement, and in the District Court there is increasing provision for the resolution of matters through judicial settlement conference.

39 "[T]he judge must explain why he has reached his decision. ... Transparency should be the watchword" (*Flannery v Halifax Estate Agencies Ltd* [2000] 1 All ER 373, at 377–8, per Henry LJ).

40 "Those with any knowledge of human nature who pause to think for a moment [are not] likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events" (*John v Rees* [1970] Ch 345, at 402, per Megarry J).

least briefly what is to happen to him or her.⁴¹ By contrast, in civil cases it is not uncommon for the hearing to be conducted only in the presence of the judge and the lawyers, without the parties themselves. In the rarified atmosphere of legal argument, the challenge for me as judge was to remember the human realities of the parties in any decision that I reached.⁴²

During the years of my judicial life, I also learnt the advantages of judicial deafness and blindness at times. Litigation is often fraught with intense human emotion, be the matter a small civil dispute or serious criminal activity requiring sentencing. I learnt that some human battles did not need to be fought by me, as where people displayed anger or hurt in a way that was not harmful to others.

The human dimension of judging required me to approach each party and disputed matter without prior assumption on my part. This lesson was especially important in responding to the diversity of New Zealand culture. It could not be assumed that all people from the same racial or ethnic background had the same cultural values or would have the same pattern of responding to conflict. I learnt of the importance for many people of saving face, especially for those from certain immigrant cultures.

Humanity also needed to be conveyed in the expression of my decisions. In the face of conflicts of evidence, I needed to recognise that people might not necessarily or consciously be telling untruths but were trying to make sense of their own world. My decisions needed to balance dignity, clarity and the human touch. Above all, my decision needed to be addressed to the person who stood to lose from the outcome.⁴³ That person, more than the successful party, needed to know the reasons for the decision. I had to convey to the loser that I had heard and considered his or her argument and then explain why I did not accept that position.⁴⁴

Finally, humanity dictated that my judicial decision-making needed to be prompt. To help meet this goal, my decision making process took place largely during the hearing, as the key facts, issues, applicable law and tentative findings started to assemble.⁴⁵ My aim as a judicial officer was to deliver judgment at or shortly after the conclusion of the hearing. Promptness could promote better decisions in that I needed to retain a sense of the hearing in completing my decision, and this sense could fade as memories clouded and other commitments intruded. Promptness could also promote better reception of decisions and reduce costs and anxiety for the parties.⁴⁶

41 In *Police v Smith and Herewini* [1994] 2 NZLR 306, 328, Hardie Boys J did not think it right to disregard the considered evidence of the doctors tendered by the Crown, as “[t]hey, not we, must live with the consequences of our decision”.

42 In *Rodgers v Rodgers* (1985) 1 FRNZ 539, at 541, Woodhouse P noted that the significance of a family transaction embarked upon during a marriage “ought not to become the subject of some arid examination by use of legal microscopes”.

43 “It was important in the way the case was conducted in court and the way that the judgment was given, that the loser was assured that he had got a fair, honest and careful hearing” (per Sir Clifford Richmond, interview 23 February 1994).

44 This is expressed as providing the LOPP (losing party’s position) and the FLOPP (flaw in the losing party’s position) (JC Raymond, “The Architecture of Argument” (2004) 7 *The Judicial Review* at 44).

45 “It is important for a trial judge to use the hearing for the purpose of working towards a reasoned decision rather than pick up the pieces and try to stitch them together after the hearing has concluded” (Mason, above n 32).

46 “One way of avoiding the dangers associated with delay is to adopt a routine practice of delivering unreserved judgments. It is a technique with which famous names can be associated” (*Hadid v Redpath* [2001] NSWCA 416, per Heydon J).

C. Humility

The start of my judicial career in the Disputes Tribunal was a life-changing experience. I quickly realised that I was faced with many realities beyond my knowledge and experience. I had to come to terms with these realities quickly and decisively without the luxury of extended time for analysis.⁴⁷ My recent experience sitting in busy criminal courts, hearing scores of cases each day, underscored the demand for quick, effective judicial responses. In some cases the answers to the questions posed were clear to my mind but in other cases the merits were finely balanced. I knew that the decisions that I gave would have real consequences for the lives of those involved and that some people would be unhappy with the results.⁴⁸

In the face of these daunting realities, the safest path for me was the path of humility. As with teaching, I needed to begin each hearing day with a quiet time for focus and reflection, so as to gather calmness and strength. As the hearings commenced, it was important for me to approach each case with genuine openness to what I could learn from the parties or counsel themselves and the evidence that they presented. This openness required me to be responsive to the parties or counsel through to the end of the hearing, even where the merits of the case were plainly heading in a particular direction. I needed to recognise that I brought to my judicial role my own limitations, subjective views and preferences, and that there would be a constant struggle to prevent these personal qualities from impeding a just resolution of the cases before me.⁴⁹ Humility directed me to be open to what guidance I could obtain from material directly relevant to each case, and more generally to training materials and courses that became available. I also needed to have the humility to ask questions, whether of the parties or counsel in court proceedings, or of my colleagues outside of court.

Humility also assisted me in satisfactorily concluding matters requiring my decision. I realised that I was required to direct my fullest efforts to the case at hand, but that my answer was not necessarily the perfect or the only answer that could be produced.⁵⁰ Particularly in high-volume tribunals and courts, the capacity for error is an ever-present hazard. It was important for me to recognise this reality, do my best and then let go of the case at hand. The appeal process was for me a cause of some concern, especially in my early years as a judicial officer. But humility helped me to accept that appeal rights are a necessary, valuable and potentially educative part of the justice system, and that I should not invest emotional energy in worrying about the progress of appeals from my decisions.

47 “Judges are not intended to be automata and can only do their best to adjudge” (*Fleming v Securities Commission* [1995] 2 NZLR 514, at 525, per Cooke P). In *M v Y* [1994] 1 NZLR 527, at 537, Hardie Boys J observed that “Judges are, fortunately, human”.

48 “Different judges will have different views, and at least one party is likely to be dissatisfied” (*Television New Zealand Ltd v Quinn* [1996] 3 NZLR 24, at 45, per McKay J).

49 “[W]hat a judge will do is inevitably influenced by his background, his training, and above all his nature” (*Re R* [1974] 1 NZLR 3 99, at 405, per McCarthy P).

50 In *Attorney-General for UK v Wellington Newspapers* [1988] 1 NZLR 12 9, 168, at 170, Cooke P noted that, in the case at hand, “a range of opinions is genuinely open”, and replied to those who say “that the answers depend on the philosophy of the individual judge, I can only reply that one must do the best one can to be objective”.

IV. CONCLUSION

The laudable goal of professionalism, which has been at the heart of the Waikato Law School during its first 20 years, is an essential element of constructive legal endeavour, whether in the academic or the judicial sphere. The precise way in which professionalism is applied in the law classroom or the court will be shaped by the personality of the law teacher or the judicial officer. In my own experience, I have found the three principles of justice, humanity and humility to be my surest supports and guides. All three elements point towards the key feature of professionalism, namely, service to other human beings. The imperative to do right to those who appear, whether as students or litigants, requires the teacher or judge to provide a safe environment through clarity, structure and a coherent path to the final outcome. The duty to act with humanity requires the teacher or judge to recognise, as fully as possible, that those who are entrusted to one's care, for however short a time, are fellow-human beings deserving of respect and dignity. The call to remain humble allows the teacher or the judge to be continually open-minded, to reach for truths beyond his or her own limitations, and in this way to draw strength for the tasks at hand.

I conclude with the waiata that I sang at my swearing-in ceremony as a judge, and which expresses the model of professionalism which I have tried to pursue in my teaching and judicial life. The waiata asks the question: "Who will care for our marae and traditions?" And there comes the answer: "Let it be what is right, let it be truth, let it be love".⁵¹

51 Mā wai rā e taurima te marae i waho nei? Mā te tika, mā to pono, me to aroha e.

A PAKEHA WORKING-CLASS MATURE MALE STUDENT'S RECOLLECTION OF HIS LEGAL EDUCATION: THE WAIKATO LAW SCHOOL EXPERIENCE

BY STUART ROBERTSON*

This article will hopefully provide a perspective of the Waikato Law School experience that will amuse, and hearten those who worked and studied there, and challenge those sceptics that have all but faded into history. In doing so I endeavour to illustrate how the Waikato Law School's founding principles: to deliver a legal education; to do so relevant to the legal, social, cultural, economic and political context of the time; and to foster a bicultural approach to legal studies, permeated our studies and affected my professional career.

I. HOW DID I GET HERE?

It was not that I did not thoroughly enjoy being an electrician in Hamilton through the 1980s, but underlying that occupation was a passion for the law. It is a misnomer that your genealogy or whakapapa entirely predisposes you one way or the other to a particular vocation. Society, including the state school system, has a lot to answer for. A high school of 1500 pupils leaves little room for proper assessment of one's academic talents or nurturing passion that requires anything other than the minimal investment in students' aspirations. At 15 years of age and with four School Certificate subjects, I left and embarked on an apprenticeship as an electrician with the local power board. This led on to night classes to obtain advanced trade and University entrance qualifications, followed by a New Zealand Certificate of Engineering. It was shortly thereafter that the opportunity arose, coinciding with the opening of the Waikato Law School, to embark on my first passion.¹

In looking at alternatives to the Waikato Law School, for no other reason than one should always look at the alternatives, it became apparent that a working-class, mature Pakeha male, with minimal university entrance papers, would prove a long shot to obtaining a place in one of the four well established law schools. In fact my recollection was that the life skills that I could bring to the degree held little value to any law school other than the Waikato Law School. As it happened, with those life skills I very nearly had sufficient credit to undertake the degree in three years. On reflection I am grateful to the admissions committee for their decision as this required me to do the full four years. The reason for this acknowledgement is that I undertook a second major in political science, specifically international relations. It also allowed me to take an introductory Māori language course. Interestingly, both complemented my legal education.

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¹ In this regard I must give full credit to my wife, Tracey, for reigniting that passion.

So it was that, in March 1992, I began my legal studies at the Waikato Law School. However, I was not a founding student of the School. Those students began by taking an 'intermediate' year at the Auckland Law School, starting at Waikato in their second year, in 1991. That year also saw a first year intake. I was, therefore, in the third intake. As such I benefited from the experiences of those pioneering students, especially in working through the curriculum, new teaching styles and examinations. We are all indebted to those students and I gratefully acknowledge their contribution to the Waikato Law School.

II. WHAT ABOUT THOSE FOUNDING PRINCIPLES?

Of the School's three primary objectives the first is a given. Delivering a legal education can be done over the internet. Doing it well is another issue altogether. It is the remaining two objectives that distinguished the Waikato Law School – teaching law within the legal, social, economic and political context of the time; and developing a bicultural approach to legal education. It should not be overlooked that professionalism and the Treaty of Waitangi were also important tenets of the Waikato Law School.

I am firmly of the view that the wide demographic of both the Faculty and the students added to the success of achieving law in context. The Waikato Law School was an extraordinary melting pot of cultures and backgrounds. Students from many different countries read law at Waikato. Students came from Asia, Africa, North and South America and beyond. We had graduates that were straight from Form 6 (Year 12) to semi-retired civil servants taking on law as a 'late in life' experience. There were a notable number of ex-policemen and nurses and of course an ex-electrician. The richness of this diversity was extraordinary in its ability to test, debate and apply the legal education provided. An example was a classroom debate led, I believe, by Ken Mackinnon on the 1981 Springbok tour. The topic was focussed on the pitch invasion by spectators at Rugby Park in Hamilton. The younger students had no idea of the international implications of that event, some not aware of the event at all. At least one student was an indigenous South African, naturally with her own views. By chance I attended that game as a paying spectator. It made for a thoroughly interesting and relevant debate on the law in context. What requires equal acknowledgement is the abilities and openness of the lecturers to encourage and allow that debate and learning. It always helps to break the ice when a certain female lecturer challenges the class with the visions of her waters breaking in the library of an august North American Ivy League law school - with pictures of past alumni and Supreme Court judges gazing down on her. That same lecturer would embark on a lively debate, at the opening of the year, challenging students as to whether a turkey baster could be held criminally liable for assault. The lecturers and others (such as Anna Kingsbury, then law librarian) led by example in their unique areas of the law, in the research that they undertook and the practical application of that research in areas such as domestic violence, international indigenous rights, national and international environmental law to name just a few. Such examples remain vivid and essential in why we have chosen this profession.

What then of developing a bicultural approach to legal education? The immediate and early exposure to our unique bicultural society and, in particular, the social and legal context instilled at the Waikato Law School was invaluable. I had always thought that, notwithstanding my background, I would have had a better understanding of Māori culture. Born in England, my family emigrated to New Zealand in the late 1960s. As I was only three at the time, all of my schooling was in New Zealand. My parents encouraged learning and I cannot recall anything negative in

relation to biculturalism. The last three years of state school education was at Te Awamutu College (the first High School to have a whare on its campus). My wife attended Ngaruawahia High School. Notwithstanding that we were patently Pakeha, I was surprised at my sheer lack of understanding of Māori cultural, political and legal issues.

It would almost have seemed that education in the 1970s and 1980s had not truly broken free of the policies of the 1950s and 1960s, despite the rhetoric. My state school education had not even scratched the surface of issues in the forefront of Māori leaders' and academics' minds of the time, let alone historical issues. There was accordingly a period of accelerated learning and adjustment at the Waikato Law School to understand why Dame Whina Cooper led her much celebrated hikoi or why the occupations at Bastion Point and Raglan golf course occurred, and for that matter the roots of both stemming back 150 years.

Biculturalism should not be confused with *te reo Māori*. Neither is it limited to *tikanga Māori*. It is a frame of mind that for law to be effective it must cater for all cultures. In the 1980s Japanese was the favoured culture to study, moving away from traditional European culture and languages. In the first decade of the 21st century it was clearly Chinese culture. The foundation principles of the Waikato Law School prepare its students for all forms of biculturalism. To have embarked on a legal education without recognising biculturalism and the Treaty of Waitangi would have been a pointless exercise. Law in context must be just that.

For many reasons I chose to take a first year paper in *te reo Māori*. I am not good at languages, but that was not the point. The point was to gain an appreciation of the Māori language because it, as with any language, is not just written or spoken. It has a relevance to its surroundings and in this regard assisted in better understanding the many law papers which touched on bicultural issues. I was particularly proud of being able to complete an oral presentation to the class on my limited *whakapapa*. I was fortunate enough that my migration to New Zealand was not in a silver winged bird, but by the *waka* 'P&O Himalaya'.

Biculturalism also peaked my interest in resource management and Māori land law, both of which I took as final year papers. It surprises me why these two papers should not always be taken together as it almost seems artificial to learn about resource management without it being in the context of Māori land. This in large part may be a reflection on the need for the legislators to better address those issues within the Resource Management Act 1991.

III. WHAT WERE WE LIKE BACK THEN ... AND HOW WLSA BECAME WULSA

In preparing this article I found some old papers from my days at the Waikato Law School, including a number of Waikato Law Student Association (WLSA) meeting minutes and accounts. They make for interesting reading. We were all so earnest in our endeavours and fiercely proud.

I am sure far more knowledgeable and qualified contributors will enlighten you on the opposition to the establishment of the Waikato Law School, and its difficult gestation and birth. Such opposition, even ridicule, continued for a number of years and was a challenge not only for the Faculty, but also for the students and fledgling student association. I recall that naysayers were still around in mid 1992, including the then Prime Minister, Jim Bolger. Mr Bolger was complaining of too many accountants and lawyers and not enough engineers. This only brought out the opponents of the Waikato Law School with letters written to the *New Zealand Herald* and *Waikato Times*. Of two such articles, written by persons from Hamilton, neither names appeared in a Waikato directory nor were registered voters in the area.

The then Dean, Professor Margaret Wilson, made available to all staff and students an information pack that brought some balance to the debate. This included such documents as *Te Mātāhauariki Waikato Law School: A new beginning*; draft statement of objectives, School of Law, 1993-1995; excerpt from the University of Waikato Research Report 1991; excerpts from an article in *New Zealand Lawyer* by Georgina Murray, and excerpts (tables) from the NZ Vice-Chancellors' Committee Report on Graduate Employment in New Zealand.² Those of you interested in the historical roots of the formation of the Waikato Law School should read this material.

I am privileged to be able to keep in contact with the Waikato Law School, through supporting the Waikato University Law Students' Association (WULSA) mentoring programme, graduate recruitment and other initiatives. It never ceases to amaze me how far WULSA has come since its early days and how the Faculty has continued to support the students. I was lucky enough to be involved with the formation of the Students' Association and will take you back to what it and we were like back then. This is also a reflection of the lecturers and administration staff and their drive to make the School a success.

The Students' Association had its beginnings in 1991 with the founding year students and the fresh faces of the 1991 first year students. That same year they were recognised by the Waikato Students' Union enabling receipt of minimal funding, albeit we were then known as WLSA. This necessarily involved drafting and adopting a constitution. The challenge was to then be recognised by the New Zealand Law Students' Association. I still have my copy of the first ever issue of the NZLSA magazine "The Case Note".³ It states in relation to the:

Waikato Law School Students' Association

The Dean of the law school at Waikato, Margaret Wilson, has advised us that at the time of going to print, the law students have yet to decide on the formation of a Waikato Law Students Association.

The following is some information from Waikato that was presented at last years NZLSA Conference in Dunedin. Readers may find the unique nature of the Waikato course of considerable interest.

"The schools' principles as biculturalism, professionalism and law in context (listed in no particular order). The degree programme is:

- LAW I: Legal Systems
 - Legal Method
 - Law and Societies
 - Four non-law papers
- LAW II: Public Law (Constitutional)
 - Public Law (Administrative)
 - Jurisprudence
 - Three non-law papers
- LAW III: Crimes
 - Torts
 - Contract
 - Property
 - Corporate Entities
 - Theory and Methods of Dispute Resolution
- LAW IV: Six full year courses from a wide range of choice.

2 'Information Pack', internal memorandum to all staff and students, from Dean, School of Law, 3 July 1992.

3 Issue #1, June 1992.

The reason our programme is as above is simply because that's what many see as being valuable in to-days and tomorrow's legal profession and other related fields.

The students themselves come from a diverse background as do the staff. The atmosphere at the school is one of friendship among the staff and students, of challenge towards completing the degree and of facing such opposition and resistance that exists."

I became involved in the Student Association in my first year (1992) helping out with the few events during the year. By the end of the year I was an active member, largely in part to the passion shown by the founding members. Many of those students were entering their final year (in 1993) and were focussed on studies. Rightly so it was for the 'younger' students to step up and carry on the good work. With the risk of missing names, for which I apologise, here are the people who featured in the Students' Association in those early days, and in no particular order:

Damien Chesterman	Bruce Hesketh
Sandy Ghaemaghamy	Terry Harris
Micheal Irons	Jonathan Hills
Fiona Roberts	Paula Sullivan
Steve Macbeth	Brenda Mailman
Kathryn Elsmore	Simon Jones
Catherine McIntosh	Alex Kupka
Jamie Meikleham	Madeleine Richards
Joel Rendle	<i>Anaru Hapeta</i>
Nigel Christie	Leah Whiu
Sarah Parsons	Doreen Ford
Nadia Ellis	Lottie Haines
Rueben Lawson	Terry Hami
Carolyn Wait	Neil Shaw
Bruce Jackson	Nicole Boyle
Joan Forret	Michelle Cassidy
Ewan Eggleston	Kim Boreham
Rhyl Jansen	Anna Rutten
Donna Llewellyn	Arthur Fagrua

I was 'volunteered' as president of WLSA in March 1993, largely due to the necessity of ensuring the brilliant work of those early students did not go to waste. To re-qualify for Waikato Student Union recognition and grants, and ultimately to be affiliated to the New Zealand Law Students' Association, it was critical that we formally adopted a constitution. The early WLSA meeting minutes for 1993 record, on 17 March, that I was to get together the necessary documentation to secure WSU affiliation, for a meeting to be held in the ironically name 'Layabouts Lounge', the following week. To achieve this, the following individuals were 'elected': president, me; secretary, Fiona Roberts; treasurer, Kathryn Elsmore, and media officer, Brenda Mailman. We also had a committee made up of a number of the names from the table above.

It was at the WSU meeting that I discovered a lack of a constitution. Nevertheless I secured an extension of a fortnight for WLSA to put together a constitution and in the meantime we were affiliated. In almost comic fashion, we held a special general meeting on 7 April 1993, as although we had finally located the 1991 constitution, it was void for lapse in WSU affiliation in 1992. We then hurriedly debated and approved the use of the WSU Model Constitution. In true budding lawyer style we set up a working group to analyse that Model, taking stock from copies of constitutions we had obtained from the Women's Refuge and the Victoria University Law Students' Association. But it was sometime after this, possibly in 1994 or 1995, that the Association's name became the Waikato University Law Students' Association (WULSA).

I have highlighted Anaru Hapeta in the table above. Anaru was the liaison representative of the Māori law students' forum – Te Whakaiapo. This group was set up to cater specifically for Māori law students and ran in tandem with WULSA. It enabled the freedom of te reo Māori and a whanau atmosphere to manage appropriately Māori issues within the Law School environment. We all recognised that neither WULSA nor Te Whakaiapo could or should attempt to be all things for all students. We ran the serious risk of failing in both. We worked together for the benefit of the students having a representative from both, for each year group, and combining efforts for orientation and the hangi event.

The hangi evening was one of two events WULSA put on each year, starting in 1992, the other being the annual Ball. I should pause here and give you some insight as to how fledgling we were at this stage. In taking over the presidency (it sounds far more regal than it was) I was handed a statement of accounts for the period 12 August 1992 to 12 February 1993. Our opening balance was \$117.61. Our closing balance (due solely to the profit from the Ball) was \$1,512.16. There was a \$17.43 discrepancy, which we simply took on the chin. These were not heady days of excess.

The hangi event typified the passion students held to make the Waikato Law School a success. It was a very hands-on event with everyone chipping in with whatever they could offer. It was held at the sports clubrooms, below the Teachers' College, with the hangi pit in the grass area adjacent to the clubrooms. We never made money from the event, but that was not its aim. It was to foster collegiality across the whole student body. It was a real eye opening experience for our international students. I found my copy of the 'Statement of Accounts' for the 1993 hangi event. It cost \$542.15 and we raised, through a koha, \$276.20, a shortfall of \$265.95. I now recall working with Mike Irons the evening before the hangi in his garage, I think in Dey Street, cutting up the pork, mutton and chicken carcasses. On the day, Junior Witehira and I hired a trailer to get more manuka, the drums and hangi stones, and with a few volunteers we dug the pit. I am not sure that WULSA runs such events nowadays, or if they do, whether it would be so hands-on. I am not suggesting they have gone all frappuccino and croissant, but these were 'old school' times.

The annual Ball was a slightly different affair. It began as a Law School dinner, strongly supported by Professor Margaret Wilson and the Faculty, with invitations going to all local practitioners and judiciary. I understand a dinner was held in 1991, but it was in 1992 that the first Ball was held. This was at the Te Rapa Racecourse and our guest of honour/speaker was David Lange. Despite a ticket price of \$40 it was a huge success with 160 tickets sold. It was a real honour meeting and listening to David Lange. In 1993 we again held the Ball at the racecourse with our guest being Judge Coral Shaw, then sitting in the Henderson (later renamed the Waitakere) District Court. In 1994 I was the treasurer of WULSA. That year's Ball moved to the Hamilton Gardens Pavilion, with guest speaker cartoonist and political commentator, Tom Scott. I believe in my

final year (1995) the venue may have moved again, this time to the Le Grand Hotel, but I cannot recall the speaker. I was very fortunate to attend this year's Law School Ball, and what an amazing event. It was held at the Performing Arts Centre with a 'Cluedo' theme. Some 360 guests were treated to a very polished and professional event that pales in comparison to the first Balls that I was involved in. Again a real tribute to WULSA.

IV. STAFF AND OTHERS

In 1993 I was a student representative on the Board of Studies. This was a fascinating experience, not only because of the topics covered (to which I am sworn to secrecy), but in the almost military, that is efficient, way they were conducted by Professor Margaret Wilson. If only our Partners' meetings were conducted so efficiently.

It was through the Board of Studies that I first met the Honourable Robert Fisher QC, then a High Court Judge sitting in Auckland. The tenet of professionalism I mentioned above, is illustrated here. I now meet Mr Fisher as a barrister, arbitrator and mediator, and through the Arbitrators and Mediators Institute of New Zealand, of which we are both members. Not surprising Mr Fisher does not recall meeting on those few occasions some 17 years ago. But, I am sure if I had been anything other than professional in my dealings with the Board and Mr Fisher I would be remembered, but for the wrong reasons. Professionalism means many things, importantly courtesy and respect, even in the face of great stress (litigation or a Board of Studies meeting).

Of course any mention of the early years of the Waikato Law School can not overlook our founding Dean, Professor Margaret Wilson. Professor Wilson's fierce determination was often misinterpreted by students as being unapproachable. While it is true that it was unwise to fall foul of Professor Wilson, the fact was she fully supported the students and their efforts to make the Waikato Law School a success.

I take the opportunity to acknowledge a number of supporters from outside the School. First is David Wilson QC, now Judge Wilson QC, sitting in the North Shore District Court. David was a great supporter of the competitive mooted programmes at the Waikato Law School. In 1995 he set up the Wilson prize for best individual mooter, chosen from the finalists in the Penlington/Hammond mooted finals. This leads nicely to introducing Justices Penlington and Hammond. Justice Peter Penlington (now retired) was at the time the resident High Court judge in Hamilton. His Honour Justice Grant Hammond, former judge of the Court of Appeal and now President of the Law Commission, had at the time very recently stepped down as Dean of Law at Auckland to take a position as a High Court Judge. Together Justices Penlington and Hammond conducted the High Court trials in Hamilton. More importantly for law students, they established the Penlington/Hammond Trophy for the best competitive mooted team. The Jafa equivalent being the, lesser, Stout Shield.

I was fortunate enough to compete in the finals of the mooted competitions in 1994 and 1995, being in the winning team for both years. I also won the inaugural Wilson Trophy in 1995. The value of this support was not immediately obvious to me or the other students but to the Faculty, local practitioners, other law schools and prospective employers it was extremely important. Not only did it foster excellence in mooted (legal research, written submissions and oratory skills), it led to participation at national and international law students' conferences and competitions. It also provided an influential stamp of approval for the Waikato Law School. It was therefore very

pleasing to see reported recently that Justice Hammond, hailing originally from Te Awamutu, gave a speech at a function to commemorate 20 years of the Waikato Law School.

Before moving on I should also recognise that the Faculty staff regularly went above and beyond the call of duty to assist students. Again apologising for the many names I am sure to miss, those that stood out for me included Bede Harris, Paul Hunt and Tim Blake for mootings, Christine Hickey for student/staff Liaison, and Ruth Busch for the Family law moot and just for being Ruth Busch.

There were also sad and tragic events that occurred during my time at the Waikato Law School, two of which highlighted for me the high esteem in which the students held members of the Faculty. I will only recount one of those events. I mentioned above taking Māori land law in my final year (1995). This was in the second semester with Angela Rogers. As with all subjects, if not more so with Māori land law, there was a sense of whanau. I am not being trivial in this remark. While the class had a real multicultural feel to it we were all part of a community. At that time my first child, my daughter, was six months old and at times I would bring her to the University Crèche or to classes. After two attempts in the L Block lecture theatre I made other arrangements. However, in Māori land law, once a bottle had been consumed, she was whisked away by Angela Rogers who proceeded to finish the lecture/discussion while carrying around my daughter.

Tragically, over the Christmas/New Year break of 1995/96 Angela was killed in a road accident. She was survived by her husband and young son, but her unborn baby did not survive the crash. I returned to the Law School early in 1996 for her memorial service, held in the quadrant. It was a very moving occasion with waiata, karakia and speeches from staff and students alike. I still recall it being a beautiful Summer's day and so many people that the quadrant was overflowing. Sad as it was, I must also share a connected story which typifies the diversity of the student body. At the memorial I sat under the marquee next to a tall older woman. Throughout we exchanged the occasional pleasantries and one or two tears were shed by my neighbour. It was not until I was leaving that I realised my neighbour was in fact a mature male student (a year or two behind me), who had made the courageous decision to live, and dress, as a woman. Without in anyway belittling that decision, the fact is you must always find something in life to make you smile, even at the saddest of times.

By the end of my tenure as president and then as treasurer (1994), WULSA had grown in leaps and bounds. I cannot take any credit for this as it came from the huge efforts of everyone at the School. We could only have achieved this from the base created by the founding students. In my President's letter to NZLSA in July 1993, for their magazine 'Casenote', I recorded that the close co-operation between students and staff had resulted in:

- Student representatives, both Māori and non-Māori
- Staff/student liaison group
- Student representation on:
 - Student literacy
 - Māori language policy
 - Computer laboratory
- Staff/student support for student groups:
 - Māori
 - International
 - Gay/lesbian
 - Feminist.

I would note two interesting points. The Waikato Law School was the first law school to have a dedicated computer laboratory. Course work included online research and computer skills. Remember, this was 20 years ago. Just before entering the Waikato Law School I had spent two and a half years as a hardware engineer with IBM. Notwithstanding that the laboratory was stocked with Apple/Mac's, this was a bold move by the School.

The Māori language policy is very interesting and a tribute to those founding students. As I recall (beware the urban myth), a group of Māori students from the founding and/or second intake, chose to answer certain of their exam papers in Māori. Even the Waikato University establishment had difficulty dealing with that issue. But as with all radical acts, it was eventually resolved and I understand all involved learnt valuable lessons. Rather than bury the issue, the Faculty engaged with the students and kept a dialogue going on how best to address this for the future. In my view this typified the School's founding principles of professionalism and biculturalism, both for the Faculty and students. Te reo Māori had been enshrined as an official language of New Zealand in 1987,⁴ but there was still resistance, and ignorance, to its widespread use outside of kohanga reo pre-schools and kura kaupapa primary schooling. The principle of professionalism arguably instilled an obligation on those students to take the action they did. In private practice, professionalism brings with it obligations to assist positively in the upholding of the rule of law and to act steadfastly in the best interest of your clients. The Waikato Law School's tenet of biculturalism ensured that the right to answer exam questions in te reo Māori was embraced, rather than swept under the carpet.

V. WHERE DID I END UP?

Waikato graduates are literally everywhere, which in itself is a huge achievement. True to its diversity, there is no expectation at the Waikato Law School that you will come out with your degree to take a common or single career path. For my part, I wished to practice law in Hamilton with ideals of being a champion for the underprivileged, but essentially adding something positive to society. There were no illusions of LA Law, Boston Legal or The Good Wife. Late in my second year I wrote to all the law firms in the Waikato region looking for a Summer clerkship. Not surprisingly, I did not find work. As a result, the following year (1994) I championed my fellow third year students to take on the Summer clerkship programme for positions in the large Auckland firms. At that time the graduate recruitment programme was rather loose in its organisation and surprisingly we got little information from the law firms or NZLSA.

I am now embarrassed to admit that I was surprised at how successful we were carpooling several times a week to cocktail functions in those monolithic tower blocks, interview panels and post-offer smoozing. But we did our School and fellow students proud with the numbers we achieved. The collegiality of that group extended to leasing student accommodation for the Summer and working for all of the top law firms in Auckland. I was very fortunate to have worked at Kensington Swan within their fledging Auckland construction law practice. Kensington Swan has similar values to the Waikato Law School. Waikato graduates are now sought after for Summer clerk and law clerk positions with all the large law firms and throughout New Zealand. Nevertheless, each year's students need to chase every opportunity for placement in these positions.

Why then move to Auckland? The reality is that the major law firms are in Auckland and Wellington, if that is the path your career is to follow. By March of the last year at law school,

4 Māori Language Act 1987 (No 176).

those same firms are interviewing for law clerk positions for the following year. If you were lucky enough to have Summer clerked, you may have already been offered a full time position. The alternative is to decline that offer and hope that at the end of the year a local firm would have a position and hire you. I was left in that position. However, having Summer clerked with Kensington Swan, it was an easy decision to make. I had become a 'Queen Street' lawyer.

Fifteen years on, this ex-electrician is now a partner in one of the top full service law firms in New Zealand, with the largest specialist construction law practice involving national and international projects and clients, and specialising in building, construction and infrastructure law. How then does the legal education at Waikato Law School contribute to such success and how can it be relevant in daily practice?

That is a difficult question to answer, simply because the founding principles of the Waikato Law School are so relevant to a successful practice that they cannot be neatly separated from the whole. Succeeding in a commercial legal practice requires openness to new concepts, new ideas and people. Whether it is a family home, high rise apartment building, waste water treatment plant, motorway extension or a subdivision, each call on all the principles central to the Waikato Law School experience.

None of these examples can be separated from the legal, social, cultural, economic and political context of the time. For example, I was lucky enough to advise a tender consortium on the State Highway 1 extension to the last section of the Albany to Puhoi project (Alpur B2). Rather than simply act as a traditional legal advisor, I was part of the tender team. That project had to consider significant environmental issues, consultation with iwi and local land owners. Rather than paying lip service, that process resulted in a number of innovative ways of dealing with unique areas of the environment, vegetation and fisheries. It also resulted in a significant change in design of the road, from a huge cut in the most northern hill, to the twin tunnel option. This project also involved the first toll road in the Auckland region since the removal of tolling from the Auckland Harbour Bridge in 1984.

In dealing with the litigation from the leaky home crisis, I often act for homeowners. This provides its own challenges in being able to advise professionally your client while understanding the unique personal pressures the client is often under. It is not simply a question of providing bland legal advice. Neither is your client a typical middle class Pakeha family. Many homeowners have just lost their life savings, their health has suffered directly from the leaks, and indirectly from the financial and other stresses. The law continues to develop in this area at times consistent with the public's expectations of accountability, but sometimes contrary to those expectations. In either case, the High Court and Court of Appeal look to apply the law in the context unique to New Zealand. This is illustrated none more so than in the area of whether a duty of care is owed by Councils to owners or subsequent owners of leaky buildings. Richardson J's analysis in the early case of *Invercargill City Council v Hamlin*⁵ is an excellent example. In the Court of Appeal His Honour lists six distinctive and long-standing social, legal and economic factors in New Zealand that were to be used to decide whether the Council owed the Hamlins a duty of care in undertaking its regulatory and inspection roles.

5 *Invercargill City Council v Hamlin* [1994] 3 NZLR 513, at 524.

The question of whether Councils owe a duty of care for leaky buildings has traversed motels,⁶ schools,⁷ commercial buildings,⁸ apartments under a hotel management arrangement⁹ and aged care facilities.¹⁰ The Building Industry Authority (BIA) has escaped any liability for approving untreated timber and monolithic cladding,¹¹ and most recently for its periodic reviews of a Council's processes for ensuring inspections of building works were adequate.¹² Each decision was made in the legal, social, economic and political context of the time. I do not envy the judges in our High or appellate courts.

I have often been asked of all the cases that I have acted on which was the most rewarding. There are two. Early in my career I worked with two partners to manage and act for 90 construction clients, mostly mums and dads, in 23 sets of High Court proceedings. The claims were against a major multinational telecommunications company and topped \$180 million. After three and a half years, and the first court ordered judicial settlement conference (which itself lasted a week), the claims were settled. One client died; three clients suffered heart attacks; one client miscarried, and three marriages broke up before the case was resolved.

The other case involved the daughter of one of those clients. She had guaranteed a girlfriend's car loan to a less than reputable, and now defunct loan company. The amount was \$15,000, which amounted to all her hard-earned savings for her OE. I was able to provide not just legal, but also practical, advice as to what the implications of the guarantee were for her. I was also able to quickly extract her from that guarantee. No doubt I could have adequately provided legal advice in both these cases with a law degree from any of our Universities, but I believe I could not have provided the required quality of legal service without my legal education having its foundation in the Waikato Law School's principles.

While neither case had a direct bicultural element, the 90 clients came from a number of cultures, backgrounds and age groups. Legal education in a bicultural environment enables you to consider and apply the law in the context of the particular client's needs. Not everyone or every culture views the law in the same way, or has the same expectations as to how it is to be applied. They also have differing expectations on what the legal process can provide as a solution. The ability to ask the right questions and accept those differing expectations makes you a far better advisor. In turn this enables achievement of an outcome more closely aligned to your client's expectations.

Professionalism is always important. While you can provide support for your client through your legal practice, your role is foremost as an independent legal advisor. This can be very challenging at times. It was often the case that I had to be quite firm with particular clients so as to avoid them prejudicing their case, or worse, committing some breach of court rules or statute. You also have a duty of confidentiality. Despite the common interests within such a 'class action', that

6 *Three Meade Street Limited v Rotorua District Council* [2005] 1 NZLR 504 (HC) and *Te Mata Properties Limited v Hastings District Council* [2009] 1 NZLR 460 (CA).

7 *Mt Albert Grammar School Board of Trustees v Auckland City Council & Ors* HC Auckland, CIV 2007-404-4090, 25 June 2009, Asher J.

8 *North Shore City Council v Body Corporate 188529* [2010] CA ANZ ConvR 10-020; *O'Hagan v Body Corporate 189855* [2010] CA NZCA 65.

9 *Body Corporate 207654 v Chen* HC Auckland, CIV 2007-404-4037, 11 November 2009, Potter J.

10 *Kerikeri Village Trust v Nicholas* HC Auckland, CIV 2006-404-5110, 27 November 2008, Andrews J.

11 *Attorney General v Body Corporate 200200* [2007] 1 NZLR 95.

12 *Attorney General v North Shore City Council* [2010] NZCA 324.

duty cannot be overridden, certainly not without express instructions. Fundamental is also the manner in which you interact with opposing counsel and, where a party is unrepresented, other parties. All these elements of professionalism ensure the smooth operation of the law and indeed provide your clients with the best legal service.

That legal service also involves providing the best solution to your client's problems. In both cases it was, to a greater or lesser extent, critical to examine the political, social and economic context in which the issue/dispute arose and the 'environment' in which it could be resolved. For the personal guarantee issue those contextual elements were at a very low and somewhat personal level. For the class action these were at a national and international level. For example, the original impetus to enter the contracts with our clients arose from the moves of an independent telecommunications operator entering the New Zealand residential telephone market. They were installing high speed (broadband capable) cabling to residential properties in Wellington and Auckland. This was a direct threat to the local loop monopoly held by Telecom New Zealand, but with the added benefit of high speed data cabling that could support cable television. The Government was not yet ready to require Telecom to 'unbundle' that local network. Telecom (although I should clarify that Telecom was not the 'other party' nor had it any involvement in the proceedings) chose to meet the competition with its own high speed cabling project, and it was our clients who were eventually contracted to install it. Unfortunately for our clients, three things occurred almost simultaneously:

- The independent operator was slowing down, and eventually it stopped its installation of the high speed cabling. The competition was no longer there.
- The defendant had failed to assess properly the costs for our clients to install the cabling to residential properties. It was not uneconomic to continue, and
- ADSL technology was being developed that would allow transmission of broadband over the existing copper local loop. There was no longer a need for the new cabling.
- Understanding the issues in this context also impacted on the desire and ability of all the parties to resolve the disputes. Even this had its twists with the case finally being resolved outside the court process.

In supporting initiatives involving Waikato Law School it is very rare that I meet a student who is anything but well grounded, talented and passionate. The adherence to the delivery of legal education in the contextual basis of the time and with the underlying bicultural approach differentiates Waikato students and graduates in sometimes subtle ways. This results in the ability to apply law in context to peoples' needs, to the reality of doing business with the world, and more importantly being able to truly understand one's client. Ivory tower legal education completely misses the point that law is about society and its real application.

That background has shaped a number of decisions that I have made and cases that I have taken on through my 15 years in practice. I seem to favour the underdog. Where possible I undertake the occasional worthy cause on a pro-bono basis and when I was an employed solicitor this usually flew under the radar. I regularly present seminars at no cost for various industry organisations and lately for the New Zealand Law Society. I recently co-authored the NZLS' submissions on the Building Act 2004 review.

Presenting seminars and assisting with submissions are particularly rewarding. They bring into play many of the Waikato Law School's principles. With either activity the real benefits are gained when the subject matter is presented, applied or challenged in the full New Zealand context. For example, the current review of the Building Act 2004 has its roots in the changes intro-

duced under the Building Act 1991 (and Building Code 1992). Those earlier changes eventually resulted in the leaky home crisis. The current review is not what it seems. Rather than bringing a more balanced approach to building regulation, streamlining and making those best able to bear the risk take that responsibility, the review is an exercise in significantly reducing Council input into the consenting and inspection processes. The objective is to reduce Councils' direct costs and future liability. It will not go unnoticed that a number of these changes will be in place by next year – an election year. Hidden within the review document¹³ is a clear desire of the Minister/Department of Building and Housing, to introduce proportionate liability. Such a move having been rejected twice by the Law Commission, it is quite extraordinary that is being considered as a side issue within the review.

The skills and principles on which the Waikato Law School is founded enables me take a wider approach to the law, beyond the simple words in statutes and judicial decisions. Educating industry groups requires that wider approach. Aiding the legislature and its select committees to consider properly new and amending Bills requires the same broad approach.

I was proud and humbled to be asked to contribute to this commemorative edition of the Waikato Law Review. In closing I challenge all the current students to understand and champion the School's principles. I ask the present and past Faculty members to celebrate their achievements in making the School and its graduates what we are today. Finally, I encourage all alumni to reflect on their own experiences at the Waikato Law School and to continue to support the best law school in New Zealand.

13 'Cost-effective quality: next generation building control in New Zealand', Building Act Review discussion document February 2010 (Department of Building and Housing, Wellington, 2010).

STUDYING THE LAW IN CONTEXT: EXPLORING AN INTERNATIONAL DIMENSION OF NEW ZEALAND LAW

BY PROFESSOR MARGARET BEDGGOOD*

I. INTRODUCTION

The School of Law at the University of Waikato opened 20 years ago with a commitment to three foundational goals: to professionalism; to a bicultural focus; and to the study of the law in context. These three goals are closely connected to each other. This is particularly true of the linkage between the commitment to a bicultural ethos and to the study of the law in the context of Aotearoa New Zealand. And, as is discussed elsewhere in this volume,¹ these three goals, partly because of their innovative nature, must constantly be reconfigured and adapted to changing circumstances and developments in the law and in the wider society. Thus the third goal, the study of the law in context, cannot be divorced from the surrounding society, both our local society here in Aotearoa New Zealand but also more broadly the regional and increasingly global society of which we are a part, and the current changes and preoccupations in all of these. Of this third goal the current Co-Editors in Chief of the Waikato Law Review have written:² “In affirming the Faculty’s commitment to law in context, the Review reflects a broad approach to legal education and legal scholarship enabling an examination of law in a social, cultural, political and economic context.” This approach is inevitably reflected in the design and delivery of course curricula in the Law School.

Before we turn to the study of this context, however, I would like to highlight the innovation displayed in the setting and articulating of these goals in a law school at that time and to pay tribute to the foresight and imagination of the School’s founding Dean, Professor Margaret Wilson, in that regard. These and two other factors, an emphasis on the importance of information technology and alternative dispute resolution, have marked out the Law School at Waikato from its beginnings as having a special character. By the time I joined the School in 1994, they were already well established and their advantages — as well as some of their difficulties of implementation — were apparent. After 20 years it is easy to see just how accurately forward-looking all those developments were.

The role of the Dean who follows an innovative founder is in many ways a difficult one: on the one hand that founding spirit must somehow be continued, while at the same time the initial ideas need to be consolidated and embedded. But those who are attracted to a School like Waikato, its staff and students, are for that very reason likely to be supportive and creative in that task. An example of the continuation of such an innovative approach during this period was the attempt,

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1 See this volume Peter Spiller, Principles of Professionalism in Law Teaching and Judicial Practice.

2 Letter from Waikato Law Review Editors’ in Chief, 8 July 2010.

initiated especially by Campbell Robertson, then a Master's student and research and computer assistant at the School, to obtain funding for a project for the School to mount the statutes of New Zealand on-line so that they would be accessible to all without charge. At that time, 1995, this was a visionary proposition, which nevertheless found enthusiastic endorsement from the staff in computer support (Jonathan Hooper), from the library representative (Professor Barry Barton) and from the faculty (Peter Jones). Such support was not, however, forthcoming from the Law Foundation and the project fell away.

Another example which could be cited was the meticulous enrolment techniques and scrutiny developed and employed by the School. These took account not only of academic ability, although that of course remained a factor, but of the whole of relevant life experience and potential, discovered by individual interviewing if necessary. It was this process which in the initial stages I believe enabled the School to increase its percentage of Māori students without resorting to the use of a quota system.

It is perhaps not surprising, given the parallel developments in our wider society, that working towards the goal of adhering to a bicultural ethos in the Law School was, in my experience, where the most difficulties and tensions arose. There were high expectations attached to this goal, both within the School and outside, and it had been one of the factors which had assured the choice of the University of Waikato as the seat of the latest law school. But despite some difficulties and disagreements, there were some particular developments which were positive and successful. The enrolment procedures were, as I have said, instrumental in contributing to the increase in the number of Māori students in the School. In this early period also the foundations were laid for Māori perspectives, concepts and traditions to be incorporated as an integral part of several of the compulsory papers; for a separate stream or tutorial to be provided in first year courses for Māori students who wished it; and for a Māori mentoring scheme to be established.

In particular, the institution of a School Kaumatua was a major factor in the School's stability and in its progress towards this goal. The success of this role was almost entirely due to the work and dedication of the first and long-serving Kaumatua, Henry (Binga) Haggie, of Tainui, whose pride and pleasure in the School and his role in it were truly heart-warming. There were others too, including Georgina Te Heu Heu and Buddy Mikaere, whose efforts at reconciliation, when that was called for, and whose general support for the School were much appreciated.

Another concept which might, I believe, be employed in other bicultural research endeavours, was the setting up of an Advisory Board for the School's research programme, Foundation for Research Science and Technology (FRST).³ This Board was carefully composed of Māori and Pakeha, women and men, lawyers and non-lawyers, and their influence was felt beyond the programme in their contributions to, and support for, the studies of a number of senior students in the School.

To all these forward-looking and visionary people the School owes a debt of gratitude.

II. PART I - THE STUDY OF THE LAW IN CONTEXT: AOTEAROA NEW ZEALAND IN THE GLOBAL SETTING

I now turn to the focus of this essay, the study of the law in context and the ways in which that has altered, and in many ways widened, in its scope in these last two decades. The study of law in Aotearoa New Zealand had been focussed traditionally, at least in the period when I was a student

3 Later Te Mātāhauariki.

in the 1970s and a teacher in the 1980s, on the history and operation of domestic law, although that has also always been within the context of its English common law heritage and background, the more so where that has remained the focus and template for New Zealand law on any particular topic. Most present-day law students could, for example, give a fair account of the English law of negligence, except as it pertains to personal injury by accident, and even then they could probably recall some version of the facts of *Donaghue v Stevenson*.⁴ But few could even begin to discuss current English land law, although perhaps they would recognise Australian land law, and similarly Australian labour law until the New Zealand ‘reforms’ of the 1990s. In some sense then the study of law here has always had an ‘international’ context, that of Empire, or Commonwealth, or, to a lesser extent, other common law systems.

The context which I wish to examine in this essay is not only wider but in some senses different from that historical one: so much of our law is now set within a truly international, and not just comparative or historically derivative, context, where principles and rules are generally agreed globally, and where these then govern our legal norms and processes. Two decades ago the Law Commission estimated that the amount of statute law in New Zealand which was determined by international agreement was 25 per cent.⁵ That figure would assuredly now be even higher. Although it has become a cliché to talk about the extent and effect of globalisation, it is nevertheless the case that in all branches of law — from war and peace to trade, finance, commerce, communications, the environment, human rights, labour relations — much of the content derives from the terms of multilateral treaties to which New Zealand is a party. The extent and importance of that growth is probably reflected in the enhanced interest and participation in the process of treaty ratification which Parliament has now assumed.⁶ Within this broader compass of international influence, the expanding effect of international human rights law (IHRL), both in itself and in a number of related areas, is becoming increasingly significant.

Yet, despite the binding treaty provisions which effect that change, that dimension is often ignored, resisted or simply poorly understood within the domestic context, in contrast to some other areas of law, such as maritime law, where no such tension or resistance appears to exist. One can only speculate on the reasons for this reluctance: in this area especially where perceived moral and cultural issues arise, they might include concerns about sovereignty;⁷ common law unfamiliarity with rights in general; and various myths about human rights.

It is important then that future lawyers, who play a not inconsiderable role in the shaping of policy and practice, should have a thorough knowledge of this background to local law. The examples which follow demonstrate areas where that international human rights dimension has become, or is becoming, an intrinsic part of the law, and hence must be part of the legal curriculum, if this indifference or hostility is to be overcome and the law and its institutions are to truly reflect our global context, and our future lawyers and judges be equipped to administer that law in accordance with our international treaty obligations.

4 [1932] AC 562.

5 *Treaties: What are they, what do they do, how are they made and how are they given effect?* (NZLC 1991).

6 The present (since 1998) procedure is set out in the Cabinet Manual. See Cabinet Office *Cabinet Manual 2008* [7.112]–[7.122].

7 See below Part II.

A. *International Human Rights Law: Its Effect on Human Rights Law, Institutions and Practice in the Domestic System*

In my early years as a law student and teacher, there was little if any attention paid to IHRL, and certainly not a course devoted to it, nor to human rights in the domestic system. By the time I joined the Human Rights Commission in 1989 that was beginning to change⁸ and when I came to the Waikato Law School in 1994 Paul Hunt⁹ was already teaching an optional fourth year half course on IHRL. In 1995 we combined our complementary experiences and expertise to create a full course on the national and international protection of human rights, which stressed the connections between the two, and which was at the time, and for some considerable time remained, the only such course in a New Zealand law school.

The study of human rights law in Aotearoa New Zealand was then in its infancy, as was its use by policy makers, lawyers and judges – the New Zealand Bill of Rights Act had been passed in 1990 and the judgment in the *Tavita* case¹⁰ was delivered in 1993. The emphasis too was almost entirely on civil and political rights. The course was therefore very much an introductory course, in a societal climate where human rights were still largely unknown or unacknowledged as such, or indeed actively resisted. (One of Paul's useful tactics was to ask the members of the class in turn to bring to class a cutting from the day's newspaper (this is in pre-internet days) which raised a human rights issue.)

The course covered an introduction to the modern human rights legal framework, that is the Universal Declaration of Human Rights,¹¹ subsequent treaties (New Zealand had by then ratified all of the existing major human rights treaties¹²), the workings of the United Nations system, and a number of specific topics such as the rights of women, Bills of Rights and indigenous rights. These were then linked to the domestic protections, legislative, administrative and judicial, in place or suggested in New Zealand. The course was innovative and forward-looking in a number of ways: in its focus on economic, social and cultural rights (esc rights) as well as on civil and political rights; in its exploration of group rights and the issue of self-determination, which had been a hot topic at the 1993 Vienna World Conference on Human Rights;¹³ in its examination of national mechanisms other than courts; and in its, albeit then tentative, analysis of the Treaty of Waitangi as a human rights document.

The teaching of human rights at Waikato Law School has continued to build on these developments and to incorporate new ones as the reach of IHRL has expanded. Besides the undergraduate

8 In 1990 Paul Rishworth and I presented a course in IHRL at the University of Auckland.

9 Now Professor of Law at the University of Essex.

10 *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA).

11 GA Res 217 A(III) (1948).

12 International Convention on the Elimination of All Forms of Racial Discrimination, (adopted 21 December 1965, entered into force 4 January 1969) (ratified 1972); International Covenant on Civil and Political Rights, (adopted 16 December 1966, entered into force 23 March 1976) (ratified 1978); International Covenant on Economic, Social and Cultural Rights, (adopted 16 December 1966, entered into force 3 January 1976) (ratified 1978); Convention on the Elimination of All Forms of Discrimination against Women, (adopted 18 December 1979, entered into force 3 September 1981) (ratified 1985); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (adopted 10 December 1984, entered into force 26 June 1987) (ratified 1989); Convention on the Rights of the Child, (adopted 20 November 1989, entered into force 2 September 1990) (ratified 1993).

13 See the Vienna Declaration and Programme of Action, adopted 25 June 1993, <<http://www2.ohchr.org/english/law/vienna.htm>>.

course, there is now a well-subscribed paper in the Master's programme and an interest in human rights topics at master's and doctoral thesis level. The inclusion of esc rights has expanded to address the rapid developments in this area since 1990; the importance of non-discrimination as a cross-cutting theme is reflected in an emphasis on groups such as children, women, refugees and migrants and those with disabilities; the study of international mechanisms now includes more analysis of the treaty reporting process and of the Human Rights Council and its Universal Periodic Review process;¹⁴ while the study of group rights has expanded and in the particular case of indigenous peoples' rights has now spawned separate courses.¹⁵

At the same time, the recognition of human rights in the domestic context has increased, even if it has proceeded less rapidly and is still far less widely accepted than one would wish. Such recognition can be seen in the increased out-put of the Human Rights Commission, evident, for example, in its 2004 status report on human rights in New Zealand¹⁶ and its subsequent 2005 National Plan of Action;¹⁷ in more local academic publications related to human rights; more citation in case law; more use by non-governmental organisations (NGOs) in cases,¹⁸ submissions and reports, including to the UN Treaty bodies and Special Procedures¹⁹ and, at least in some contexts, such as the need to address the rights of persons with disabilities in conformity with the Convention on the Rights of Persons with Disabilities (CRPD),²⁰ more acknowledgment at government level. All of these can be and are reflected in the law curriculum.

B. Human Rights Standards in Other Areas of Law

Moreover, human rights law, both international and domestic, has now a place in other law courses; although in some cases the content may have been there before, it would not necessarily have been recognised and described as 'human rights'.

(1) The Treaty of Waitangi and indigenous rights globally

The first example where this has occurred is also an indication of the crossover between the various goals of the School: for a knowledge of the development of indigenous rights internationally is an essential counterpoint to any study of our own history and the fashioning of the law for a nation with two founding cultures; and the 25 year development of indigenous rights at the international level has been paralleled by and coincident with "Treaty" developments in Aotearoa New Zealand. While there is a basis for such rights in common law, that too has been developed here only very recently, although recognition of its existence seems to have been generally assumed.²¹

14 A/Res/60/251. See <<http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx>>.

15 For example, Indigenous Peoples' Rights which is offered at the Undergraduate level and Indigenous Peoples and International Law which is offered at the Postgraduate level.

16 The report is at <<http://www.hrc.co.nz/report>>. It is currently being reviewed, see Review of Human Rights in New Zealand 2010 at <<http://www.hrc.co.nz/home/hrc/humanrightsenvironment/reviewofhumanrightsinnewzealand2010/reviewofhumanrightsinnewzealand2010.php>>.

17 See <<http://www.hrc.co.nz/report/actionplan/0foreword.html>>.

18 Such as the Child Poverty Action Group.

19 For example, Action for Children and Youth Aotearoa, Aotearoa Indigenous Rights Trust, Caritas Aotearoa New Zealand, Human Rights Foundation, National Council of Women, and Peace Movement Aotearoa.

20 International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, (adopted 13 December 2006, entered into force 3 May 2008) (ratified 2008).

21 See *Ngati Apa et al v the Attorney General*, CA173/01, CA75/02, 19 June 2003, at [46]-[7].

So while admittedly there have been many ground breaking developments in the New Zealand context, such as the establishment of the Waitangi Tribunal and of the whole Treaty claims settlement process, at the same time Māori have been significant players and shapers in international fora on indigenous rights, from the early days of the Working Group on Indigenous Populations²² through to the Permanent Forum on Indigenous Issues,²³ the drafting and eventual adoption of the Declaration on the Rights of Indigenous Peoples (DRIP)²⁴ and the Expert Mechanism on the Rights of Indigenous Peoples.²⁵ This background has been apparent in, for example, the controversy over the rights to the foreshore and seabed, in the recent visits of two Special Rapporteurs on Indigenous Rights and in the Treaty of Waitangi claim known as the flora and fauna claim, WAI 262. In these and in many aspects of study around the Treaty of Waitangi, recognition of its connection with the concept of rights has become more common, beyond those hapu/iwi organisations and NGOs concerned specifically with the rights of indigenous peoples, for example in recent work by the Human Rights Commission.²⁶

It will be interesting to see how much influence these international developments will have on policy making and on the development of the law with regard to various Treaty issues and particularly the concept of self-determination in our local context, now that the DRIP has been endorsed, at least in part, by Aotearoa New Zealand²⁷ and has been, for various local political reasons, far more widely commented on than is usually the case with human rights instruments. Inevitably, any developments here will affect our own pedagogy: as far as teaching and research are concerned, this dynamic international background is already evident in Waikato in the setting up of separate papers on indigenous rights²⁸ and in its incorporation into what are essentially comparative jurisdictional studies, such as Dr Robert Joseph's work on post-settlement structures in Canada and Aotearoa New Zealand.²⁹

(2) Immigration, specifically refugee law

Immigration policy and the legal framework which enables it are very much seen as the prerogative of each state, as is the granting of citizenship. But immigration is of course a global phenomenon and there are aspects of the law which are of particular global concern, as it relates to refugees, including asylum seekers, and migrants. New Zealand has ratified the 1951 Refugee Convention³⁰ and the 1967 Protocol³¹ and accepts an annual quota of refugees, but the Convention and Protocol themselves do not spell out in any detail many of the rights of these refugees, including their rights to work, healthcare, housing, social security and education, although these

22 <ECOSOC Res 1982/34>, <<http://www2.ohchr.org/english/issues/indigenous/groups/groups-01.htm>>.

23 <ECOSOC Res 2000/22>, <<http://www.un.org/csa/socdev/unpfii/index.html>>.

24 A/Res/61/295, <<http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/RES/61/295&Lang=E>>.

25 A/HRC/Res/6/36, <<http://www2.ohchr.org/english/issues/indigenous/ExpertMechanism/index.htm>>.

26 See, for example, the Human Rights and the Treaty of Waitangi page, <<http://www.hrc.co.nz/home/hrc/humanrightsandthetreatyofwaitangi/humanrightsandthetreatyofwaitangi.php>>.

27 "National Govt to support UN rights declaration" John Key, 20 April 2010 (includes Questions and Answers), <<http://www.beehive.govt.nz/release/national+govt+support+un+rights+declaration>>.

28 Above n 15.

29 R Joseph, *The Government of Themselves: Indigenous Peoples' Internal Self-Determination, Effective Self-Governance and Authentic Representation: Waikato-Tainui, Ngai Tahu and Nisga'a* (PhD Thesis Dissertation, University of Waikato, New Zealand, 2006).

30 Convention relating to the Status of Refugees, (28 July 1951, entered into force 22 April 1954).

31 Protocol relating to the Status of Refugees, (18 November 1966, entered into force 4 October 1967).

entitlements are mentioned in more detail in non-binding communications of the United Nations High Commissioner for Refugees (UNHCR).³²

In the 1990s the law as regards asylum seekers in New Zealand was unclear and the processes for dealing with them were ill-defined and almost entirely administrative. As a result firstly of the Gulf War in 1991, and more particularly after the attacks in New York and Washington in 2001 and subsequent reaction to those both overseas and here in New Zealand, there arose a number of human rights issues concerning this group, especially the increased use of detention and then the introduction of the security risk certificate process.³³ These concerns culminated in the case of Ahmed Zaoui. This case and the security risk certificate process itself led to some trenchant criticism both from the New Zealand courts³⁴ and from the United Nations Committee Against Torture (CAT),³⁵ essentially calling for the observance of fundamental human rights. Some of these concerns have now been addressed in the new Immigration Act which came into force in November 2010. But others, including the contentious questions of detention and of the use of classified information in refugee proceedings, remain unresolved. New Zealand has not ratified the Migrant Workers Convention,³⁶ with its comprehensive coverage of the rights of all migrants, both legal and illegal, and every so often cases arise which raise concerns about the treatment of migrant workers here.

Again as regards the teaching of the law in its context, a course on immigration and refugee law has had to address these issues and will continue to need to monitor local developments, such as recent suggestions that the processing of asylum seekers ‘off-shore’ as adopted by the Australian Government should be considered here, against broader IHRL standards and parallel developments in comparable jurisdictions.³⁷

(3) The ILO and the teaching of labour law

In the 1970s and 1980s the teaching of labour law (or, as it is also described, industrial or employment law) was in its infancy. As it expanded in that period, some attention was paid to the United Kingdom origins of, for example, the trade union movement and there was some comparative analysis with similar jurisdictions. Little, if any, reference was made to the international background or, specifically, to the work of the International Labour Organisation (the ILO),³⁸ despite New Zealand’s involvement in and support for that organisation from its beginnings. Nor were work rights usually considered in the context of wider human rights programmes, again despite the close involvement of the ILO with the drafting of articles 6, 7 and 8 (the “work rights” sections) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).³⁹

32 <<http://www.unhcr.org>>.

33 Immigration Act 1987, s 114.

34 *Zaoui v Attorney-General* (No 2) [2005] NZSC 38.

35 Concluding observations of the Committee against Torture: New Zealand, CAT/C/NZL/CO/5, <<http://www2.ohchr.org/english/bodies/cat/docs/cobs/CAT.C.NZL.CO.5.pdf>> and Conclusions and recommendations of the Committee against Torture: New Zealand, CAT/C/CR/32/4, <[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.CR.32.4.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CAT.C.CR.32.4.En?Opendocument)>.

36 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, (adopted 18 December 1990, entered into force 1 July 2003).

37 Other human rights breaches resulting from the ‘war on terror’, such as torture and excesses of surveillance, can be addressed in general human rights courses.

38 <<http://www.ilo.org>>.

39 Above n 12.

In this there has been a marked change, possibly occasioned by the ILO's rapprochement with human rights discourse, notably in its 1998 Declaration on Fundamental Freedoms and Rights at Work,⁴⁰ which designated four categories, viz, equality and non-discrimination, freedom of association and the right to collective bargaining, the abolition of child labour and of forced or compulsory labour, and seven (subsequently eight) matching ILO Conventions,⁴¹ as fundamental human rights. Another factor has been the ILO's establishment of much more user-friendly access to its documentary data-base through its excellent website. Again these developments are being taken on board in the teaching of employment law and in the establishment of separate courses on international labour law and industrial relations.

It would be possible to add to this list of areas and hence those courses which have been and are being affected by the expansion and recognition of IHRL, by including for example trade law, environmental law and the law of armed conflict. But these few examples will serve to illustrate the expanding compass of IHRL influence.

III. PART II - FUTURE DIRECTIONS IN INTERNATIONAL HUMAN RIGHTS LAW

The rapid expansion of human rights coverage over these last 20 years would suggest that further developments and refinements are to be expected. Predicting what those might be is a fairly hazardous enterprise, but the law teacher must to some extent attempt it. In the particular field in which I work, namely esc rights, a number of developments are already discernible. It is no longer possible, if it ever was, to consider these rights aside from their wider context, that is their link to development and to the eradication of poverty and the obligations of states in that wider context, and the growing acknowledgment of the need to recognise the responsibility of other non-state actors in that regard.

Historically the discourses of human rights and development have remained silo-ed, pursuing parallel but separate paths. Gradually, in the last two decades, that has changed. While there may still be scepticism about a right to "development" and little endorsement, particularly by "developed" states, of the 1986 Declaration on the Right to Development,⁴² the concept of a "rights-based approach" to development and to the giving of aid has become increasingly favoured by development agencies⁴³ and by some branches of the United Nations machinery.⁴⁴ Such an approach seeks to incorporate into development planning and implementation, a recognition of esc rights as rights, of the underlying requirements of non-discrimination and of the new "democracy rights" to information, consultation and participation of those directly affected, and of the accountability as duty bearers of donors and development agencies. Human rights groups, for their part, have had

40 Adopted 18 June 1998, <<http://www.ilo.org/declaration/lang--en/index.htm>>.

41 Freedom of association and the effective recognition of the right to collective bargaining - ILO C87 Freedom of Association and Protection of the Right to Organise Convention, 1948, and ILO C98 Right to Organise and Collective Bargaining Convention, 1949; elimination of all forms of forced or compulsory labour - ILO C29 Forced Labour Convention, 1930, and ILO C105 Abolition of Forced Labour Convention, 1957; effective abolition of child labour - ILO C138 Minimum Age Convention, 1973, and ILO C182 Worst Forms of Child Labour Convention, 1999; and elimination of discrimination in respect of employment and occupation - ILO C100 Equal Remuneration Convention, 1951, and C111 Discrimination (Employment and Occupation) Convention, 1958.

42 A/Res/41/128, <<http://www2.ohchr.org/english/law/rtd.htm>>.

43 NGOs such as Oxfam, for example, and Government agencies such as DFID.

44 Such as UNDP: see their 1990 Human Development Report, for example, <<http://hdr.undp.org/en/reports/global/hdr1990>>.

to come to terms with learning to measure their achievements in more precise ways,⁴⁵ with indicators, benchmarks and budget analyses, and to accept and welcome the need to work in partnership with experts in other fields, such as health-care and environmental protection.

Much of this collaboration has occurred in the context of the need, from the perspective of both development and human rights, to work towards the eradication of inequality and of poverty, especially extreme poverty, both locally and globally. For the human rights specialist, this requires coming to terms with ways of measuring poverty and with questions like ‘is extreme poverty a violation of human rights in itself or the sum of violations of a number of esc rights (work, health, housing, social security, education)’, all of which require a thorough knowledge of the progress which has been made regarding those rights, their definition, implementation and enforcement, in international, regional and domestic courts and policy-making.

One international context where the eradication of poverty has been a prime focus has been in the Millennium Development project, encapsulated in the Millennium Development Goals (MDG).⁴⁶ These originally, and surprisingly, made almost no reference to human rights at all, despite the obvious cross-over between these goals and a number of esc rights. More recently, especially in the setting of targets under the various goals and in academic commentary, these connections have been recognised, and with them an acknowledgment of the advantages which the incorporation of the components of a rights based approach might bring to the achievement of these goals.⁴⁷

Two issues concerning obligations are also of increasing interest and importance. The international human rights framework, largely for historical reasons, is predicated on responsibilities and obligations resting on states and only on states. But it is well recognised that, in many ways in the globalised world of the 21st century, rights are violated and/or could be protected by a range of other powerful actors for whom states have at best only an indirect responsibility, which they may often not be in a position to exercise. One question therefore exercising the human rights community is how these non-state actors can be brought within the international framework of human rights responsibility and protection: for example, how might multi-national enterprises (MNEs), international financial institutions (IFIs), the World Trade Organisation (WTO) or armed opposition groups be made more directly accountable.⁴⁸

The other intriguing question relates to the human rights obligations of states themselves beyond their own territorial borders. A requirement or at least exhortation to “international cooperation and assistance” between states dates back to the United Nations Charter,⁴⁹ and indeed arguably to the 1919 Constitution of the ILO,⁵⁰ and has been followed through especially recently in the work of the UN Treaty Bodies and of the Special Procedures.⁵¹ Here again there is a close

45 See for example T Landman and E Caralho *Measuring Human Rights* (Routledge, London, 2010).

46 <<http://www.un.org/millenniumgoals>>.

47 See for example P Alston, “A Human Rights Perspective on the Millennium Development Goals” paper prepared as a contribution to the work of the Millennium Project Task Force on Poverty and Economic Development (2007); M Salomon, *Global Responsibility for Human Rights. World Poverty and the Development of International Law* (OUP, Oxford, 2007); Carmona below n 57.

48 See for example P Alston (ed) *Non-State Actors and Human Rights* (OUP, Oxford, 2005).

49 Charter of the United Nations, (adopted 26 June 1945, entered into force 24 October 1945).

50 Constitution of the International Labour Organisation, (entered into force 28 June 1919) <www.ilo.org>.

51 See, for example, CESCR General Comments 15 and 18, Report of Paul Hunt, Special Rapporteur on the Right to Health, UN Doc A/HRC/7/11/Add2 (2008).

correlation between human rights and development requirements, where the needs of ‘developing’ states and the offerings of ‘developed’ states can come together.

The interesting question here though, for the human rights lawyer, is just how far any of this exhortation to co-operation and assistance can be said to place an obligation on states, either to request help, in the case of developing states, or to provide it, in the case of developed states. As to the latter, it would seem reasonable to argue that once a state is acting as a donor, then it has an obligation in that role to adhere to any human rights obligations it may have otherwise entered into, such as to act without discrimination, and to be accountable for the planning and performance of its programmes.⁵² Beyond that, can it be said that states, or the international community as a whole, have a general, unspecified obligation to give aid, even, say, the 0.7 per cent of GDP which states have pledged to work towards under the (non-binding) MDGs? At this stage, probably not, although some have so argued⁵³ and the Nobel Prize winning economist, Amartya Sen, has supported the idea of “imperfect” obligations being laid, in this context, on “anyone who is in a position to help”.⁵⁴ Perhaps less controversial is the suggestion⁵⁵ that states have obligations as members of various international finance (the IFIs) or trade (the WTO) organisations to respect, protect and fulfil their human rights obligations when considering policies and programmes under those regimes and that state representatives should speak out to uphold these. Whether, as mentioned above, those organisations have themselves any direct human rights obligations remains a matter of controversy.

One recent development of potential importance has been the adoption by the UN General Assembly on 10 December 2008, after twenty years of discussion, of an instrument enabling a number of complaints processes for breaches of any of the rights in the ICESCR, an Optional Protocol (OP).⁵⁶ The existence of such complaints processes, similar to those available in relation to other human rights treaties, can be expected to affirm, once and for all, the justiciability of esc rights and thus to facilitate the development of jurisprudence and enforceability mechanisms for breaches of esc rights and generally to raise the profile of these rights as “real” rights. In addition to the more common individual complaints process, this OP allows for an enquiry process initiated by the Committee on Economic, Social and Committee (CESCR) itself and for it to transmit findings or recommendations directly to the UN and other relevant interested bodies, thus giving the CESCR a clearer entrée into the development field.⁵⁷

Another development in a related area might perhaps also prove of assistance in the context of development and international cooperation. The ‘responsibility to protect’ (R2P) doctrine⁵⁸ was

52 Hunt, *ibid*; Carmona, below n 57.

53 Hunt, *ibid*.

54 A Sen, *Development as Freedom* (OUP, Oxford, 1999); *The Idea of Justice* (Allen Lane, London, 2009).

55 See sources cited notes 51 and 57.

56 A/Res 63/117. The OP will come into force when it has received 10 state ratifications. At present (October 2010) there are 3.

57 See further for example MS Carmona *The obligations of ‘international assistance and co-operation’ under the International Covenant on Economic, Social and Cultural Rights. A possible entry point to a human rights based approach to MDG 8*, (2009) 13 *International Journal of Human Rights*, at 86-109; MA Bedggood “Who is my neighbour? International obligations and the contribution of human rights theory and practice” in J Boston, A Bradstock and D Eng (eds) *Ethics and Public Policy: Contemporary Issues* (VUW Press, Wellington, forthcoming 2010).

58 International Commission on Intervention and State Sovereignty *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa, IDRC 2001): See also, <<http://www.responsibilitytoprotect.org>> for the ICISS report and UN documents.

developed in the context of humanitarian intervention, for example in relation to the events in Darfur. What is notable is that it has led to a reconceptualisation of the concept of ‘sovereignty’ to include not only the traditional negative component of a state’s right to non-interference, but also a positive component of a state’s duty to protect its peoples. If that duty is not observed then the “international community” has an obligation to intervene. The concept has also been extended beyond the immediate context of “humanitarian intervention”, to encompass a responsibility on the international community to prevent atrocities occurring, to react with measures short of military intervention and to rebuild after any intervention. The United Nations Secretary General has also emphasised a three-pillar strategy for advancing R2P, recognising the primary responsibility of the state itself, the commitment of the international community to assist that state and a timely response when a state is failing to provide protection.⁵⁹

It has been suggested, somewhat tentatively as yet, that this doctrine might be adapted to support the role of the international community, and hence of states, in coming to the aid of those states or their peoples where the home state is simply unable to address all of their esc rights. While it is acknowledged that such an expansion or transformation of the R2P doctrine is not immediately likely, it does contain elements which might be adapted to the development enterprise.⁶⁰

Another direction in which IHRL may develop is in an extension of the grounds on which discrimination may be considered unlawful. The general concept of non-discrimination in international law is now approaching a *ius cogens* norm, as witnessed by recent statements of the Inter-American Court, the ILO and the CESCR.⁶¹ The latter body has begun, somewhat tentatively, to extend the cloak of anti-discrimination protection to encompass “sexuality” rights,⁶² a move already taken in some domestic jurisdictions⁶³ and endorsed and described by a meeting of international human rights experts⁶⁴ and recently by the United Nations High Commissioner for Human Rights,⁶⁵ although not yet by the United Nation’s “political” bodies, the General Assembly or the Security Council.

To return to the task of studying the law in context: part of that task is surely to look forward and attempt to recognise trends such as these with a view to promoting or reacting to them within the broader context of IHRL. In addition to giving thoughtful consideration to such possible extensions and developments, we must allow for the unexpected: who would have predicted the resurgence of fundamentalist religion and its clash with human rights? Or the ‘war on terror’, with its resultant resiling from commitment to the protection of well established civil and political rights? In cases such as these, the best preparation must be an understanding of the basic tenets of human rights and fundamental freedoms, and the need to uphold them.

59 “Implementing the Responsibility to Protect”, Report to the UN General Assembly, 12 January 2009, A/63/677.

60 E. A. and M. Hammer, “Yes we can? Options and barriers to broadening the scope of the responsibility to protect to include cases of economic, social and cultural rights” One World Trust, Briefing paper 116, 2009 and MA Bedgood, above n 57.

61 “Juridical Condition and Rights of Undocumented Migrants” Advisory Opinion OC-18/03, Inter-Am Ct HR (Ser A) No 18, [101] (2003); CESCR, General Comment 20, 2009; for the ILO see above n 41 and accompanying text.

62 General Comment 20, *ibid*.

63 Including New Zealand.

64 The Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity 2007 (Yogyakarta Principles). See <www.yogyakartaprinciples.org>.

65 Navanethem Pillay, United Nations High Commissioner for Human Rights “Ending violence and criminal sanctions based on sexual orientation and gender identity” Press Release 17 September 2010, <<http://www.ohchr.org/en/News-Events/Pages/DisplayNews.aspx?NewsID=10367&LangID=e>>.

IV. CONCLUDING REFLECTIONS

The study of the law in context, as it relates to IHRL, works, as it were, in two ways. The international context and law may be changing but should, or how should, those changes be reflected in the local society around us? Then also the law, as well as needing to reflect changes in society, can help to shape them, always providing that it does not attempt to move too far ahead of the values and ethos of that society. In this matter of IHRL and its relationship to domestic law, what is the law's role and how best can we prepare its practitioners to carry out that role?

As regards those developments, mentioned above, which are already clearly accepted as part of IHRL, such as those concerning the rights of indigenous peoples or of asylum seekers or of workers, these clearly need to be part of the law curriculum. Consideration needs to be given as to how those concepts can be adapted for incorporation into policy and practice in Aotearoa New Zealand, with due consideration for the uniqueness of its laws, history and institutions — that is how can those concepts be adapted to make them acceptable and hence enforceable here? So, for example, does the new Immigration Act sufficiently protect the rights of asylum seekers as outlined in the Refugee Convention, the CAT and the documents of the UNHCR? Does the current industrial regime, let alone changes recently proposed to it, adhere to the rights enshrined in the ICESCR to which New Zealand has long been a party, or to those ILO Conventions which it has ratified, or those by which it is nevertheless bound? More broadly, are esc rights sufficiently protected in our legal system, and, if not, how could their status be improved? These are all crucial questions for lawyers, for policy makers and for civil society, and therefore for the law student.

As regards those developments which are identified above as future possibilities, these need to be at least discussed as part of the law curriculum, given the time lag from study to the use of the skills acquired, to anticipate what might need to be done in the New Zealand context to implement them, should they come to pass, or to assist in making that happen. In a number of these areas the lawyer will be led into cross-disciplinary research and into a need to be able to identify the extent and limits of the role of law in policy making. Again for example, what are the underlying requirements for states as donors and do New Zealand's aid programmes conform to these, given its ratification of various relevant human rights instruments? Are our representatives to the World Bank, the IMF and the WTO properly briefed on their emerging responsibilities? What are New Zealand's rules as to the regulation of those MNEs either registered or operating in New Zealand? How far have our international obligations been taken into account in investment decisions taken by arms of the New Zealand Government? What is the Government's position on the adoption of the OP to the ICESCR, or to the development of the R2P doctrine?

In some instances it happens that domestic law is in advance of IHRL, as is the case with New Zealand law on the illegality of discrimination on the ground of sexual orientation. Here the question might be: what is the New Zealand Government doing to advance the adoption of a similar norm at the international level? In a similar recent example, New Zealand's representatives took a leading role in the development of the CRPD, where the domestic law had already recognised disability as a ground on which discrimination is illegal.

All of these aspects are legitimate questions for discussion in a course on human rights law and in the various other courses where human rights are a component. They introduce a rather more contentious issue which cannot be avoided in the teaching and study of many branches of the law: how far is that study of the law a study of the underlying values of a society and their reflection, however unacknowledged, in its structures? Does IHRL reflect an agreed set of global values and

do these mesh with our own? And what should change if they do not? What then is the role of the teacher of IHRL in promoting those values or in attempting to tease out the connections between them and the law and its institutions in Aotearoa New Zealand? This may be the most challenging question in our teaching of the law in its international context.

TE PIRINGA

BY MATIU DICKSON*

He kōrero-a-waha te tikanga a te Māori kia tukuna atu te mātauranga i waenga i ngā reanga o ia tangata. Ko ngā kōrero purākau me te whaikōrero ki runga i te marae ētahi o ngā tikanga mo aua mahi. Nō reira e ai ki te pepeha nei: Ko te kōrero te kai a te Rangatira.

Na te tiakina mai o ngā mokopuna e ōna korōua me ōna kūia ka āhei te tuku atu te mātauranga nei ki ngā mokopuna i ngā kōrero nei me ngā taurua o ngā tūpuna nei. He tāonga ngā mokopuna nō reira e tika ana kia manāki i a rātou i ngā wā katoa. Na ngā tūpuna ka tohua ko wai o ngā mokopuna e pai ana kia tohu mo ēnei mahi mātauranga. Ka āta matapaki rātou i te āhua o te mokopuna me tōna whakapapa.

Ko tētahi tikanga kia mau i te pūtake o te korero mo ake tonu, ko te pepeha, te whakatauki rānei. Mō ia iwi aua pepeha, e pa ana ki ngā āhuatanga katoa o te noho a te iwi. He kōrero tohutohu ki ngā uri kia pai ai to rātou noho me te kaupare ake ki ngā kino o te āo. E kiia nei ahakoa no mua noa atu te pepeha nei ko ona tikanga noniānei tonu.

Nō te tau 1858 ka tohua e ngā iwi ko Pōtatau te Wherowhero hei Kīngi mo te motu. Tuatahi, kāre ia i te whakaae nō te mea kua pakeke haere ia otirā 'kua tō te ra' ki a ia. Ēngari nā te kaha o te tautoko o ngā rangatira ki a ia, ka eke ia ki te ahurewa tapu o te Kingitanga. E rua ngā tau ki muri, ka mate ia ēngari i waiho ake ia i tenei pepeha (tongi ki a Tainui) ki ōna uri:

Te Piringa, kia paiheretia kōrua kia kotahi
Ko te whakapono hei kākahu
Ko te ture hei whāriki
Kia mau ki te aroha, ki te ture me te whakapono.

Kua mōhio hoki ngā rangatira Māori o aua wā kei te haere tonu mai ngā Pākeha ki te noho ki konei ahakoa te aha. Nō reira, he pepeha tēnei ki ngā iwi kia whakaritea mai ratou i a ratou anō mō aua mahi tūkinu a te Pākeha. Ko aua māramatanga mo te pepeha ko tēnei, kia noho tūturu te tangata hei Māori ko te aroha me te whakapono hei hoa māna. Ēngari kia mau tonu ki te ture. He ohore te mahi o tēnei kupu i te mea he kupu tēnei mō te ture Pākeha.

Ki ōku whakaaro kei te mōhio a Kīngi Pōtatau nei ma te ture te Pākeha e patu i te Māori, e whana-ko, e raupatu rānei i te whenua Māori. Ko ngā tino pūtake o te Kingitanga ko ēnei:

- Kia kōtahi ngā iwi Māori o te motu i raro i te mana o te Rangatira kōtahi;
- Kia mutu rawa atu te hoko o te whenua Māori ki ngā Pākeha, ki te Kāwanatanga rānei.

Heoi anō, ka whaiwhakāro ake a Kīngi Pōtatau, ma te ture ano te ture e akiaki i te ao Māori e whakatika hoki i ōna raruraru. Nō reira he ākina tēnei ki te iwi Māori kia mōhio ki te ture hei awhina atu i a rātou.

I te wā ka tō te whakaaro o te iwi me te Whare Wānanga kia tīmatatia te Kura Ture o Te Piririga, i tākohangia tēnei tongi e Te Arikiniui Te Atairangikaahu ki a Te Piringa. Kua kitea inaianei e te katoa kua ū te kaupapa o tēnei tongi ki ngā tūranga kaupapa o Te Piringa. He mea whakamīharo tēnei i te mea no mua noa atu te tongi nei me tōna kaitito.

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Māori have an oral tradition, that is, the transfer of knowledge within and between generations, which was carried out orally by way of story-telling or the more formal speech-making. *Ngā korero purākau* are the stories and *whaikōrero* is formal talking on the *marae* or ancestral gathering places of Māori people. The value of public speaking is expressed in the saying: *Ko te kōrero te kai a te Rangatira* – (The chiefs thrive on talking and debating).

Such a transfer of knowledge was considered ideal in the situation between grandparent and grandchild. This preferred relationship was because the constant care of the grandchild by his or her grandparents meant that every occasion was a learning situation for that grandchild. *Ngā tūpuna* are the elders/ancestors and *ngā mokopuna* are the grandchildren. Seeing the future was compared to looking into a *puna* (pool) and seeing the *moko* (reflection) of the individual. Thus, the grandchildren were the future of the tribe in a pool attended to by their elders

Except for the transfer of *tapu* or sacred knowledge, there was no formal tuition, rather the child learned by absorbing the knowledge and following the example of the elders. The behaviour, demeanor and character of the child were observed by the elders who chose the pathway of knowledge for that child, to suit and take advantage of the positive aspects of the child's character. The *whakapapa* or genealogy of the child also played a part, for Māori believed that one's *whakapapa* determined one's destiny and position within the tribe. *Whakapapa* means to put into layers. Each generation of an individual was layered, for example all of the generation of one's grandparents were referred to using the same term, *ngā tūpuna*. One's relationship to one's grandparents was the same to everyone else in that generation.

Often grandparents would take the eldest of the grandchildren to *whāngai* or foster because that child as the eldest, carried the responsibility of future leadership for the *whānau* (family) or for the tribe. *Whāngai* is described as an adoption according to Māori *tikanga* or custom. *Whāngai* children were cared for mainly to relieve stress within a family. The children lived with *whāngai* parents (usually grandparents but not always) and were given back when the situation as to their care had improved. The *whāngai* child of grandparents was a favoured child and treated accordingly. Ideally but not always, that child was the first-born male child. I was a *whāngai* in such a way by my maternal grandparents mainly because my mother was young when I was born. I was a special (some say spoilt) child too because I was named after my two maternal uncles who had died in World War II and are buried in Italy.

The *whānau* was the extended family unit inclusive of all the lines of descent close to the individual as in their *whakapapa*. Several *whānau* from a common ancestor formed a *hapū* or subtribe. Several *hapū* from a common ancestor further back in the *whakapapa* formed the *iwi* or tribe. The *hapū* was the usual unit of Māori social organisation which operated at *marae* level.

Tuakana and *teina* were terms for the older and younger siblings of the same gender of a family. The *tuakana* was usually chosen for leadership and the *teina* was expected to support the older but also given protection in return. The *teina* had fewer constraints on his/her behaviour and sometimes outshone the older because of this. Good and wise leadership by the *tuakana* brought *mana* (prestige) to the tribe and with it respect for the leader. But it also brought with it the burden of duty. *Mana* was achieved by performing good works for the people and for others. It was the barometer of the respect shown to the leader of the tribe. Bad or incompetent leadership meant the loss of *mana*. *Rangatira*, the word for chief, means to weave (*ranga*) a group (*tira*) together to form a coherent group under the authority of the chief.

Sometimes tuakana were not up to the task and their role was given to another sibling or other member of the whānau for the time being. However, the whakapapa of the tuakana line remained the same and often that line's leadership potential was resurrected in future generations.

There are many stories in Māoridom about the relationships and the disagreements between tuakana and teina siblings. For example in my tribal area of Tauranga Moana, Tōroa was the tuakana leader of the waka or canoe called Mataatua. Mataatua was part of what is called the Great Migration of waka from Hawaiki in the 1400s which brought the Māori people to Aotearoa/New Zealand. The descendants of Tōroa now live the Bay of Plenty region. Puhi was his teina. The two argued about leadership roles and according to the Mataatua traditions, Puhi took the waka, his whānau and his supporters to the North where they settled to form the Ngāpuhi tribe.

The story of Whatihua and Turongo is another which deserves mention. This is an incident from the Tainui waka tradition where Whatihua the tuakana tricked his teina Turongo. However, later history gave more importance to Turongo and his descendants who became the Kahui Ariki of the Kingitanga. So the teina achieved more mana in the end. In stories of female tuakana and teina the role has been more supportive of each other.

The knowledge keepers were referred to as the tohunga or those who had been chosen (tohu) for the task. Some knowledge was considered tapu, therefore the protocols for the learning of that knowledge and its retention was highly prescribed. An example of the tapu knowledge was that of genealogy or whakapapa. Whakapapa is described as being the glue with which Māori establish their social relationships. It was considered imperative that the whakapapa be learnt and recited without mistake. Such a mistake or hapa could bring misfortune to those reciting or to those whose whakapapa information it was. It was also thought that letting all and sundry know one's whakapapa potentially opened that person to the threat of makutu or witchcraft. One had to be very circumspect as to who knew one's whakapapa or where one recited it. If one was disrespectful when the whakapapa was acquired then it was thought that that person would not be able to remember the information. This attitude to learning was similar when learning the stories of the tribe.

One way of encapsulating the essence of a pakiwaitara or story was by the use of pepeha or whakataūāki. Pepeha and whakataūāki are translated¹ as meaning charms, witticisms, figures of speech, boasts and other sayings. They were tribal specific and covered all aspects of tribal life and the world around. They were pithy sayings that gave instructions to the listener as to how to conduct themselves or to explain certain circumstances or phenomena. For example, such pepeha were constructed by the wise elders of the tribe whose experience and instructions kept the members of the tribe safe.

Some say that they are like communications with the ancestors² and though they may have resulted from very old events of the tribe, the philosophy contained therein is still relevant in modern society. The language used in the pepeha is sometimes that of the ancient Māori world, as such words usually had several meanings and required the listener to explore all the possible interpretations.

There is a pepeha that explains this: "He iti te kupu, he nui te korero", which means that the word may be small or brief but it conveys a lot. As oral traditionalists, Māori knew the expediency of words as well as the beauty of its use. The composer of the pepeha was also considered as to whether it was important. Some pepeha were left as guidelines for the tribe when the leader was

1 H Williams *Dictionary of the Māori Language* (Wellington, GP Publications, 1997) at 277.

2 H Mead *Nga Pepeha a Nga Tipuna* (Wellington, Huia, 2003) at 4.

at his death bed. These were sometimes called *ohāki* or oral wills. Much was made of the ability to hear the oral directions from the tribal leader at that time that death was imminent because it set the future for the tribe on his/her death. It was particularly important where there might be potential for disputes as to leadership where there were several brothers or contenders for leadership, or where *mana* over land was contentious.

In 1858 Pōtatau Te Wherowhero was chosen as King for the Māori people. He was reluctant to accept because he felt that his life was nearly over but the chiefs of other tribes led by Te Heuheu Tukino of Ngāti Tuwharetoa and Wiremu Tamihana of Ngāti Haua persisted in the request or *tono* to Pōtatau. He met the criteria of leadership in his abilities and his *whakapapa* connection to all the tribes of the land. Pōtatau relented and became the first Māori King. As he had predicted, he died two years later but not without leaving *pepeha* to instruct his tribe. One of those *pepeha* is the subject of this article and it is this:

Te Piringa, kia paiheretia kōrua kia kotahi

Ko te whakapono hei kakahu

Ko te ture hei whāriki.

Kia mau ki te aroha, ki te ture me te whakapono.

Be united, spread the good word so that we are one (people)

Use your belief in God as a fine cloak

And the law as a decorated mat (for your feet)

Hold onto your love for each other, the law and your beliefs.

The *pepeha* hints at the inevitability of settlement of the country by the Pakeha settlers and like other Māori leaders King Pōtatau was preparing his people for when that would happen. *Paiheretia kōrua* means to be blessed by the Christian God so there is a reference to the growing influence of the Church among Māori. The reference is also to two people becoming as one, that is, the need to settle differences. The missionaries were the first to translate the Bible and to teach Māori the new ways, this new knowledge was keenly sought by Māori who put it to good use. The missionaries were initially trusted but by the time of the land wars, Māori leaders became suspicious of their true intentions. However, Māori generally saw goodness in the Christian teachings because it was not too different to the values they held under Māori *tikanga* law. *Whakapono* is the taking up of the new religions by Māori.

The kiwi feather cloak (*kahu kiwi*) became the symbol of chiefly status and was much prized. On formal occasions Māori leaders were expected to wear such finery as representative of their *mana* and that of the tribe. King Pōtatau's use of the word *ture* is unusual for it is a transliterated word of the Hebrew *torah* and refers to the introduced law, the Pakeha law. The decorated mats (*whariki whakairo*) were displayed on formal occasions, again to enhance the *mana* of the chief and the tribe. The patterns were intricate and woven by women weavers of the tribe for use by all tribal members.

I believe that the reference to the *ture* or the 'law' by King Pōtatau is a recognition by him that the law would play a part in enforcing Pakeha systems which it did, but also that the 'law' could be the answer to restoring the *mana* to Māori. Very quickly Māori leaders at that time, like Te Kooti and later Sir Apirana Ngata, realised that for Māori to cope with the change caused by colonisation, it required that they have a good knowledge of the introduced political system and

the law. This edict is not lost on some Māori students who enrol at Te Piringa as to the role of the law with their ancestors and in the modern context.

King Pōtatau was aware of the uncertainty his people might face if the Pakeha settlers pursued their desire for more land. The Kingitanga which he headed was established primarily to unite all Māori and to halt the sale of Māori land to the settlers and the Crown. However, the Crown considered the forming of the Kingitanga an act of rebellion and used this reason to provoke warfare with Māori. The consequences of the land wars in the end was that Māori land was confiscated and a system of land tenure imposed by the Native Land Courts made the alienation of Māori land easier for settlers and the Crown. Māori social organisation and leadership were in disarray as well. Māori population numbers fell so dramatically that it was thought that the Māori people would die out, but it was not to be.

During the discussions about starting a new Law School at Waikato University in the late 1980s it was thought that a new School should reflect the desires of the Māori constituency of the region and the University. Māori supported the setting up of the new School³ and were particularly enthusiastic about the foundation goal of the School that the bicultural nature of the law be taught. This included the teaching of the Māori tikanga system of law. Tika means to act correctly. Ngā tikanga refers to a set of values by which Māori behave properly, honestly, fairly and in good faith. The new School would be the first in the country to have such a goal in its establishment.

One of the year one papers offered is Legal Systems and Societies (LAWS106). The first six weeks of this paper covers Māori tikanga law. The students are taught the value systems Māori society was built on, like for example aroha (love), manaakitanga (caring), utu (reciprocity) and whanaungatanga (relationships). It means that the students need to learn new Māori words and ideas; the objective is to show students that Māori had a working legal system though it was not immediately obvious to the early settlers. Given that the law now affects Māori in a negative way above the proportion to their numbers in the community, ways are being sought where Māori value systems can be used to deal with Māori offenders. For example, the Youth Court now sits on marae as the Rangatahi Court when dealing with young Māori offenders. The purpose is to show these young offenders the tikanga of their marae and to reconnect them to their marae and to their whanau.

The mana whenua tribes of Waikato/Tainui were ardent supporters of the Law School because it was established in their rohe or region and the leadership of the time saw the new School as a good opportunity for their young tribal members to study the law. The head of the Kingitanga at that time, Te Arikini Dame Te Atairangikaahu played a prominent role at the eventual opening of the new Law School buildings in 1991.

As is typical of important traditional Māori leaders she also made several gifts to the venture. She gifted carved maihi (barge boards) called Te Rākau Kōtahi. These symbolised the carvings which recorded the oral stories of the elders. She also gifted the pepeha or tongi in the Tainui dialect of her ancestor the first Māori King Pōtatau. That tongi is now part of a waiata sung by staff and students at formal Māori occasions. In doing this the late Māori Queen symbolically cast her mana and protection over the new School. In 2010, the University approved a renaming of the Law School to Te Piringa – Faculty of Law to honour that gift and to celebrate the 20th anniversary of the Faculty.

3 Te Mātāhauariki Report (University of Waikato, 1990).

Next year in 2011, Te Piringa will offer the teaching of a first year law paper (LAW103) using te reo Māori as the language of instruction. This will complement the kaupapa Māori law papers and parts of papers already taught in Te Piringa. Te Piringa is the faculty of choice for Māori law students. Anecdotally, Māori students have mentioned to me that they enjoy being part of a law faculty that recognises their Māoriness and the Māori skills that they can contribute to the whanau of Te Piringa. Also, the mainstream of our law students are supportive of being taught the kaupapa Māori of the law and have come to accept that that is what happens when they attend Te Piringa – Faculty of Law. We are fortunate to have law staff who are supportive and capable of teaching the law in a way it was intended when the Faculty was first mooted.

A REALISTIC PROFESSIONALISM – THE NEXT STEP?

BY THOMAS GIBBONS*

I. INTRODUCTION

The 20th Anniversary of Te Piringa – Faculty of Law, is certainly something to be celebrated. From a difficult birth,¹ the School has consolidated and grown. I am proud to be one of its graduates.

I have written elsewhere on how the Waikato Law Review has itself reflected the School's three core goals of professionalism, biculturalism, and law in context.² In this article, I want to consider the topic of professionalism in more detail, and, in particular, the link between professionalism and the law school experience. I have had the benefit of reading drafts of the articles by Professor Wilson³ and Judge Spiller,⁴ both of whom taught me during my undergraduate LLB years. In Professor Wilson's case, she taught me Public Law A (constitutional law) shortly before she entered Parliament in 1999; Judge (then Professor) Spiller lectured in Legal Systems, and later consumer law, before he became Principal Disputes Referee and then a judge. Both were excellent lecturers, bringing a combination of theoretical and practical knowledge, though there are plenty of others who could be mentioned as well as being particularly influential – without wanting to single anyone out, in addition to Judge Spiller and Professor Wilson, the surnames Morgan, Manyam, Havemann and Gillespie were as important to my undergraduate studies as Barton and Farrar were to graduate research.

Some comment on my own background may be useful. Hamilton born and bred, I was enticed to law school not by any particular sense of social justice, but by “glamorous media images”, reading John Grisham's *The Rainmaker* at 16, when I was contemplating tertiary study; and recalling the brilliant courtroom battle in *A Few Good Men* (noting, of course, that both these media do have a sense of social justice about them, and that whenever I re-read *The Rainmaker*, I am reminded – if ever needed – that the practice of law is fundamentally about helping people). I initially enrolled in a Management degree, later adding Law, and then switching to a conjoint degree in Social Sciences and Law. I commenced my university studies in 1998, at a time when the economy seemed slow, and legal jobs hard to come by. I was therefore quite job-oriented (what Judge Spiller might call a “teleological” approach to my degree as a whole), and kept in mind I wanted a job at the end of degree. That said, within a few weeks of commencing my LLB studies, I had decided I wanted to be a legal academic, and read widely and academically throughout my stud-

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1 See Margaret Wilson “The Making of a New Legal Education in New Zealand: Waikato Law School” (1993) 1 Wai L Rev 1 at 4. Readers of Professor Wilson's article may or may not wish to summarise her comments on the Law Faculty's difficult beginnings as “Labour pains”.

2 See Thomas Gibbons “Waikato Law Review: The First Ten Years” (2002) 10 Wai L Rev at 39-54.

3 Margaret Wilson “Challenges to Legal Education: the Waikato Law School Experience” (2010) 18 Wai L Rev at 15-25.

4 Peter Spiller “Principles of Professionalism in Law Teaching and Judicial Practice” (2010) 18 Wai L Rev at 26-39.

ies, though I decided along the way I would need some practical experience on completing my degree. Alongside the compulsory LLB papers, I majored in History for my Social Science degree, focused on commercial law in my optional LLB papers, and did research in constitutional law for my research-based Honours papers. I had articles published in the *Waikato Law Review* and *New Zealand Law Journal* while a student. I also clerked with a large Auckland firm the summer before completion, and returned there when my studies were finished. Auckland and the large firm environment did not suit, and I returned to Hamilton in 2004 to a job at McCaw Lewis Chapman, a prominent Hamilton firm with a long history, and a strong relationship with the Law School.⁵

I have enjoyed being a practising lawyer more than I thought I could, with the client work stimulating, the client interaction enjoyable, and the office camaraderie positive and supportive. I became an Associate with the firm in 2006, and a Partner in 2008. I have also continued academic pursuits, with regular articles in the *Waikato Law Review*, contributions to *Hinde McMorland & Sim Land Law in New Zealand* and the *Laws of New Zealand*, and time as a tutor and lecturer in equity and securities law respectively. My colleagues may comment on whether I am a better lawyer or academic: I respectfully hope the former is the case.

With the influences of Te Piringa in mind, this article begins with a discussion of the topic of professionalism, with particular attention to how the term has been understood in Te Piringa's own contributions to legal education thought and practice. It continues with some historical comments on the New Zealand law school experience from the perspective of its students; a topic largely ignored by legal historians. These discussions serve to illustrate the inherent tensions in the notion of professionalism – between the legal profession, law students, and the law faculty. Aspects of this discussion draw on my own experience as a student of the School, as a graduate, and now as a commercial lawyer in Hamilton, the city in which Te Piringa – Faculty of Law is based. At the time of writing, I am also co-teaching a course at the Faculty while maintaining my legal practice. This personal perspective is more anecdotal than deliberately post-modern; it does however help demonstrate these tensions.⁶

II. THE GOAL OF PROFESSIONALISM

The context of the establishment of the Waikato Law School has been considered elsewhere, and it is not my intention to revisit it here. Clearly, the establishment of a law school is not a simple exercise, and the Faculty as it stands today is a testament to the dedication of those involved. What can be noted for these purposes is to remember that one of the key drivers for the School was a perceived need for “more lawyers”. Turning to Te Mātāhauariki - the Report of the Law School Committee – we see:⁷

5 Associate Judge David Gendall was a Partner at McCaw Lewis Chapman before becoming Dean of the Law School in 2000; Senior Lecturer Les Arthur previously worked at the firm; as did Judge Craig Coxhead and Stephen Hooper, both former Senior Lecturers. McCaw Lewis Chapman focuses its employment on Waikato graduates. The firm has particular strengths in commercial and business law, Māori legal issues, property law, and alternative dispute resolution.

6 Like Leah Whiu, there is an element of the “dichotomised experience” of coming full circle, from student, to graduate, to lecturer (albeit part-time). See Leah Whiu, “Waikato Law School’s Bicultural Vision – Anei Te Kuarahi Hei Wero I A Tatou Katoa: This is the Challenge Confronting Us All” (2001) 9 *Wai L Rev* 265 at 268. That article of Whiu’s is focused on the goal of biculturalism, as this article is more directly focused on professionalism.

7 Donald M Gilling, et al *Te Mātāhauariki: The Report of the Law School Committee* (University of Waikato, Hamilton, 1988) 1 at 27.

New Zealand is a society that needs not only more lawyers, but lawyers who must respond to the needs and concerns of people in a bicultural society We have found an increasing, accelerating demand for law graduates by the community, and by the legal profession. Side by side with this growing demand, there has been a perceptible slowing in the rate of production by law graduates.

Further, in an article on the establishment of the Waikato Law School and the (then very original) structure of the Waikato LLB degree, founding Dean Professor Margaret Wilson echoed the comments in *Te Mātāhauariki*, noting that the “dominant factor” in the decision to establish a new law school at the University of Waikato was “the shortage of law graduates to meet the demand from the profession for new graduates, especially in the regions south of Auckland.”⁸ That is, one of the key drivers for *Te Piringa* was a desire to train more lawyers to become members of the profession. Professor Wilson noted that of the three goals for the school, the first “was to provide a professional legal education, in the sense that [the LLB degree] complied with the requirements to practice law.”⁹ *Te Piringa* must therefore produce lawyers, and good ones. This may be difficult to measure, but in a qualitative sense, this has clearly been achieved. Waikato law graduates have secured jobs – and succeeded in them – in firms throughout the world: New York, London, Sydney, Melbourne, as well as New Zealand centres - including Hamilton.

Professionalism is of course about more than training lawyers for the practice of law, and a “professional legal education” is not just about meeting the requirements of Council of Legal Education. Professor Wilson recognised as much:¹⁰

It may be argued that the essence of being professional is to consider matters beyond the individual alone. The legal professional person must provide a competent legal service to her or his client, but advice tendered should always be in the context of the ethical rules and practices that accompany the legal rules. The behaviour of lawyers who responded to the new ideology [of the post-1984 period] by putting their clients, and on occasion their own financial well-being, above all else has brought the legal profession into disrepute. It has also raised the questions of who should teach this aspect of professionalism and how it should be taught. Academic institutions have not seen the teaching of legal ethics as their primary responsibility, as it is difficult to teach professional responsibility unless it is related to practical legal situations. The more conceptual the degree course becomes the more difficult it is to teach professional responsibility. Yet it is difficult to argue that a degree that is intended as a professional qualification should not address this issue.

This extract hints at the different ways that terms like “professional” and “professionalism” can be understood. Professor Wilson mentions a professional legal education as leading into the requirements to practice law, or membership of the legal profession: that is, a professional can be understood as a member of a profession.

Professor Wilson also mentions professionalism as being grounded in ethical behaviour: that is, a professional is one who behaves ethically. This can be seen as part of “training for the profession” (in other words, a professional is one who complies with Rules of Professional Responsibility, or Client Care Regulations); or can be seen as something more: that ethical behaviour demands scrupulously correct actions, the avoidance of unethical action, even on matters not covered by rules or regulations. Compliance with rules is not inherently the same as good ethics. These aspects - membership of a profession, compliance with the rules of that profession, and compliance

8 Margaret Wilson above n 1 at 4.

9 *Ibid.*

10 *Ibid.*, at 3.

with the practices and correct habits of that profession beyond those rules – would probably be at the heart of many understandings of professionalism.

However Professor Wilson goes further, noting that the “Waikato Law School is expected to provide an education that will train people to be not only lawyers, but legal professionals.”¹¹ These words can be read to mean that “legal professionals” are something apart from practising lawyers, and this last point is the crux of what I want to discuss here. “Being professional” is something law school should encourage and demand of its lawyers, whether or not they become members of “the profession”; and this of course means that being professional is about more than ethical behaviour: it is about effort-based behaviour. Professor Wilson mentions that professionalism includes being able to look beyond the individual. I submit that a professional is not simply a member of a profession, nor simply one who behaves ethically. Rather, a true professional must go even further, in providing excellent service, being client-oriented, having a focus on producing quality results, adhering to required ethics and professional practices, having a degree of toughness and resilience (including being able to deal with failure), being able to be business-oriented and pragmatic as well as rule-oriented, having a commitment to the task at hand, being able to work cooperatively as well as competitively, and with a mind to the importance of the work at hand.

In terms of curriculum, a course like Dispute Resolution, with time spent on exercises like client interviewing, can assist with this, but the focus for assessment purposes is very much on the one-off interview, not the strong relationship orientation many business and personal clients require. I recall David Gendall (now Associate Judge Gendall) emphasising in a professional responsibility module of Legal Systems the difficulty of conflict of interest situations in family transactions, or with long-standing clients. More could be done in some areas, like company law, to illustrate these difficulties. In a company law dispute, the question “who is the client?” may come to the forefront. Is it “the company”? A particular director? A particular shareholder? On what basis are the instructions received? To provide another example, in the first year Legal Systems and Legal Method courses, legal ethics were inculcated both at a conceptual and practical level (example: “those who hide library books won’t obtain ‘certificates of character’ required for admission as a barrister and solicitor”). However this is to treat professionalism as primarily something that exists between professionals: more can be done in this area to reinforce that being a good, “professional”, lawyer involves not just “thinking like a lawyer”, but also “thinking like a client”.

As professional services firm consultant David Maister has put it:¹²

A really professional consultant, I am told:

- Gets involved and doesn’t just stick to their assigned role.
- Reaches out for responsibility.
- Does whatever it takes to get the job done.
- Is a team player.
- Is observant.

11 Ibid, at 4.

12 David Maister “Professionalism in Consulting” in L Greiner and F Pulfelt (eds) *The Contemporary Consultant* (Thomson-Southwestern, USA, 2005) <<http://davidmaister.com/articles/1/3/>>. One of my colleagues describes the essence of these characteristics as “grunt”.

- Is honest.
- Is loyal.
- Really listens to the clients' needs.
- Takes pride in their work, and shows a commitment to quality.
- Shows initiative.

As Maister adds, this list “reveals that a high level of professionalism doesn’t stop with a foundation of technical qualifications and analytical skills. In addition to these basic attributes, the right *attitudes* and *behaviour* must also be in place, and these become the distinguishing factor for achieving real professionalism.”¹³

A legal education that is oriented towards professionalism, then, should look not only to its students becoming members of the profession, but also to the qualities that illustrate that professionalism. It is important to note that these factors are not related to whether legal education is skills-oriented or academically-oriented;¹⁴ rather, these requirements of “attitudes and behaviour” are applicable to all types of legal education, whether entirely theoretical, entirely practical, or somewhere in between.

III. STUDENTS AND PROFESSIONALISM

A. *Some Thoughts on Student Requirements*

My own experiences of law school, both as a student and as a part-time lecturer, reinforce these notions. While not all law graduates will become lawyers, it must be recognised, particularly in certain subjects, that many students do wish to become practising lawyers, and for those who do not, requiring professionalism remains important. Though some may find the suggestions awkward, “what if” lecturers were to:

- Require that students attend all classes (in the working world, turning up is required, whether one is in a law firm or not).
- Require that students be on time (turning up late to a client meeting would not create a good impression).
- Require that all assessment be completed on time (clients may make some allowance for work being late by reason of illness, but generally, a deadline is a deadline).
- Require that students engage in class discussion (clients do not generally like it when their lawyers shrug their shoulders; nor do supervising partners). In particular, Maister’s list would suggest that a degree of “enthusiastic engagement” is required.
- Require that work be error-free (clients do not appreciate errors; even one is more likely to lead to the client saying “fail” than “C pass”).
- Require a wider range of assessment, including (for example) letter-writing. Much of legal practice involves communication other than by way of exam answer or opinion: it requires clear and succinct letters between lawyers and clients, lawyers and other lawyers, and lawyers and other professionals. It

13 Ibid. See also generally, David H Maister, *True Professionalism* (Free Press, New York, 1997), drawing the distinction between a “professional” and a “technician”.

14 Compare Margaret Wilson, above n 1 at 1.

takes little to require that a student prepare a formal opinion; and then convert this to a letter to the client in easy-to-read language. It is in this context that many “immaterial facts” (such as that the client has an elderly mother who is sick) can become very material in the context of providing an appropriate professional service.

- Require a range of group work, with less emphasis on individual assignments. Collaborative or team-oriented group work is an essential part of both legal practice and the wider working world.

Some of these ideas will already be implemented by particular lecturers, or in particular courses: I can recall courses where attendance was required, where participation was graded, where assessment required strict compliance with presentation templates, and where work was required to be oriented towards a client rather than a lawyer. Some will also be difficult with which to comply: the Council of Legal Education continues to mandate that certain courses must have formal examinations, though formal examinations are “almost never” required in practice, unlike turning up, engaging in discussions, producing error-free written work, and writing letters clients can understand. What is argued here, however, is that there is a link between these kind of requirements and the professionalism required of lawyers, not only in formal rules of professional responsibility, but also in the habits and practices of lawyers, and in the expectations of clients – the kind of professionalism that Maister envisages.¹⁵

Needless to say, some of these proposed requirements concern the “attitudes and behaviour” of students, and some more directly relate to the attitudes and behaviour – or requirements – of law lecturers. Some of these considerations require a reassessment of the nature of university teaching. It is increasingly common to perceive students as “consumers” or “clients” of tertiary education.¹⁶ If students are to learn a client orientation, then they must come to see the lecturer as the client, someone who has an interest in quality documentation, attention and results.¹⁷ One should not stretch the analogy too far: some clients can be more challenging than any lecturer should be, but if the lecturer, rather than the student, is the “customer”, then some students will need to re-orient their perspective. This is likely to provide them with good professional training.

B. Reflections from Experience

Professionalism in this sense goes well beyond “Professional Responsibility”:¹⁸ it is a way of thinking, and acting. It has many facets, and the facets I wish to emphasise are best illustrated by a return to anecdote and student experience.

15 See also Mary Ann Glendon *A Nation Under Lawyers* (Farrar, Strauss and Giroux, New York, 1994) at 249, on how lecturers’ requirements of students may play a role in preparing them for the profession.

16 See J Goodman-Delahunty and B Walker “Academic Life: an interpersonal dimension” in Cantwell and Scevak (eds) *An Academic Life: A Handbook for New Academics* (ACER, Victoria, 2010) 160 at 165. JP Raines and CJ Leathers (2003) *The Economic Institutions of Higher Education* (Edward Elger, Cheltenham, 2003) at 172.

17 It is important to note that I do not propose the wholesale use of the Socratic method. Particularly in their first years of study, I believe students will benefit more from a combination of lecturing and small-group tutorial discussions (as works quite well in, say, History), than from the kind of factual recall (and some would say fear-oriented recall) that the Socratic method requires. Lecturing allows for the presentation of the lecturer’s knowledge, including, where appropriate, political, sociological, and economic approaches, in a way less possible with the Socratic method. Tutorials allow discussions based on lectured material, and beyond. That said, further on in the LLB, there is a place for more students to be expected to be able to summarise briskly cases, answer questions, and follow a line of reasoning in front of others. But I do not wish to get distracted: the point of this discussion is to orient the focus towards what is expected of students in terms of professionalism, rather than the way particular lecturers approach a class.

18 Kaye Turner “Teaching Professional Responsibility: the Waikato Experience” (1994) 2 *Wai L Rev* at 151-159.

I recall one Crimes lecture where we were examining the *Gay Oakes* case and “battered woman’s syndrome” in the context of provocation. The lecturer noted that Oakes’ partner was Doug Gardiner, “and he was buried in the garden”. The lecturer paused, smiled, and waited for laughter: it was forthcoming from the students present (students being only slightly less inclined to laugh at lecturers’ jokes than lawyers are at judges’). Some of the subject matter of law school can be fairly arid, and everyone deserves a good chuckle at that stage of the LLB. However, in the context of the practice a law, anything other than a straight face would be forbidden. Part of being a professional would be to be able to listen to the facts, express empathy, and seek to advance the client’s interests without any sign of the mental links that might be drawn. Law lecturers can help advance professionalism by taking a second pause after the laughter, and observing that any merriment of this kind would be entirely inappropriate in the context of a client meeting or defended hearing.

Another example comes from Land Law: the case *Efstratiou v Glantschnig*,¹⁹ where Mr Glantschnig sold his house at undervalue after returning from overseas to find his wife and her boarder in compromising circumstances. It has significance in land law as a “fraud” exception to indefeasibility. Law students love that one – perhaps partly because of the use of judicial euphemism – and a student text even refers to it as “that case”.²⁰ But it was not just “that case” for Mr Glantschnig: it was likely his only case, his only experience with the judicial system. The relevant lawyer, at the initial client meeting, could not have been permitted to fall off his chair laughing as though the client’s story were a Monty Python sketch. Rather, the lawyer would have been required to approach the problem empathetically, clinically, professionally (as an aside, it is notable that we still talk of “clinical legal education” rather than “empathetic legal education”, when the latter is often what clients really want). Humour can of course assist with learning: there is a reason that the case of *Efstratiou* is called “that case”, and a reason people remember it (and perhaps law students deserve more laughs). But to treat cases like this as opportunities to provide a “hook” for learning a “rule” is to miss a large part of their value, in helping students understand the importance of professionalism in their legal careers.

A final example is of a different kind. In one course, according to anecdote, a relatively large number of students obtained an extension on one of the assignments. One can surmise that law lecturers tend to be more forgiving of tardiness than clients; needless to say, I believe that keeping to deadlines is an important aspect of professionalism. In fact, my own views go further. It might be common in a university environment for a student to be given, say, three weeks to complete a written assignment. To prepare the student properly for legal practice, the day before that first assignment is due, a second assignment should be set, also due the next day. Client demands can be unpredictable, and the earlier this kind of lesson is learned, the better.

It is acknowledged that many LLB graduates take on jobs and careers other than the private practice of law. Some other environments are more forgiving. However, large numbers of graduates do commence law school envisioning themselves as future lawyers, and even though many might leave the profession, law schools still have a place in preparing them for careers within it. It is important to note that these ideas are not about requiring something more of students, but rather of requiring something different of students: a mindset change about the requirements of professionalism in any kind of job, task or role.

19 *Efstratiou v Glantschnig* [1972] NZLR 594.

20 Andru Isac, *Butterworths Student Companion: Land Law* (2nd ed, Butterworths, Wellington, 2001) at 37. This phrasing has been removed from the current (4th) edition.

IV. THE NEW ZEALAND LAW STUDENT EXPERIENCE

There is voluminous overseas literature on the experience of being at law school.²¹ In New Zealand, various studies have examined the history of New Zealand legal education,²² or the experiences of particular groups of students,²³ but the literature base is much smaller. This section of this article does not attempt to provide a fully rounded or contextual view of this law school experience. Rather, it considers a series of anecdotes. There are a number of limitations on the use of these anecdotes. Many are part of a memoir, and therefore contain an element of a “rose-tinted glasses” perspective on the relevant writer’s own past. It can also be suspected that not all experiences are usual: a number of those who have written memoirs are prominent for reasons other than their legal careers, and some have been involved in politics, for example, and may therefore be atypical. In addition, no particular attempt is made to contextualise these experiences. Rather, their main use is to show that “no one is alone”: others have shared the joys, difficulties, and frustrations of law school, and also to draw attention to the specific elements of the law school experience.

A. Workload

Law school is hard work: this is presumed by most law students to be deliberate – perhaps as preparation for the challenges of practice – and seems to be something celebrated by incoming law students, who joyfully carry heavy piles of books, or happily spend hours in the library, eschewing other pursuits. Those students who study conjoint degrees have an easy comparison: I personally found each LLB course involved significantly more work than an equivalent level course for my BSocSc, a view shared by 1980s student Peter de Bres, who thought the LLB workload “one and a half times an arts degree”, with an “enormous” annual workload.²⁴ Similarly, 1960s student (and later Minister of Finance) Ruth Richardson saw the study of law as part of a “political apprenticeship”, and described her law school years as “socially abstemious”;²⁵ and Peter Williams, who attended law school in the 1950s, “swotted” and “worked hard”, avoiding extra-curricular activities to complete his degree.²⁶ Of course, it is easy to suspect as a law student that while you find it hard, others find it easy. Bryan Gould’s recollection of how he scored 94 per cent in an exam he almost skipped is one story that may confirm this suspicion.²⁷

Does this mean Richardson was “professional” about her studies, and Gould not? Perhaps, though some would see the ability to “wing it” as being as important a component of professionalism as hard work. My own assessment is that being a good lawyer is hard work (though very enjoyable), but that there is more to it than that. Qualities like rapport and empathy with clients are also important – and we could ask, for example, how the “abstemious” Richardson would have fared in private practice. The challenges of law school in terms of workload are part of preparation

21 See Scott Turow *One-L* (Farrar, Straus and Giroux, New York, 1988).

22 See Peter Spiller “The Legal Profession” in P Spiller, J Finn and RP Boast *A New Zealand Legal History* (Brookers, Wellington, 1995) at 263; Geoff McLay “Toward a History of New Zealand Legal Education” (1999) 30 VUWLR at 333.

23 See Makere Papuni-Ball “Caught in the Cross-Fire: The Realities of being Māori at a Bicultural Law School” (LLM thesis, University of Waikato, 1996).

24 Peter De Bres “The LLB degree course: some observations by a ‘young’, yet ‘not so young’ graduate” (1986) 62 NZLJ 344 at 344-347.

25 Ruth Richardson *Making a Difference* (Shoal Bay Press, Christchurch, 1995) at 18-19.

26 Peter Williams *A Passion for Justice* (Shoal Bay Press, Christchurch, 1997) at 28.

27 See Bryan Gould *Goodbye to All That* (Macmillan, London, 1995) at 20-21.

for the profession. But good law students – like good lawyers – must also work smart. Therefore, “hard work” – particularly if seen as being able to read a multitude of cases – can both reinforce and detract from inculcation in professionalism. In a professional career, what really matters is effectiveness.²⁸

B. Broader Perceptions

I found the first few weeks of law school an eye-opening experience, with new concepts, new jargon, and new ideas. Legal Systems introduced the language of law: the courts, the appeals, the *stare decisis* and *cur adv vult*. Legal Method introduced the idea of “thinking like a lawyer”, the material/immaterial facts split, and the nature of legal reasoning. Law and Societies introduced a new world of concepts, including, *inter alia*, what it might mean to be “Pakeha”, the reforms of the 1980s-1990s and the “New Zealand Experiment”, the “limits to growth”, “hegemony”, “neo-liberalism” and a range of other polysyllabic terms.²⁹ The latter course, to the befuddlement of many contemporaries, remains my favourite from law school, and certain frameworks from that course still guide aspects of my worldview (though I am probably now more conservative than that course would have permitted). Perhaps the profession demands a degree of conservatism: a notion some would criticise, and others acclaim; still others might say the reality is otherwise. In terms of political outlook, I believe Law and Societies provided certain frameworks for understanding the world that were oriented towards a “progressive” and/or “liberal” approach to political, social and personal issues: for example, the role of social factors in inequality. Reflection on these factors and the persons raising them (that is, the identity politics of academics), wide reading, and perhaps a greater degree of life experience led me to question some of these frameworks. However, these conceptual frameworks have helped make me a better professional, through a better ability to understand and reflect on the role of law.

Others took different things from their law school experience. Professor Wilson, the founding Dean of the Law School, wrote of her 1960s legal education:³⁰

Through studying law I gradually came to understand the deliberative nature of legal decision making. The legal system was created by men who held positions of power in politics or the legal system. It served their interests and what they perceived to be the needs and interests of the community. If the legal system was to be changed, it would be necessary to influence these men or to replace them with people who were sympathetic and understanding of a different world view.

Prominent lawyer Mai Chen was less confident of her views when she attended law school in the 1980s:³¹

Even when I wanted to question the impact of certain laws on the oppressed, and to query the ‘fairness’ of laws, I sometimes said nothing. When you are naturally an outsider, the desire to conform and to be one of the crowd is very strong I did not fit the mould and I agonised over whether I had any contribution to make to the law.

28 See generally Ronald J Baker *Measure What Matters to Customers* (Wiley, Hoboken NJ, 2006) especially chapter 4.

29 See Paul Havemann “‘Law in Context’: Taking Context Seriously” (1995) 3 *Wai L Rev* at 137-162.

30 Margaret Wilson *Labour in Government 1984-1987* (Allen and Unwin/Port Nicholson Press, Wellington, 1989) at 5-6.

31 Mai Chen “Discrimination in New Zealand: A Personal Journey” in E McDonald and G Austin (eds) *Claiming the Law: Essays by New Zealand Women in Celebration of the 1993 Suffrage Centennial* (Victoria University of Wellington Law Review and Victoria University Press, Wellington, 1993) 137 at 144.

Perhaps no one “fits the mould”; perhaps part of the point is that law school is supposed to mould the student. Even those who might not perceive themselves as naturally “outsiders” find law school difficult and agonising. That said, my legal education certainly recognised the role that “insiders” and “outsiders” (whether self-perceived as such or not) can play in our legal system.

C. Feeling the Pain

One senses that Chen’s experience was not entirely enjoyable. One student of the 1970s (and it is perhaps significant that this was written about while being experienced, rather than being a memoir), observed that “males are more happily adjusted to the competitive environment of the law school, and females generally are not”.³² I cannot prove otherwise, but while I look back very fondly on the law school experience (and have in fact returned for a part-time LLM), I do not believe law school is challenging only for certain groups of people. One verse read while working in the library sums up the challenges of law school, which become particularly acute at about the third year:

I wish I’d never been to law school

I wish I’d never known the truth

That law school takes your humanity

While it robs you of your youth

A few years in practice makes one less cynical, but to say that law school is hard for everyone is not to seek to marginalise the experiences of those in particular groups; it is simply an effort not to lead some to assume that others find it easy. That said, not everyone finds law school a challenge. As a mature, part-time student in the 1980s, Anne Holden’s greatest frustration was carparking.³³ A number of contemporary students will, no doubt, be able to relate to that – and perhaps many practising professionals as well.

V. CONCLUSION

As described above, it is easy to hold the view that one of the reasons the LLB workload seems so high is that law is deliberately designed as a challenging degree, so that students are ready for a challenging career. Demanding professionalism of law students can be seen as “part and parcel” of what they sign up for. A career in law is challenging: it requires learning, commitment and *professionalism*.³⁴

To date, Te Piringa has met the goal of professionalism in a number of ways: through an LLB that meets the requirements of the Council of Legal Education, and so provides (most of) the formal training students require to enter the profession. It produces good lawyers, who have achieved success in their roles and – presumably – in client service. It has emphasised practical skills, such as mooting in Legal Method, and client interviewing in Dispute Resolution. It has provided a legal education strongly grounded in professional ethics and professional responsibility, developing

32 Anonymous “Law: Sexist Beginnings” *Broadsheet*, 37 (March 1976) 20 at 21-22.

33 Anne Holden “Law in the Slow Lane” in E McDonald and G Austin (eds) above n 31 at 152.

34 Karl Llewellyn “Elements of the Law” (1957) <<http://www.law.uchicago.edu/audio/llewellyn101857>>, a sound recording of Llewellyn contains insightful thoughts on professional challenges facing lawyers within the first five minutes.

specific courses in these areas, although there is more to be done. In particular, students need to be oriented towards the requirements of being “good professionals”, seeing the course lecturer, rather than themselves, as the “client” or “customer”. They must appreciate the contextual elements of a law degree, and take a teleological approach that a law degree is preparation for a professional career (whether as a lawyer or not). This is not an easy exercise. Student practices and expectations are formed over the whole degree, and the requirements of a Maister-like professionalism cannot simply be introduced in a particular course.³⁵ Rather, much as “hard work” is perceived as embedded in the degree, so too must professionalism, and a service orientation, be embedded into student requirements and understandings from the beginning of law school. Llewellyn himself followed this approach;³⁶ and to reiterate, this approach is not about requiring more of students, but rather something *different* of students: a more realistic professionalism.

The title of this article draws on that of an article by Karl Llewellyn, a famous legal scholar and law reformer, and one of the most prominent legal realists.³⁷ Llewellyn said on many occasions: “technique without ideals is a menace, but ideals without technique is a mess.”³⁸ In the law school of the 21st century, both ideals and technique are critical, but professionalism – including these ideas, and also going beyond them – must remain an essential part of Te Piringa’s mission and practices.

35 Similarly, it may not be easy for lecturers to take a different approach: professionalism as a law teacher requires, at least to some extent, that students are nurtured, that passions for areas of law are shared. A cold, clinical, “demanding” approach to teaching may serve to advance student professionalism, but may also discourage their engagement and enjoyment. In other words, the kind of approach advocated here required careful “reflexivity” (see Havemann, above n 29) on the part of both students and lecturers.

36 See Karl N Llewellyn *The Bramble Bush: on our law and its study* (Oceana Publications, New York, 1960 [reprint of 1930 edition]).

37 The title of this article draws on Karl Llewellyn “A Realistic Jurisprudence – The Next Step (1930) 31 Columbia LR at 431.

38 Ibid.

LIVING WITH THE WAIKATO FOUNDATION PRINCIPLES, 20 YEARS ON

BY PROFESSOR JOHN H FARRAR*

I was Dean of the School of Law from 2004-2008. I was near to conventional retirement age but was approached over the Deanship. I had always been interested in the Waikato experiment of establishing the first new law school in New Zealand since the 19th century and accepted the Deanship as something of a challenge.

The Committee established by the University to consider the setting up of a Law School produced the report, *Te Mātāhauariki*, in 1988. This report clearly identified three objectives for a Waikato Law Degree.¹ These objectives have been subsequently labelled principles.² They were:

1. To provide a professional legal education;
2. To teach law in its context which meant the social, economic and political environments within which the law was made and practised;
3. To develop a bicultural approach to legal education so that the Māori perspective was reflected in all aspects of the curriculum and the activities of the School.

It is unusual for a New Zealand law school to have clearly stated objectives or principles and once identified it did not necessarily prove easy to reconcile the three objectives. Also objectives can be changed but when they are classed as principles they perhaps are more resistant to change. The history of the first 20 years of the Waikato Law School reflects this tension.

I. OBJECTIVES OR PRINCIPLES?

According to the *New Shorter Oxford English Dictionary*,³ an objective seems to have originated as a military term – the point to which an advance of troops is directed. In everyday usage, it basically means something that one's efforts or actions are intended to attain, something in the nature of a purpose, goal or target. Thus it is a practical concept of decision-making and management and it is implicit in this that objectives can and do change in the light of experience.

Principles on the other hand are more of a philosophical nature. Aristotle in his *Metaphysics*⁴ regarded a principle as a starting point for reasoning. Professor Ronald Dworkin⁵ thought of a le-

* Bond University and the University of Auckland. Dean of Waikato Law School 2004-2008.

1 Margaret Wilson, "The Making of a New Legal Education in New Zealand: Waikato Law School" (2001) 1 *Wai L Rev* at 1, 4, 18.

2 When I came in 2004, they were sometimes referred to in this way although I notice that the language of *Te Mātāhauariki* and Margaret Wilson was much less constricted.

3 Vol 2.

4 Book II, Part 2.

5 Ronald Dworkin *Taking Rights Seriously* (Cambridge MA: Harvard University Press, 1977) at 22, 82.

gal principle as some ethical standard recognised by the law and contrasted this with a legal policy which was an economic, social or political goal at which the law is aimed.

Judged by these criteria, professionalism seems to be more of an objective than a principle in either sense. Biculturalism seems to be a social or political goal or policy rather than a principle and law in context is more of an approach to legal education. As such, it can be an objective but it is hardly a principle.

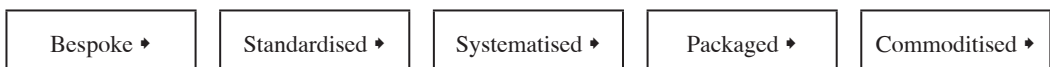
II. PROFESSIONALISM

All law schools espouse professionalism to some extent and there is an increasing tendency to teach legal skills. Some law schools, particularly those that adopt a law context approach, often adopt a very critical approach to the legal system and the legal profession. However, to do so is not inevitable. One of the most impressive law teachers that I had was Sir Otto Kahn-Freund. Sir Otto had been a Labour Court Judge in Weimar Germany before the rise of the Nazis and was a man of broad liberal culture. When I was a student at University College London he was a Professor at the London School of Economics and I attended his lectures. Later he was appointed Professor of Comparative Law at Oxford. He always fitted law into its social, economic and political context and he was often critical, but his criticism had an intellectual rather than an ideological basis, although I think that politically he was probably a socialist or social democrat. His criticisms were usually constructive,⁶ as I have tried to be.

The traditional roles of a lawyer have been to act as adviser, organiser of transactions, advocate and resolver of disputes. From the beginning the Waikato Law School, more than any other New Zealand Law School, has put emphasis on the skills necessary to fulfil these professional functions.⁷ In this respect it shared something in common with the Bond Law School⁸ of which I have also been Dean.

In the last 20 years, most people, including lawyers and law students have become computer literate. Developments in technology have made the law more accessible to ordinary people. Some of the mystery which often surrounded law and legal process has been removed. Legal services have undergone and are undergoing change. The modern emphasis is less adversarial and more cooperative, with the rise of informal networks and the sharing of information.

Richard Susskind in his book, *The End of Lawyers? – Rethinking the Nature of Legal Services*⁹ considers this question and summarises his thinking in the following diagram:



6 Sir Otto Kahn-Freund “Comparative law as an Academic Subject” (1966) 82 LQR 40 and “On Uses and Misuses of Comparative Law” (1974) 37 MLR1. See also *Selected Writings* (Stevens, London, 1978).

7 Wilson, above n 1 at 18-19.

8 Bobette Wolski *Skills, Ethics and Values for Legal Practice* (2nd ed, Lawbook Co, 2009). Bobette Wolski “Why, how and what to practice: integrating skills teaching and learning in the undergraduate law curriculum” (2003) 52 Journal of Legal Education 287.

9 Richard Susskind *The End of Lawyers? – Rethinking the Nature of Legal Services* (OUP, Oxford, 2008) at 29.

The first is the traditional one-on-one professional service, tailored to the need of the particular client.¹⁰ As time goes by there is a tendency to standardise legal transactions – such as conveyancing of property.¹¹ The third stage of systematising involves the reduction of many transactions to systems which are stored online.¹² Some of these can even be purchased commercially.

Susskind then talks about the packaging of services for clients where document assembly systems are given to the client. This is a way of the lawyer entering the client's domain, but it can also be thought of as a form of "do it yourself". From this, the transition is to the final stage – commoditisation.¹³ This is where a legal service is made available online to a broader public. An example would be debt collection systems. Other examples are standard form contracts.

The challenge for all law teachers is how to accommodate the information revolution. There is a growth of e-learning. People are increasingly accessing online material in lectures. "Death by PowerPoint" is a common format for lectures.¹⁴

At Waikato Law School these developments enabled the introduction of video streaming of lectures of the first two years of the LLB to our satellite campus in the Bay of Plenty. This initiative arose out of the need to expand the School and to meet the needs of students in that area. It was difficult to meet that need with fulltime staff and video streaming met the needs of those students. Lectures became accessible to students at any time and were coupled with face to face tutorials required by the Council of Legal Education. This meant that many mature students could enrol for law outside a major centre for the first time. There was some resistance to this from the other law schools¹⁵ but it is arguably the way of the future. In the Waikato environment the first two years of the degree can lead to a Diploma in Law as a self standing qualification. This format has ongoing appeal to people who do not necessarily contemplate a legal career but wish to have some knowledge of the law. Thus the Waikato Law School has been a pioneer and innovator.

Whether technology is improving legal education and the legal profession is debateable. My feeling is that we are winning some things and losing others. There is easier access to a range of material but a lack of willingness to do in depth research in a library, and what is more important, a lack of willingness on the part of clients to pay for it. Our sense of professionalism may need to change and be less scholastic in the future. It has been stated¹⁶ in a recent study by a group from University College London, examining the use of two popular research sites, that users are not reading on line in the traditional sense. New forms of 'reading' are emerging as users 'power browse' through titles, contents pages and abstracts for quick wins. "We are evolving from being cultivators of personal knowledge to being hunters and gatherers in the electronic data forest."¹⁷

10 Ibid, at 29.

11 Ibid, at 30.

12 Ibid, at 30.

13 Ibid, at 31-2.

14 JH Farrar *Legal Reasoning* (Thomson Reuters, Wellington, 2010) at ch 20.

15 This was largely based on conservatism and the feeling that students would miss face to face encounters with lecturers. It reflected a lack of understanding of modern students, and their preferences.

16 University College London, "Information Behaviour and the Researcher of the Future," 11 January 2008, <www.ucl.ac.uk/slais/research/ciber/downloads/ggexecutive.pdf>.

17 Nicholas Carr *The Shallows – How the internet is changing the way we think, read and remember* (Atlantic Books, London, 2010) at 138.

III. BICULTURALISM

Biculturalism in sociology involves two originally distinct cultures in some form of co-existence. When one thinks of biculturalism one thinks of New Zealand and Canada where biculturalism often entails bilingualism. The partnership between Māori and Pakeha was envisaged by the Treaty of Waitangi. The history of the Treaty and its significance is a massive topic in its own right and is the subject of many books and articles. The most recent is *The Treaty of Waitangi in New Zealand's Law and Constitution*¹⁸ by Matthew Palmer in 2008. In his book, Palmer shows how the English and Māori translations of the Treaty differ in significant respects and how there are differences between Waitangi Tribunal findings, judicial interpretation and Cabinet decisions. Nevertheless, there is a core of common sense emerging. Palmer summarises this as follows:¹⁹

The Treaty of Waitangi, and its principles, should be interpreted broadly, generously and practically, in new and changing circumstances as they arise;

As an agreement upholding the Crown's legitimacy, in governing New Zealand for the benefit of all New Zealanders, in exchange for the Crown's active protection of the rangatiratanga, or authority of hapu, iwi and Māori generally to use and control their own interests, especially in relation to land, fisheries and te reo Māori and their other tangible and intangible taonga or valued possessions.

The Crown must also ensure that Māori enjoy the rights and privileges of pakeha New Zealanders.

Since this agreement involves a continuing relationship akin to partnership between the Crown and Māori, the parties should act reasonably and in good faith towards each other, consulting with each other, compromising where appropriate, and reasonably redressing past breaches of the Treaty.”

This is an interesting and convincing attempt at synthesis.

In the history of the Waikato Law School, biculturalism proved to be a difficult goal. This was due to intrinsic difficulty in the concept and the fact that in the 20 years there have been shifts in the interpretation of the concept. It is arguable that there has been a shift from biculturalism to bi-ethnicism and then from bi-ethnicism to neotraditionalism.²⁰ Originally biculturalism was identified with post colonial theory and was associated with decolonisation, ethnic liberation and cultural revival.²¹ However, there was a shift of emphasis to separate ethnic identification²² and this was part of a general movement from class-based to identity-based politics.²³ It is arguable that the movement to ethnic discourse changed biculturalism in a fundamental way. Culture and ethnicity were merging and the ethnic groups' interests were politicised.²⁴ At this stage the idea

18 Matthew Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008).

19 Ibid, at 356.

20 Unpublished paper by Dr Elizabeth Rata, “The Failure of Biculturalism, Implications for New Zealand Education” but also see Leah Whiu, “Waikato Law School's Bicultural Vision – Anei Te Huarahi Hei Wero I A Tatou Katoa: This is the Challenge Confronting Us All” (2001) 9 Wai L Rev at 265. Leah's article draws on earlier work by Makere Papuni-Ball and Stephanie Milroy. Leah argues strongly for an indigenous research agenda, transformative theory of action and a feminist critique of how knowledge is valued. I valued Leah as a colleague and agree with some of her arguments but on balance I find Dr Rata's analysis convincing.

21 Rata, above n 20 at 3; Whiu above n 20 at 267.

22 Rata, *ibid*, at 4.

23 *Ibid*, at 4.

24 *Ibid*, at 5.

developed that non-Māori can never have a full understanding of Māori tikanga. This is in spite of the fact that most modern Māori are genetically part Pakeha.²⁵

The next stage of development was a shift from ethnic to tribal identity.²⁶ Although tribalism had always been a characteristic of Māori culture and politics, it has become particularly important with the Waitangi Tribunal Treaty settlements and tends to separate Māori from Māori. As such, it is a potentially divisive factor in both Māori and national politics. It is difficult to reconcile these developments with the idea of International Human Rights, where the individual rather than the group, has hitherto been regarded as the bearer of human rights and citizenship.²⁷ However, the United Nations Declaration of Indigenous Peoples Rights 2007 now gives some recognition to group rights.²⁸

Biculturalism is often contrasted with multiculturalism. Multiculturalism is the acceptance of multiple ethnic cultures²⁹ and since 1987 New Zealand has pursued a multicultural immigration policy. New Zealand, like Canada, has got itself into a complex situation because of a clash of bicultural and multicultural policies. By contrast with New Zealand and Canada, the United States of America does not have a clear policy on multiculturalism. Instead there is an idea of a melting pot in which all the immigrant cultures are mixed and amalgamated without state intervention. When I was Dean, I asked the Te Piringa group to give me their views on how biculturalism and multiculturalism could be reconciled. There was a long silence. Perhaps they cannot be reconciled.³⁰ No wonder then that successive Deans of the Waikato Law School have faced difficulty in the implementation of this objective.³¹

On the other hand this question has proved to be of interest to an increasing number of international students who have studied at Waikato. A lot of this interest sprang from the appointment of Professor Michael Hahn as Director of International Relations and Dr Robert Joseph's new paper on indigenous people's rights and international law. I would also like to pay tribute to the pastoral work done by former Waikato Law School law lecturer, Doug Tennent, particularly with Pasifika students.

25 Standard Classification of Ethnicity, 2005.

26 Rata, *ibid.*, at 8.

27 Sarah Joseph and Adam McBeth (eds) *Research Handbook on International Human Rights Law* (Edgar Elgar, Cheltenham, 2010); Shelley Wright *International Human Rights, Decolonisation and Globalisation* (Routledge, London, 2001) at ch 2.

28 New Zealand has now signed this declaration.

29 Wikipedia – "Multiculturalism" Accessed 6 September 2010, 1:45 pm; Christine Inglis Multiculturalism: New Policy Responses to Diversity, Management of Social Transformation, UNESCO Policy Paper No 4.

30 However, for an attempt to reconcile them under the Rule of Law see Justice ET Durie, "The Rule of Law, Biculturalism and Multiculturalism" (2005) 13 Wai L Rev at 41. 'Justice, Biculturalism and the Politics of Law' in Margaret Wilson and Anna Yeatman (eds) *Justice and Identity: Antipodean Practices* (Bridget Williams Books, Wellington, 1995) at 33.

31 Wilson, above n 1.

IV. LAW IN CONTEXT

The study of law in context often overlaps with law and society and socio legal studies. In fact there is conceptual overlap but not identity in these approaches.³² They are also linked with the sociology of law but not all law teachers who adopt a law in context approach think of themselves as sociologists.³³ I was an original member of the Socio Legal Group of the then Society of Public Teachers of Law in the United Kingdom. This was in the 1970's. Since then, law in context has tended to hive off into separate approaches – sociology of law, socio legal studies, law and economics, critical legal studies and feminist legal studies. However, as a general approach it is arguable that we are all law in context teachers now. It is rare for law to be taught in an entirely “black letter” way without reference to context. Nevertheless, as Philip Selznick has stated “in the background to any question of context is the question of transcendent values which need to be identified.”³⁴

Members of the Waikato Law School have participated actively in law and society conferences in Australasia, and when I was Dean, the intention was to form an Australasian Law and Society Association and possibly to convert the New Zealand Yearbook of Jurisprudence into a Law and Society Review. Somehow this has not happened which is a pity.

V. CONCLUSION

The first 20 years have been a brave experiment which is a history of success and failure. The Law School has established itself with the local profession and judiciary and enhanced its national and international profile. It has suffered from a lack of resources from the beginning and I hoped to do something about this. At one stage there was the possibility of securing matching funding from the Labour Government towards a Law and Management Building which would have provided much better facilities for the Law School. The University failed to pursue this at the appropriate time. The matter of Te Mātāhauariki Research Institute represents another instance of a lost opportunity. When I became Dean I found this bore an uneasy relationship to the School, but was successful in recruiting Professor Alex Frame as Professor of Law and Director of the Institute. Alex was strongly committed to the bicultural goal and very active in research on the Te Mata-punenga project³⁵ but relied on the University to secure continued funding for research. This did not happen and we are still waiting to see the publication of the records of the last rites of that Institute. These matters leave me with a strong sense of regret.

The Waikato Law School will only succeed in the future if there is greater commitment by the University and New Zealand to its mission. At a gathering at Taupo in 1998 Alex Frame called for “a wide-ranging, careful, co-operative cultural scholarship which refuses to succumb to adversarial posturing, political window-dressing, bureaucratic convenience, academic rivalry, or racial

32 Philip Selznick, “‘Law in Context’ Revisited” (2003) 30 *Journal of Law and Society* 177; Roger Cotterell and Philip Selznick, “Selznick Interviewed: Philip Selznick in Conversation with Roger Cotterell” (2004) 31 *Journal of Law and Society* 291-317.

33 MDA Freeman *Lloyd's Introduction to Jurisprudence* (8th ed, Sweet & Maxwell 2008) at 858.

34 Selznick, above n 32 at 185-6.

35 This is a compendium of reference to the concepts of Māori Customary Law.

prejudice”.³⁶ I say Amen to that and support it as a pathway for the evolution of a common law for Aotearoa/New Zealand.

³⁶ Alex Frame *Grey and Iwikau – A Journey into Custom, Kerei Raua Ko Iwikau Te Haerenga Me Nga Tikanga* (Victoria University Press, Wellington, 2002) at 75; see also Andrew Sharp, “Why be Bicultural?” in Margaret Wilson and Anna Yeatman (eds) above n 30 at ch 8.

AN ACKNOWLEDGEMENT

The article by Dr Robert Joseph, titled 'Re-creating Legal Space for the First Law of Aotearoa-New Zealand' which appeared in the last issue of this Journal (Waikato Law Review, Vol 17 (2009), p 74) included a section headed 'General Customary Law' from pages 84-87 which, as is recorded in footnote 63 by Dr Joseph, 'draws heavily from the work of Te Mātāhauariki Institute... at the University of Waikato'. It was unfortunately not made sufficiently clear, however, that the section reproduces substantial text from the *Introduction* to *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law*, authored by Richard Benton, Alex Frame, and Paul Meredith and presented to participants at the Tūhonohono Symposium at Hopuhopu in June 2007.

The Editors of the Waikato Law Review and Dr Robert Joseph apologise to Dr Richard Benton, Dr Alex Frame, and Mr Paul Meredith for the failure clearly to attribute this material to them as joint authors, and they in turn accept that the failure was inadvertent on the part of their friend and colleague Dr Joseph and the Editors.