

# WAIKATO LAW REVIEW

TAUMAUARI

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## EDITOR IN CHIEF'S INTRODUCTION

Again this issue of the Waikato Law Review encompasses articles that cover a wide diversity of topics. These range from the Harkness Henry lecture from retired Chief Coroner Judge Neil MacLean, reviewing the developments in coronial practice during his years as a coroner; to consideration of the human rights issues surrounding female genital mutilation; to the legal aspects of protecting your digital assets.

The highly respected Harkness Henry speaker Judge Neil MacLean's comprehensive review of events during his career also contains his recommendations for future changes to the coronial process. I extend my thanks to Harkness Henry Lawyers for continuing to support Te Piringa, the Waikato Law Review and making this important milestone lecture possible.

Further scholarly attention in this year's edition includes the consideration of the role of legal professional privilege in New Zealand's taxation law environment, and a challenge to the use of the "illegality exception" in international contract law. The final discussion reviews the need for a more cooperative approach, as a key to reforming the civil justice system.

I wish to thank our contributors for their valuable work.

I would like to thank Juliet Chevalier-Watts for her many years of service as Editor in Chief of the Waikato Law Review, and for her Case Comment contribution to this year's Law Review. I also acknowledge Sadeq Bigdeli, who served as Editor In Chief for much of the period and has undertaken a period of leave to support the Iranian government in developing its international trade infrastructure. We wish him all the best in that endeavour and look forward to his return to the Faculty next year.

This volume would not be produced without the efforts of our student editors and I especially thank our Senior Student Editor, Carey Church, who has gone above and beyond the call of duty.

Wayne Rumbles  
Acting Editor In Chief  
Dean, Te Piringa – Faculty of Law  
Waikato University



## THE HARKNESS HENRY LECTURE

# THE VISION AND THE REALITY: REFLECTIONS ON THE EVOLVING ROLE OF THE NEW ZEALAND CORONER IN 2015

BY JUDGE NEIL MACLEAN, QSO\*

In 2015, on Black Friday 13 February, I retired from probably the most interesting and challenging role in my career when I stepped down as Chief Coroner after eight years.

Although I continue to be ex officio a coroner by virtue of an acting warrant under the District Courts Act 1947, I anticipate that as with most District Court Judges I am unlikely to do any more coronial work.

This paper offers me an opportunity to reflect on over a third of a century as a coroner, initially as a Deputy Coroner in Christchurch from 1978, then the Regional Coroner for the Central Canterbury region, including Christchurch, until my appointment as a judge in 1993. I spent 13 years ex officio as a District Court Judge until my Chief Coroner role started.

I had assumed that my appointment as a Judge in Gisborne would mark the end of my coronial involvement but somewhat surprisingly, and to my pleasure, I became involved in a number of interesting and challenging inquests over the next 12 or so years. This arose because I had considerable involvement when the 1988 Coroners Act came into force, working with the Ministry of Justice to prepare the first ever manual for coroners and had got to know a lot of the 70 plus coroners scattered around the country.

The result was that a number of coroners who were faced with conflicts of interest asked whether I might be prepared to take on particular one-off inquests, which with the approval of the Chief Judge, I was happy to do.

Also on a number of occasions when a matter had gone on judicial review to the High Court, the Judge directed that there be another inquest and preferably handled by a District Court Judge.

I found the experience rather fascinating because it really brought home to me the difference between operating as a judicial officer in an adversarial environment as opposed to an inquisitorial one.

The sense of relative freedom, but also increased responsibility when, as a coroner, I needed to make decisions as to the scope of an inquest, the witnesses and evidence required, was a sharp contrast with the more “jack in the box” role of a Judge in the adversarial jurisdiction where basically one turns up, listens to what each party has to say and gives a decision. The parties define the issues whereas a coroner decides that.

I had followed the coronial reform process quite closely and offered some advice at various stages. When I saw that applications were being sought for the appointment of a first ever Chief Coroner I, somewhat tentatively, put my hat in the ring and to my pleasant surprise, after a fairly rigorous selection process, was appointed.

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\* Chief Coroner 2007 to 2015, Appointed District Court Judge 1993. LLB Canterbury, Honorary LLD Canterbury.

I think my appointment came somewhat out of left field for the other coroners in New Zealand, a number of whom had also applied, and it was a tense and interesting time particularly as all the existing coroners were, in effect, sacked and if they were interested in continuing as full-time coroners, needed to reapply. Changing from a predominantly police-driven, very localised, and inconsistent process to a coordinated, civilianised, national one, was a demanding and often frustrating exercise. I must admit that for a period in early 2007 when I went to Wellington, and was confronted with a huge pile of policy documents and other background information that needed to be rapidly absorbed, which revealed what a lot needed to be done with a deadline to be up and running by 1 July, I wondered what I had let myself into. So it was head down and go go go. Somehow we got there just in time.

Eight years then followed as Chief Coroner, against the background of a fairly blank canvas with broad expectations outlined in the Coroners Act 2006, which meant there was a lot to be done to put flesh on the bare bones of the legislation. In practice I kept a copy of another document handy, which I will discuss, as my “bible”.

In the rest of this paper I will reflect on my experience as Chief Coroner, but also on the whole coronial reform process from my perspective, both in New Zealand and in other comparable jurisdictions, on where we came from, what the expectations and drivers for reform were, and the extent to which those have been realised. I will end with a tentative look forward as where we might go in the future.

## I. HISTORY

This year marks 800 years since Magna Carta which has prompted a lot of celebration and discussion, both academic and public, about our legal and constitutional heritage. This has prompted reflections on the extent to which the principles and concepts upon which our law and constitution can be traced back to 1215, including concepts such as freedom from arbitrary law making and trial by one’s peers.

The reality is that much of what is in the actual Magna Carta document (depending on which version is being looked at) seems quite outdated and irrelevant to us and indeed there is very little that can now be seen in our modern law. Nevertheless, it is properly regarded as being an important foundation waypoint on the transition from King-made, arbitrary law, to the parliamentary democracy we enjoy today. As the Rt Hon Lady Justice Arden DBE a member of the Court of Appeal of England and Wales, former Law Commission head and an ad hoc Judge of the European Court of Human Rights observed in a recent article for a “Shaping Tomorrow’s Law: Magna Carta”,<sup>1</sup> the Magna Carta is a monumental affirmation of the rule of law. It proceeds on the all-important assumption that disputes are to be decided in accordance with the law. This was not a new idea but an important confirmation of it. As Lord Irvine LC put it: “The primary importance of Magna Carta is that it is a beacon of the rule of law”.<sup>2</sup> Laws LJ describes Magna Carta as a “proclamation of the rule of law”.<sup>3</sup> The King was not above the law and he could not displace the due application of the law by his judges. Moreover, by providing for the judicial determination of disputes according to

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1 *Shaping Tomorrow’s Law, Volume 1, Human Rights and European Law: Building New Legal Orders* (Oxford University Press, Oxford, 2015).

2 Lord Irvine “The Spirit of the Magna Carta Continues to Resonate in Modern Law” (2003) 119 LQR 227 at 234.

3 At 244.



the law of the land, Magna Carta laid the foundations of what we know today as due process of law. It also gave judges what has been their traditional and vital role of acting as a bulwark for the individual against arbitrary action by the state. The concept of due process is an element within the concept of the rule of law.

The time span of 800 years from then to now, evokes a degree of wonder at the durability of fundamental concepts and yet there is another aspect of our current legal system that can trace its roots back to before then. As my prized copy of the 1854 second edition of the hallowed text *Jervis on Coroners* notes:<sup>4</sup>

That the office of Coroner is of great antiquity, and was originally of high dignity, all writers agree . . . . In progress of time, however, in proportion to the advancement of the prerogative, and augmented authority of the sheriff, the power of the Coroner decreased; and we now look in vain for the individual, who, in the language of Chaucer, was:

Lord and sire,  
Full often time was knight of the shire,  
A schreve had been, and a Coronour.

He went on to add:<sup>5</sup>

. . . in consequence of the rust and relaxation inseparable from ancient institutions, or of the efficiency of its officers, has fallen from its pristine dignity into the hands of those who are, in some instances, incompetent to the discharge of even their present limited authority.

That's telling it like it is isn't it? Criticism of coroners is nothing new. In that edition of *Jervis* he noted the word coroner or coronator is derived from a "corona", that officer being called:<sup>6</sup>

. . . "because he hath principally to do with pleas of the Crown, and such wherein the king is more immediately concerned". Various have been the appellations of this officer at different periods in the history of this country. In the rein of Richard the First he was styled Coronarius; but by Magna Charta, and the subsequent statutes and law books, Coronator; or Custos placitorum coronae, because he had originally the custody of the rolls of the pleas of the Crown.

By that I think he meant that coroners were heavily involved in what we would now describe as Criminal Law in a judicial and policing sense.

After commenting further on the antiquity of the office, which he noted was "of so great antiquity, that its commencement is not known", he added:<sup>7</sup>

But, whatever may have been the commencement of the office, it is evident that Coroners existed in the time of Alfred, for that king punished with death a judge who sentenced a party to suffer death upon the Coroner's record, without allowing the delinquent liberty to traverse.

It makes the judicial complaints procedure in New Zealand seem rather tame?!

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4 John Jervis *A Practical Treatise on the Office and Duties of Coroners: with Forms and Precedents* (2nd ed, S Sweet, W Maxwell and Stevens & Norton, London, 1854) at iii.

5 At iii.

6 At 1–2 (footnotes omitted).

7 At 2–3 (footnotes omitted).

161 years on, in another prized book of mine, the 13th edition of *Jervis* published last year, the editor, a good friend of mine, Dr Paul Mathews, who is the Senior Coroner for the City of London, put it more succinctly:<sup>8</sup>

... the office of coroner is a very ancient one. But no one is quite sure of its origins. There is some evidence that the office of coroner existed before 1194 but it is only because of Article 20 of the Articles of Eyre of that year that the office can be conclusively established.

The Articles of Eyre included “in every county of the King’s realm should be elected three knights and one clerk to keep the pleas of the Crowns”.<sup>9</sup>

In the Magna Carta of 1215, it was recognised that the office of coroner had existed previously, because in Article 24 it said, “[n]o sheriff, constable, coroner or other of our bailiffs shall hold the pleas of the Crown”. In other words the concern was that coroners were getting too big for their boots and dealing in areas involving crime and punishment where they should not be. Nothing new there?

As Christopher Dorries OBE the Senior South Yorkshire (West) coroner in his admirable text *Coroner’s Court* observes,<sup>10</sup> “it is not difficult to see how the post-holder became known as the ‘crownner’ and subsequently ‘coroner’”.<sup>11</sup>

His observations of the medieval coroner include:<sup>12</sup>

The role of the early coroner was that of an independent and reliable revenue collector for the King, acting as a check on the power of the sheriffs and feudal lords. The office was unpaid and the requirement of knighthood implied a man of stature with significant financial resources.

Christopher Dorries notes that one of the most important tasks of the coroner by medieval times was investigation of sudden death noting it as “a potent source of revenue for the Crown”.<sup>13</sup>

That arose because at that time, the focus of the justice system was taken up with compensation for the victim or the raising of revenue for the Crown. Any object causing death, known as a “deodand”, was part of this financial aspect. The coroner monitored this to ensure the King received his proper share.

He notes further that:<sup>14</sup>

Justice was a form of general taxation upon the inhabitants. One example was the “murdrum” fine, [which is said to be origin of the word murder] imposed originally by William the Conqueror to protect ... Normans in an unfriendly Saxon environment.

How that worked, was that when a violent or unnatural death occurred, the person finding the body was responsible for raising the “hue and cry”. This would prompt the coroner to go to the body, gather a jury of men, and unless it was proven that the body was Saxon, the deceased would be presumed to be Norman. The coroner would record all this and the murdrum was imposed on the locality.

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8 Paul Mathews *Jervis on Coroners* (13th ed, Sweet & Maxwell, UK, 2014) at 1-04.

9 At 1-04.

10 Christopher Dorries *Coroners’ Court: A Guide to Law and Practice* (3rd ed, Oxford University Press, Oxford, 2014).

11 At [1.08].

12 At [1.10].

13 At [1.11].

14 At [1.14] (footnote omitted).

The coroner had other roles including the requirement to be present at trial by ordeal whereby to prove your innocence by, for example, picking up a red hot poker without being burned. The principle being, that God would protect the innocent from harm. The coroner would record the event and preserve forfeit property for the Crown. Not surprisingly, there were few acquittals.

Gradually, the role changed to that of a more medico-legal witness, preserving the record until the King's justices got around to dealing with it on their, sometimes rare, visits out to the country areas. The coroner would take sureties (a form of bail bond) from witnesses and that was another good source of revenue because, not surprisingly, often witnesses once they got wind of the King's justices coming would scarper.

So by 1500, almost the sole remaining function performed by the coroner was that of holding inquests into deaths. We see good evidence of that in Hamlet, where there is discussion about the role of the coroner in determining whether Ophelia had committed suicide. The point was that generally, if there was a suicide, the estate was forfeit to the Crown, and other unpleasant consequences followed, such as being buried at the crossroads with a stake through your heart (apparently to confuse the spirits leaving the body as to which direction to go).

Throughout the 18th and 19th centuries, statutory forms consolidated and clarified the powers of the English coroner, marking the beginning of the true medico-legal death inquiry system so familiar to us today. As a system of death registration was instituted in the early 19th century, the role of the coroner moved from one of protecting the financial interests of the realm to an interest in the medical causes of death.

### *A. History in New Zealand*

It seems that the coroner's office existed prior to 1846 and in effect, came across, as did so much of our law, from England. New Zealand's first coroner was Dr John Johnson who took up office in May 1841. Records of early inquests held in Auckland identify concerns still topical today, including alcohol abuse, drownings, deaths in custody and work place safety. Some of the verdicts from that time are rather fascinating, such as cause of death being "by visitation of God".

The Coroners Ordinance 1846 provided "[a]ll persons so to be appointed as [a coroner] and all persons now acting as Coroners shall hold their offices during pleasure".<sup>15</sup>

That ordinance provided that the Governor of New Zealand could appoint "fit persons" to be coroners.<sup>16</sup> There was no requirement, such as medical or legal competence.

The legislation progressively moved through the Coroners Act 1858, which added jurisdiction to enquire into the origin of a fire (still part of the jurisdiction of some Australian coroners). In turn, s 8 of the Coroners Act 1867 spelt out the jurisdiction to enquire:

... concerning the manner of the death of any person who is slain or drowned or who dies suddenly or in prison or while detained in any lunatic asylum and whose body shall be lying dead and to inquire into the cause and origin of any fire whereby any building, ship or merchandise or any stack of corn pulse or hay or any growing crop shall be destroyed or damaged.

Inquests had to be held before a jury, and coroners were authorised to direct a medical practitioner to perform a post-mortem examination. They also sometimes made recommendations about fencing of dangerous areas and the like and in one case, noted in Gluckman in *Touching on Deaths*,

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15 Coroners Ordinance 1846 10 Vict 5, cl 1.

16 Clause 1.

commented that a reason for a man's suicide was likely to be related to the promiscuous behaviour of his wife.<sup>17</sup>

The Coroners Act 1908 largely re-enacted the earlier Act but took away some of the powers, such as that their findings of inquest no longer had the force and effect of an indictment of the Grand Jury in England and also removed the necessity to have a jury.

That Act continued through until the Coroners Act 1951 (which was the Act pursuant to which my first appointment was made). My warrant is signed by Governor-General Keith Jacka Holyoake. The intention was that it would create a complete code by combining the law in relation to coroners in New Zealand and in England into one statute. The jurisdiction as to fires was taken away.

The purpose of an inquest was stated to be:<sup>18</sup>

- (a) The fact that a person has died:
- (b) The identity of the deceased person:
- (c) When, where, and how the death occurred.

Then, in 1988, a further Coroners Act made a few changes. That was in turn, replaced by the Coroners Act 2006 which came into force on the 1st of July 2007.

### 1. *Background to the 2006 Act*

In August 1999 the Law Commission, (comprising as they then were):

- President Baragwanath J
- Paul Heath QC (now a High Court Judge)
- Judge Margaret Lee
- Mr DF Dugdale
- Denise Henare ONZM (now a District Court Judge currently working alongside me in the ACC appeals jurisdiction)
- Timothy Brewer ED (now a High Court Judge):

issued a discussion paper, which followed an extensive consultation with Māori for an earlier succession law project. During the course of that project the Commissioners had become aware of some aspects of coronial practice that were a particular concern to Māori and others, particularly in respect of cultural, religious and/or personal issues.

That discussion paper *Coroners: A Review*<sup>19</sup> had a significant focus on issues around bodies and body parts and related post-mortem procedures, but also the procedure for appointments, supervision and removal of coroners, with comment on the failure of government departments to act on coroners' recommendations.

They also noted a lack of uniformity of coronial practice, and the absence of methods for systemic appraisal of reports to enable the patterns of sudden death, or factors predisposing to sudden death, to be identified and accorded an appropriate response. Also noted was: a lack of training for coroners, no qualification requirements, the need for a Chief Coroner, availability of coroners afterhours, and a process of bringing coronial recommendations to public notice, with a

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17 Laurie Gluckman *Touching on Deaths: A Medical History of Early Auckland Based on the First 384 Inquests* (Southern Publishers Group, Auckland, 2000).

18 Coroners Act 1951, s 12.

19 Law Commission *Coroners: A Review* (NZLC PP36, 1999).

feedback mechanism on responses or lack thereof, backed up by an annual report to Parliament by the Chief Coroner.

## 2. *The 2000 Law Commission Report*

This is the “bible” I referred to earlier. In report number 62, *Coroners*, the Commission in 2000, came up with what proved to be a seminal report which led directly to the 2006 Act.<sup>20</sup> It noted that the existing system was “patchy, unsystematic and inadequate”. Also that it was “haphazard”.<sup>21</sup>

Key specific recommendations of the report were:

- Coroners to be legally qualified.
- A statutory appointment process.
- Training programmes to be provided by the then Department of Courts.
- Appointment of a Chief Coroner with a Kaiwhakarehe (coordinator) position.
- Consolidation of coronial districts and a reduction in the number of coroners with a suggested move towards a system of full-time coroners.
- Remuneration provisions to be in line with other judicial officers.
- Retention of the longstanding Justice of the Peace functions as a backup auxiliary.
- An annual report from the Chief Coroner.
- Clarification as to who had legal control of bodies that fell within the jurisdiction.
- Much more specific directions as to retention of body and body parts and in particular, explanations to families of what was going on. This echoed concerns picked up in their earlier investigations.
- A statutory right to object to the High Court Coroner’s post-mortem decisions.
- Clarification, and expansion of, persons entitled to be kept informed.
- A power to “direct” an autopsy, rather than “authorise”, including a power to direct that it be done immediately.
- Clarification about procedure where adverse reports or comments were made.
- Ability for a Chief Coroner to direct which coroner is to be involved.
- Statutory recognition of an ability to appoint independent legal counsel to assist.
- Development of Chief Coroner guidelines regarding publication for self-inflicted deaths.
- Complaints about coroners to be determined by the Chief Coroner.

## 3. *The Chief Coroner’s role as the commission envisaged*

This included:

- Promoting education concerning coronial matters.
- Acting as a liaison and contact point.
- Ensuring coroner reports were publically available.
- Receiving and determining complaints.
- Developing training programmes.
- Preparing plans for major disaster.
- Following up on implementation of recommendations.
- Issuing guidelines on a range of best practice areas.

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<sup>20</sup> Law Commission *Coroners* (NZLC R62, 2000).

<sup>21</sup> At xi.

- Discussing issues with outsiders on SIDS (Sudden Death in Infancy).
- Being involved in funding and needs regarding mortuary facilities.

The foregoing list is only a small part of some 60 plus, detailed oversight proposals and I have primarily selected these tasks because of what happened about them in due course that may be of interest. The significant thing about this document is succinctly noted in the Preface: “Protecting the lives of its citizens is the primary function of the State.” Its processes for investigating sudden death ideally should be geared to finding the causes and eliminating them for the future, while respecting the sensibilities of the family in its grief. This reflects the view in *Jervis* – often quoted, from John Donne: “Never said to know for whom the bell tolls. It tolls for thee”. As they put it, “the death of any member of society is a significant event with ramifications for the rest of us”. Those disturbing pictures of the little Syrian boy’s body on Bodrum beach bear witness to that.

### *B. What Parliament Did and the Resulting Coroners Act 2006*

Perusal of *Hansard* shows that when the Bill came to Parliament and went through a Select Committee stage, it received largely bipartisan support, and picked up on many of the recommendations of the Law Commission.

In at least one respect it went beyond the proposal of the Commission for a transition to full-time, legally qualified coroners. The Commission recommended that existing coroners (about 74) continue in office until retirement age. Also, the continuation of the system being supplemented by a Justice of the Peace, where a coroner was not available. Instead the Bill provided that all the existing coroners were to cease their functions as from 1 July 2007, except for completion of matters they already had in hand. Justices of the Peace would only have a very limited role (essentially to take evidence at a distance) and that any existing coroners who wished to continue as a coroner would have to apply along with anybody else qualified who was interested.

Not surprisingly, this created a considerable degree of angst, with rumbling discontent including talk of compensation for loss of office and unconstitutionality, but also, on the part of some, a sense of relief. My English and Welsh coroner friends call it the “big bang” approach to coronial reform.

I took up office in January 2007, some five months prior to the Act coming into force, and hit the ground running, because there were a large number of loose ends that needed to be tidied up including (to name but a few):

- Doing a nationwide audit of all current files.
- Meeting and discussing transition arrangements with as many of the existing coroners as possible.
- Starting a process of advertising for, interviewing and selecting coroners for the new positions.
- Creating a bench book.
- Creating forms.
- Meeting with a large number of interest groups and other agencies, including investigative agencies such as police, up and down the country.
- Repositioning the structure from a rather haphazard, locally focussed one, to a consistent national framework.

One of the most challenging, but also eye-opening experiences, was travelling around the country meeting representatives of Iwi. While the Commission had anticipated the appointment of a Kaiwhakahere, in fact that never happened, but at a practical level I was aided immeasurably by the support of Harris Shortland, Fiona Kale from the Ministry of Justice and, more latterly, Naida

Glavish of Auckland.<sup>22</sup> Various interest groups, particularly Māori, were very interested in what was going on. In many areas, they were quite suspicious, and uneasy. I heard many harrowing tales of processes that had gone on in the past, often well in the past, involving the death of loved ones, the perceived inhumanity, and lack of cultural sensitivity in the process of the involvement of police and coroner.

All I could say to them was that, so far as I was concerned, I hoped they would give me some time to ensure that the letter and spirit of the new legislation, which reflected the Law Commissions awareness of the underlying issues, would be instituted. Some of the meetings were very challenging and I was grateful for the ongoing support of Harris and others through this quite difficult time.

I think it would be fair to say, that the main thrust of the concerns I heard was that, as before, there would be largely lip-service paid to the legislation around, or in this area, and that things wouldn't change.

### *1. What were the main concerns of Māori?*

The concerns coming through were very much those reflected to the Commission, including unnecessary delay, unnecessary and overly long retention of body parts, no explanation as to why body parts and organs were being retained or when they would be returned, unnecessary post-mortems and generally a perception that the Pakeha system simply didn't "get it" in terms of tikanga and expectations around the tangi process, including in particular the desire for the body to be accompanied at all times.

I equally became aware of a considerable unease amongst the pathology profession as to what the implications of the new Act would be in terms of their workload and practice. I also became aware that some forensic pathologists had been urging a move away from the concept of a legally qualified person controlling things, to some sort of medical examiner system as in the USA. Their concerns included a belief, at least in some circles, that the number of post-mortems would drop so dramatically as to render it both uneconomic and/or detrimental to the maintenance of a certain level of expertise. In fact, those concerns turned out to be unwarranted, at least so far – and I will speak more about this later.

Through this paper I will pick out a number of other areas of change in the legislation and then discuss how the concerns were born out, i.e. the extent to which the vision of the Law Commission, as reflected largely in the legislation, match the reality.

On the issue of unnecessary post-mortems and delay, I tried to ensure that the new coroners as they were selected, appointed and prior to taking office were well-briefed on tikanga, and all the nuances and complications of the coronial process; bearing in mind that although initially the majority of the new appointees were in fact existing coroners, they too had a wide variety of experience and differing practices and there were six appointees who had never been coroners.

As it happens, by early next year there is likely to be only five coroners who were coroners under the 1988 Act.

A lot of work went into preparing a bench book (which the coroners had never had before), covering a lot of these areas of concern, but also an intensive week-long, first ever, orientation programme (similar to that for new judges) was set up.

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22 Harris Shortland is the father of the eventual Coroner Brandt Shortland ex Hamilton.

As an aside, something that came as a rather unpleasant surprise was that, unlike the position in other comparable jurisdictions (except for Te Reo immersion courses), the Institute of Judicial Studies in New Zealand did not, and still does not, see education of coroners as part of its brief. Accordingly, I had to design a training programme, both initially at orientation, and later, on an ongoing basis, from scratch.

So far as the issues of delay in making early decisions, letting families know what was going on and releasing bodies as early as possible, was concerned, we set up a major new process in the form of a 24/7 service.

Initially there was little direct support from the Ministry of Justice after “business hours”, and gradually we phased coroners in as duty coroners, covering the after-hours period (which had been largely in the past with some exceptions covered by Justices of the Peace) to provide a genuine 24/7 service. It was very stressful for the coroners and had significant flow-on effects, which are still being worked through as it continues to evolve and take on additional functions.

In time, this evolved into the present system we have now, of a 24/7 National Initial Information Office (NIIO), fully staffed by the Ministry of Justice, as the sole entry point for any reports, questions or issues arising in the immediate aftermath of a death, which might, or might not, need to be brought into the coronial process.

This was a challenging and demanding development, and it would be fair to say there was not whole-hearted approval, even amongst the coronial ranks, because of the demands of being on duty for a particular period, 24/7, are not easy. Other stakeholders, including police, pathologists, and funeral directors were initially very sceptical.

I think, by and large, most of those concerns have been allayed, but I am sure that the process will continue to evolve. It is a balance between ensuring that our people (staff and coroners) can cope without a deleterious effect on them, but more particularly, providing a genuinely accessible, receptive and immediately proactive process, to ensure that no matter when and where a death occurs, the system is immediately on the front foot and able to make significant decisions, without the sort of delays that often plagued the system, particularly afterhours, in the past.

Having that in place threw up extra challenges both for the police and pathologists plus people such as funeral directors and other agencies who become involved. In many cases we were 24/7, but they (except the police) were not.

In time, one of the perhaps unanticipated spin-offs, was that despite a degree of police scepticism in some areas, and to some extent a concern that coroners and their staff were taking over what had hitherto been a police role, in fact, the end result of the NIIO process has been a huge, but largely objectively unquantifiable, reduction of a lot of time wasting and effort by police.

## *2. What do I mean by that?*

About 30,000 people a year die in New Zealand. Roughly one fifth or 6,000 of those deaths now come to the attention of NIIO and the duty coroner. Whereas in the past, if there was no doctor available, or some uncertainty about whether a death should or should not be certified by a doctor, and particularly after-hours, there could be considerable delays with police trying to locate doctors, uncertainty and delay with frustrated funeral directors, and in particular upset relatives, wondering what on earth was going on. Many deaths needlessly came into the system and some deaths that should have did not.

Of that 6,000, roughly half are now able to be resolved by the NIIO system and the duty coroner, often following direct coroner to doctor discussion.



The reality is, that many in the medical profession were, and continue to be (as new and particularly foreign-trained doctors come into our system), unsure about their certification responsibilities, i.e. when it is appropriate to certify a death and when it is not. By setting up the facility we now have, a lot of that is able to be sorted out very quickly.

The other, and intended spin off, is when an issue arises as to whether or not, once it has been decided jurisdiction should be taken, there should be a post-mortem examination, and if so, what type. In most cases, the issue is able to be resolved much more rapidly than in the past. Not all, particularly some forensic pathologists, are happy with this, and say wrong decisions are being made.

I think it would be fair to say that the default position prior to the new Act (again with some exceptions, particularly here in the Waikato with Coroner Matenga, but also with some other coroners), had been to defer the decision as to whether a death came into the process or not to the police. Coroners would invariably take the view that any violent death or sudden death would automatically have a post-mortem examination, and there was not necessarily, informed thought put into whether that was necessary, or if one was necessary, whether it could be restricted in some way.

In the past, again with some exceptions, if family or whanau were upset, and wanted to challenge the issue, it was not necessarily very easy. First you had to know who the relevant coroner was (and it could be any one of about 74), how to get hold of them, and then how to get your concerns through. By default, police personnel, often with little training, were attempting to cope with the often confrontational issues that can arise, particularly in the case of the death of a baby. But also in the case of an elderly person, where family would be saying things like “Mum was 93 – why on earth do you want a post-mortem?”

The new process, once bedded in, meant that one of the (now 16 plus chief) coroners were right at the early stages involved in this part of the process and as experienced lawyers, properly but pragmatically, dealing with the letter and spirit of the legislation. The thrust of that being, the spiritual, ethnic, cultural, and other concerns as factors that must be weighed up, in making a decision about a post-mortem examination, or whether to assume jurisdiction.

There were some monumental stand-up rows in the early stages, both between coroners and some pathologists, coroners and some police and occasionally, funeral directors and/or family members.

One of the important features in the new Act, which reflected Commission concerns, was the establishment of a fast-track appeal procedure, if family or whanau were dissatisfied with a post-mortem decision. We expected, on the advice of the then State Coroner in Victoria Australia, Graeme Johnson (a good friend and supporter of our coroners) a lot of objections to go to the High Court, at least in the first months or years.

Interestingly, up to this time, not one objection has gone to the High Court, yet. Why is this?

I think it is partly because of the quality of coroners that we selected, utilising their lawyer skills, but also probably, more importantly, pragmatic common sense, coupled with an acute awareness of the importance of the role of next-of-kin (or in the parlance of the Act “immediate family”) and the need to take their views into account.

Unlike Victoria, Australia, our Act does not give the coroner any jurisdiction in a contentious body-claiming type situation and while not common, when they do arise, they can be rather challenging for all concerned. My approach, I think supported by most of the coroners, was that, if there was an issue about to whom the body was to be returned, either the contesting parties resolved

that themselves, or went to the High Court (or arguably the Family Court) to resolve it. In the meantime, the body stayed where it was (usually in a mortuary). Realistically and understandably, what tended to happen was that this, in effect, forced the contesting parties to be realistic, and to reach their own compromise situation, usually far better than an imposed one.

In most cases, this is what happens, and probably, reflects the requirement for coroners to have regard to tikanga, but also Māori customary practices, i.e. it is for the respective parties to resolve as part of a sometimes rigorous process.

Continuing the theme relating to bodies; release of bodies; post-mortems and moving on to body retention issues, as I noted earlier this was an area of concern conveyed to me and I know to the Law Commission at an earlier stage.

As part of the NIIO process, where a duty coroner controlled the situation through to the release of the body, we were able to ensure that there was a consistent, reasoned, and recorded process, complying with the letter and spirit of the Act to ensure that the relevant members of the immediate family were aware of:

- the fact there was going to be a post-mortem;
- the fact that in most cases they had a right to object and if so, we would hear them and explain our decision; and
- the obligation on us to advise when a body was released, if there was anything missing. If so, what it was and for how long it would be retained.

We needed to ensure these requirements were all strictly complied with. This proved very demanding, and in many cases quite unworkable. There was considerable resentment within some pathology circles, as to what was entailed in this, and while I think the situation is largely resolved now, it is still an area of some concern and I note, there is a little bit of tweaking of the provisions (which were in practice a little unworkable), in the Coroners Amendment Bill, which had its second reading in October 2015.

It raises challenging issues about recognition of Tikanga in New Zealand Law or as Natalie Coates (a Solicitor at Kahui Legal) discussing *Takamore v Clark*<sup>23</sup> described it, the “capacity of the common law to provide for the recognition of tikanga and Māori customary law”, and now “Māori Customary Law [can] be afforded recognition in the state legal system in the 21st century”.<sup>24</sup>

The Bill as reported back, sensibly in my view, re-asserts the overall legal control of the coroner as against the wishes of the pathologist, although it remains to be seen how in practice the provision that “[t]he pathologist may otherwise carry out the post-mortem as he or she thinks fit” pans out.<sup>25</sup>

I have seen in the latter part of my long career as a coroner, a substantial shift in the attitude towards dealing with body parts, retention, testing etc. It would fair to say I think, that in the past there had been a somewhat cavalier disregard of the right of people to know what was going on with their loved ones, and many unexplained, or even unadvised retentions. Incidents like the Greenlane heart retention concerns,<sup>26</sup> and similar issues in other jurisdictions, all helped bring this to greater public attention.

23 *Takamore v Clark* [2011] NZCA 587, [2012] 1 NZLR 573.

24 Natalie Coates “The Recognition of Tikanga in the Common Law of New Zealand” [2015] NZLR 1 at 1.

25 Coroners Amendment Bill 2015 (239-2), cl 20.

26 “Secret deal over missing babies’ organs” *Sunday Star Times* (online ed, New Zealand, 6 December 2008).

For my part, in my time and supported by all the coroners, we have been at pains to make sure that the legal position is recognised and respected. That is, that the coroner is in legal control of the body, the coroner will decide what happens with the body and the coroner must be told what is going on, so that he or she can in turn impart that information to the relevant members of the immediate family.

That then leads on to changes in autopsy, or post-mortem practice over the last few years.

I mentioned earlier, the default in the past had been to a full post-mortem examination, in a lot of cases. That has definitely changed, albeit not without sometimes vigorous (to put it euphemistically) discussion between particularly, coroners and pathologists, both at joint training and in one-on-one interactions during the working days and nights.

In the past, and to some extent still, the starting point from the pathologist perspective (bearing in mind that the meaning of an autopsy is “to see for yourself”) if they are involved and tasked to establish a cause of death, is that you have to leave it to them to decide what to do, how far to go and how long they have to do it.

I think most pathologists have gradually modified their approach, and are increasingly accepting now that there has to be limits on their authority. The coroner must remain in control, albeit that we do not want to interfere and tell them precisely how to do their job.

It is now six months since I stepped down from my role, so I am not aware of what has been going on recently, but even in the weeks leading up to my stepping down there was ongoing, quite intense, discussion between pathologists, a major DHB, hospital, police and coronial interests, about post-mortem resourcing issues.

Part of the reality is, as with Australia, England and Wales, there is a shortage of trained pathologists, particularly forensic pathologists, willing to carry out coronial post-mortems. In New Zealand we have been substantially reliant in recent times on relatively short-term appointments of American or other overseas-trained forensic pathologists who, while they come from a not dissimilar medico-legal investigative background, are trained with slightly different nuances. Particularly, between the medical examiner system of Canada and the USA, and the Australasian and English practice. The equivalent of a coroner in many American states is the medical examiner, who is usually a doctor and sometimes a pathologist. You can over generalise, because in some American jurisdictions there are no qualification requirements for a coroner at all other than a minimum age and a clean criminal record.

It is encouraging to see Select Committee support for us to adopt, at least partially, the model which seemed to be working very well in Victoria, Australia – allowing for a largely non-invasive interim inspection of the body, including the use of a CT or similar x-ray scanner and toxicology. In the Victorian concept that has worked well, because virtually all bodies that come into the coronial system in the State of Victoria come into Melbourne to the Victoria Forensic Institute of Medicine (VFIM) and all go through a scanner. That differs from our distributed system with pathologists in various main centres.

That means that in Victoria, there is an ability to have a much more informed discussion between the coroner/police/pathologist at a relatively early stage and more likely to be a rational, well-informed decision-making process, as to when a full post-mortem is required and when it is not. I hear anecdotally, that the implementation of that system in Victoria has resulted in a substantial reduction in the number of post-mortem examinations.

It remains to be seen how that concept pans out in New Zealand, and then in turn the implications of that if there is a significant fall in the number of post-mortem examinations, with

the ramifications of that for the pathology workforce. The prospect of rapid drug screening and enhanced CT/MRI scanning holds interesting prospects also.

In New Zealand, we have a small number of forensic pathologists. They handle the complex and other cases, particularly of a criminal nature, but of necessity to keep up their level of expertise, also carry out a lot of the more routine work.

They are supplemented by (and we could not manage without), a group of about 30 or so other pathologists, often attached to other organisations, so that coronial post-mortem work is but a small part of their daily practice. They supplement the system, and generally, have provided a very expeditious, user-friendly service. Their continuing availability is somewhat moot.

I think there has been a quantum shift generally, in the last decade or so, about the way we look at the issues of whether a full invasive post-mortem can be justified, what can be retained and for how long, and what can be done with those retentions.

The reality is that the vast majority of post-mortems are now coronial. The hospital (consensual) post-mortem which was prevalent in the 1950s (perhaps up to 50 per cent of all hospital deaths) is now very rare. I think it is largely a resource issue, but as a result, the opportunity which historically medical students had to be involved in as an ultimate quality control check and learning opportunity (i.e. a full anatomical examination) has been lost. But also, I think, it reflects a pragmatic perspective, i.e. is it really necessary – or are the resources better directed to saving the living?

Balanced against that, is the fact that much of the benefits of modern medicine derive from widespread historic autopsy practice, particularly in areas such as cardiac health. I sense too, that after eight years, Māori and other concerned groups, are beginning to accept that there is now well-informed judicial oversight and that the spirit as well as the letter of the law is now being engaged.

### *C. Recommendations*

I want to now turn to another area which the Commission discussed and they envisaged a role for the Chief Coroner. This role is in recognition of an important part of a modern coronial system namely, the making of recommendations, getting them to public notice, to the ultimate benefit of society with the aim of reducing deaths in similar circumstances.

One of the areas where I feel to some extent a sense of failure, is that I have been advocating for some years without success, the implementation of systems similar to that in Victoria, England and Wales whereby there is a requirement for a mandatory response when a coroner makes a recommendation. Even if it is to simply say that the recommendation is unrealistic or plain daft; it doesn't really matter. What I wanted was a requirement for response.

There has been an understandable unease in some circles as to whether that is giving too much power to the coroners, and I am the first to acknowledge that some recommendations or comments that coroners have made in the past have been unrealistic and/or not really based on the evidence before the coroner in the particular case. In the worst cases this sometimes simply reflected a hobbyhorse of the particular coroner. However, the vast numbers of recommendations are well-founded, and warrant a response.

Although I had no success in my mission, we have been able to achieve quite a lot by ensuring that all recommendations are posted on the Internet via NZLII and are available to anybody, including family, researchers, lawyers and media.<sup>27</sup> We have in recent years, started publishing on

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<sup>27</sup> New Zealand Legal Information Institute at <[www.nzlii.org](http://www.nzlii.org)>.

the Internet (and in hard copy for anybody who wants it) a publication called *Recommendations Recap*, which summarises the recommendations that have been made, and where there has been a response, what that was.<sup>28</sup> In course of that we have also identified a number of themes (as envisaged by the Law Commission) and expanded the report in areas, such as butane poisoning (huffing), suicide, forestry deaths, driveway run-over deaths and sudden unexpected death in infancy, to name but a few. To some extent, I see that as fulfilling the vision of the Commission to identify trends to the better advantage of society as a whole. I must say that I have some unease that the proposed amendment in 57A and 57B of the Bill,<sup>29</sup> requiring prior notification with four weeks to respond while parties address the issue will in fact lead to delays and perhaps a reluctance for a coroner to speak “*truth to power*”.

Baragwanath J in his capacity as President of the Law Commission at the time, and also reflected later in a seminal address he gave at the Asia Pacific Coroners Society Conference we hosted in Auckland in November 2010, saw this area as a vital role for the modern 21st century coroner.<sup>30</sup>

So what is now the current reality of the role of the coroner in New Zealand in 2015?

Baragwanath J in his address, described the role of coroner as a “noble one”.

The major underlying theme, I believe, of the Law Commission report,<sup>31</sup> was that if we were to continue with a coronial system it needed to be brought into the 21st century, properly resourced, and to have a responsible function, as Baragwanath J put it “to speak truth to power”.

The ancient office of coroner has always been an inquisitorial one. That word “inquisitorial” is often somewhat of a buzz word generally as a better way of resolving all or many legal disputes, particularly criminal.

What do we mean when we say the role of the coroner is an inquisitorial one? It was well put by Lord Lane CJ in *R v South London Coroner, ex parte Thompson*:<sup>32</sup>

It should not be forgotten that an inquest is a fact finding exercise and not a method of apportioning guilt. The procedure and rules of evidence which are suitable for one are unsuitable for the other. In an inquest it should never be forgotten that there are no parties, there is no indictment, there is no prosecution, there is no defence, and there is no trial, simply an attempt to establish the facts. It is an inquisitorial process, a process of investigation quite unlike a trial where the prosecutor accuses and the accused defends, the Judge holding the balance or the ring, which ever metaphor one chooses to use.

That approach has been accepted as being applicable in New Zealand running alongside the proposition that the scope of a coroner’s inquiry should not be construed narrowly and that when a coroner investigates the “circumstances” that has a wide meaning.

One of my experiences as a very young coroner in Christchurch was to be taken on Judicial Review in a medico-legal matter in the case of *Re Hendrie* where Hardie Boys J, a previous Harkness Henry lecturer (along with Baragwanath J) said:<sup>33</sup>

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28 Office of the Chief Coroner of New Zealand *Recommendations Recap* <[www.justice.govt.nz](http://www.justice.govt.nz)>.

29 Coroners Amendment Bill 2015 (239-2), cl 30.

30 David Baragwanath, President of the Law Commission “The Importance of a Modern Coronial System in the 21st century – Enquire and proclaim: the role of the coroner in promoting the right to life” (speech to the Asia-Pacific Coroners Society Conference, Auckland, 23 November 2010).

31 Above n 19.

32 *R v South London Coroner, ex parte Thompson* (1982) 126 SJ 625.

33 *Re Hendrie* HC Christchurch CP445/87, 12 January 1998 at 11.

This must necessarily involve in this case not only a determination of the procedures that were employed, but are also a determination as to whether the correct procedures were employed.

And Randerson J in *Abbott v Coroners Court of New Plymouth* where he opined similarly.<sup>34</sup>

One of the leading texts in Australasia is *Death Investigation and the Coroner's Inquest* and in that book they made the following comments, which I think have equal application in New Zealand:<sup>35</sup>

... where such an encounter (talking about Police apprehensions) has led to a death, civilian or police, the task for an inquest is to ascertain as a matter of fact what occurred in the period time prior to the person's death and whether the police operation was carried out competently or in such a way as to inflame an interaction unnecessarily and in such a way as to lead to an avoidable death. This is required analysis of plausible alternatives to particular forms of intervention, such as the use of less confrontational tactics, different procedures in course of house raids, less use of police car chases and different strategies for apprehension of persons suspected of being psychiatrically unwell.

I accept that in the New Zealand context now, the independent Police Conduct Authority ably chaired by my longstanding mentor and friend Judge David Carruthers (another Harkness Henry lecturer), will in practice often fulfil that task. Often so well that there is little left for a coroner to do. But inevitably there will be, I have no doubt, as there has been in the past, cases where a fearless investigation by a coroner acting inquisitorially will be necessary to “*speak truth to power*” and go into the sort of detail Freckleton describes.

The coronial system has sometimes been described as an “inquisitorial cuckoo in an adversarial nest”. The reality is that what it means for a coroner to be an inquisitor is still not well understood, even amongst the legal profession. Last month Fletcher Pilditch, Barrister of Auckland, and I ran some seminars on proceeding before the Coroners Court, for the New Zealand Law Society as part of their continuing legal education programme. We discussed what the implications of the inquisitorial coronial process are for lawyers, and practical and theoretical implications of that, which fundamentally are that there is a very useful role for lawyers in the process. There was an astonishingly high turnout of practitioners up and down the country which reflects an encouraging interest in the role. There is a role for lawyers, both as counsel acting to assist the coroner, or acting for interest groups and members of family, but there needs to be an appreciation that it is different from acting in an adversarial role, although at times that does not mean that there cannot be very rigorous cross-examination.

Judge Posner in his book *Reflections on Judging* has some interesting comments:<sup>36</sup>

Inquisitorial judges are criticized for being excessively insulated from worldly experience, excessively bureaucratic, legalistic, and regimented.

It is in the “inquisitorial” type of adjudicative system that prevails in the nations of Continental Europe, in Japan, and in most other countries outside the Anglo-American sphere, that judges conduct investigations, call witnesses, ask questions of witnesses, disdain most evidence that isn't documentary, are appointed and promoted strictly on merit and not by politicians, do not use juries in civil cases, and for all these reasons reduce the trial lawyers to little more than kibitzers.

34 *Abbott v Coroners Court of New Plymouth* HC New Plymouth CIV–2004–443–660, 20 April 2005.

35 Ian Freckleton and David Ranson *Death Investigation and the Coroner's Inquest* (Oxford University Press, Melbourne, 2006).

36 Richard A Posner *Reflections on Judging* (Harvard University Press, Cambridge (Mass), 2013) at 299–300 (footnote omitted).

Whatever the merits of such a system, it's not about to be adopted in the United States, though pockets already exist here, for example in proceedings before administrative law judges in social security disability proceedings, which are not adversary.

The negative connotation of "inquisitorial" is only one barrier toward significant movement away from our adversary system; more important is that an inquisitorial system greatly increases the ratio of judges to trial lawyers because it casts the judge as player rather than as umpire – in fact as the main player in the legal drama. In an adversarial legal system, in contrast, "a large measure of judicial passivity is structurally inevitable." Forcing a wholesale conversion of trial lawyers into judges – into modestly paid government employees – would be institutionally daunting and politically unthinkable in our system. Furthermore, an inquisitorial system requires a higher-quality judiciary than an adversary system does because of the judge's ... role in an inquisitorial system relative to lawyers' role; this rules out judicial appointment by politicians. But the greater variance in the background, training, and legal skills and smarts in our lateral-entry adversary judiciary is a source of strength as well as of weakness.

But ultimately it is the coroner who decides what the issues are, how they will be addressed, what evidence he or she is prepared to hear. Hopefully that is not done in ways insulated from world experience, excessively bureaucratic or regimental.

There have not been many higher court rulings in respect of coroners in New Zealand. That has an up side and a down side. The up side is that it suggests basically we are getting it about right; the down side is that we do not have the benefit of higher court authority to give us a steer in some of the controversial areas.

There has been a recent High Court judicial overlay in areas of natural justice in terms of the rights of a person about whom adverse comment has been made, see *Carroll v The Coroners Court* in Auckland where Winkelmann J spelt out some guidelines for coroners when they proposed to make an adverse comment about someone.<sup>37</sup> The Bill as reported back, probably reflects *Carroll* and provides some guidance on Parliament's views.

Similarly Whata J has given some useful guidance on issues around non-publication of name in the case of *Gravatt v the Coroners Court at Auckland*.<sup>38</sup> Both cases are required reading for those lawyers who wish to practise in this area. *Gravatt* reflects the principle underlying so much of our legal system that essentially what goes on in the public courts is a matter of public interest provided appropriate privacy and natural issues are properly addressed.

The Kahui twins inquest demonstrates the different approach of a coroner's inquisitorial approach (i.e. what actually happened?) as opposed to the adversarial criminal one, (has guilt been proven?).

What we have not had, is what the Australians have had in terms of higher court judicial oversight in the still vexed area of the weight to be given to cultural/spiritual concerns in the post-mortem process. However, I think, but others may disagree, somehow we seem to have worked our way through this to get to a point where, I hope, much of the early fears of those interest groups I spoke to back in 2007 have been allayed. It is interesting to see a recent English case, *Rotsztein v HM Senior Coroner for Inner London*, involving an Orthodox Jew and "Jewish law strictly forbids the desecration of a corpse and requires it to be buried promptly."<sup>39</sup>

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37 *Carroll v Coroner's Court at Auckland* [2013] NZHC 906.

38 *Gravatt v Coroner's Court at Auckland* [2013] NZHC 390, [2013] NZAR 345.

39 *R (on the application of Rotsztein) v HM Senior Coroner for Inner London* [2015] EWHC 2764 (Admin), [2015] ACD 132 at [6].

The Court said that in the case of religious objection to invasive autopsy:

- a. There had to be an established religious tenet that an invasive autopsy was to be avoided before any question of avoidance on European Convention on Human Rights, art 9 grounds could arise.
- b. There had to be a realistic possibility that non-invasive procedures would establish the cause of death and would permit the coroner to fulfil their duty.

Certainly I have found that as in the many meetings I have had with interest groups up and down the country in the last few years, those sorts of concerns have substantially diminished.

### 1. *A Peek into the Future:*

As we can see, the role of the coroner has evolved over eight centuries. The process will continue.

While the recent proposed amendments largely represent a fine tuning of process there are some big issues that are waiting. These include:

- The extent to which the Right to Life provisions of our Bill of Rights Act may be developed in the death investigation process. The comparable provisions of the European Human Rights Declaration are as *Rotsztein* shows becoming more and more significant overseas. There are potential ramifications here, particularly the constraints on coroners' powers reflected in the proposed changes, such as the tempering of the power to direct police, the constraints of jurisdiction for overseas deaths and deaths during hostilities.
- The conventional position is that the specific Statute overrides such general concepts as are often the focus of English jurisprudence, but for how long I wonder.
- The reality of the skill shortage in pathology ranks, not just here, but in Australia and England.

A couple of recent English articles note real concerns. Peter Hutton writes:<sup>40</sup>

... the current and future provision of pathology to meet the needs of coroners is insecure. There are insufficient autopsy competent pathologists being trained any many of those currently doing the work are stopping.

While David Bailey states:<sup>41</sup>

The proportion of departments struggling to provide the service is also greater than expected, but more worryingly is the number that have failed to address the problem in any way. Combine that with the proportion of pathologists who have either given up autopsy practice or intend to in the near future and one comes to appreciate that this is an already hard-pressed service on the edge of a complete meltdown.

And

... although the forensic services is functioning satisfactorily at present, the future for forensic and non-forensic pathology service is 'fragile, and corrective action needs to be taken now'.

To a lesser extent that reflects the New Zealand situation. We have been generally well served by the dedicated men and women who have carried out coronial pathology in the past, and some new

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40 Peter Hutton *A review of forensic pathology in England and Wales: Submitted to the Minister of State for Crime Prevention* (Home Office, March 2015) at 86.

41 David Bailey "The Future of the Coronial Autopsy Service" [2015] 171 *The Bulletin of the Royal College of Pathologists* 181 at 183.



people are coming on, but the reality is that the service is hard pressed in some areas and vulnerable to the implications of an aging workforce.

Experienced anatomical pathologists prepared to work in the coronial area, and particularly forensic pathologists, are a precious and scarce resource. While our autopsy numbers are holding steady, and possibly slightly dropping, the reality is that we are vulnerable to people leaving. Getting replacements can be difficult and time consuming. We do not produce enough home grown talent in this area, and were it not for the ability so far to attract foreign-trained forensic pathologists, (mainly American from a medical examiner environment with implications there), albeit on short-term arrangements, we would have problems.

While there are technological enhancements, such as more use of MRI and CT scanning, and possibly quicker initial drug screen tests in the wind, which might enable us to follow the lead of the coroners and VFIM in Victoria and cut down materially on the number of fully invasive autopsies, (something foreshadowed in the Bill), there are capital and training resource issues. We will also need to maintain for criminal law purposes a critical mass of world-class expertise.

Thought needs to be given as to ways and means of making the role a more attractive one as a medical specialty area.

## 2. *Ensuring we are prepared for the next mass fatality*

Sadly it's a matter of when not if.

We can be proud of the coronial response to the challenges posed by the Christchurch earthquakes. The existence of NIIO and the ability to rotate a small group of embedded coroners at Burnham, backed up 24/7 by the back office services of NIIO, ensured we were able to play our small but vital part. This was done in concert with other agencies to provide expeditious resolution of identification issues, release of bodies to families, with one reliable source of information. Also we could convene early inquests for the small group of missing, but presumed dead, persons of whom no trace could be found.

The benefit of initial ground work done by us in 2010 following my attending presentations in London on planning for the Olympics, and learning from the Victorian Bush fires (Coroner Johnson was invited to sit in on their process), plus the establishing of good working relationships with key agencies at Pike River, was significant. Somehow we coped and kept the day-to-day service running as well.

At the behest of the various agencies involved in debriefing post-earthquake, I facilitated a working group to start work on a national planning strategy to help ensure that next time we are prepared. Mine was very small part, and the main credit goes to the other agencies and particularly Pat Helm of the Department of Prime Minister and Cabinet to make this a reality.

## 3. *Suicide*

This is a topic worthy of a lecture on its own, but suffice to say that it became a major area of focus for me, both in speaking to groups up and down the country who, like me, were concerned at what was going on, what the true facts are and beginning what I described as “gentle opening up of a discussion” about what has traditionally been a rather taboo topic. One that in the past was thought best not talked about for risk it might encourage others. The same reasoning cautioned against putting out accurate, up-to-date provisional statistics. While the great weight of reaction was supportive, there is still a small but influential influence among some, who disagree with my approach.

What has been encouraging is the willingness of the Ministry of Health to work with me in setting up a national suicide notification service to provide early, informed advice about an apparent self-inflicted death to enable a swift, coordinated and informed response to get postvention assistance and counselling under way for the vulnerable group of people (especially youth) impacted by a suicide.

The publication debate continues. There is a wide spectrum of opinion, and this was reflected in the Law Commission report last year and in the proposed changes in the Bill. There is no easy answer, but in my view hiding information from public view is not the solution. If the present discussions around assisted suicide progress, there are likely to be challenging implications for coroners, such as what is the official cause of death? Self-inflicted? Or the terminal or other condition underlying the decision to end life?

#### *4. Cardiac Inherited Disease Group (CIDG)*

This is another example of good working interagency cooperation. For some years, with the support of forensic pathologists we have been participating in facilitating information flow to the CIDG, a very proactive group under the leadership of Dr Jon Skinner at Starship. They are involved in some cutting-edge research and follow up of searching for genetic mutations, many hitherto unknown, that can explain cases of sudden, unexplained death in young people, including babies and young adults, such as the sudden collapse of a player on a sports field or apparent drowning. The payoff, apart from helping explain to relatives why death occurred, is that if family wish, screening of other genetically connected family members may detect the same mutation, and steps can be taken to prevent further fatalities, as often further investigation reveals other puzzling deaths in the historic family line.

#### *5. Sudden unexpected death in infancy (SUDI)*

Another example of cooperation is the successful pilot with funding from the Health Research Council, and prior to that the Ministry of Health, of a collaborative link with a project, led by Professor Ed Mitchell in a contractual arrangement with Communio, which enables a small team of dedicated health-trained Investigators to visit families who have had a baby death, (what we used to call Cot Death), and do a very detailed analysis of all the surrounding circumstances, over and above what the police do. This produces much more information for the coroner and because the project also run a control group alongside, is likely to produce some new research insights in the near future into this baffling, immensely distressing area.

#### *6. Mortality Review Committees under the Health Quality Safety Commission*

This is another group with whom I spent a lot of time. In the past there has been tension, sometimes between overlapping agendas. However, while now most mutual concerns have been allayed, together we have often been able to work very closely in a mutually supportive way, ensuring that reports from them or the office of the Chief Coroner or individual coroners, are based on accurate information.

#### *7. Inter-agency cooperation*

This is a critical area with much yet to be done. The models discussed, developed for SUDI, CIDG and Suicide give a hint at what can be done, but the reality is the coroner cannot do the task on his or her own. We need information, quickly, from others. Sadly, the Privacy Act 1993 (or the perceptions of it), and a silo mentality in some other agencies can get in the way. The coronial system has a wealth of accurate evidence-based data, which other agencies want and need to be

able to access. Other agencies also have information a coroner needs. There is plenty yet to be done in this mutual-need area notwithstanding the barriers I have mentioned, but with goodwill and persistence together we can do so much more.

## II. CONCLUSIONS

So how have we measured up to the vision of the Law Commission?<sup>42</sup>

Bearing in mind as the Commission itself put it “[t]he community is the ever-present client of the coronial system” and the Ontario Coroners motto to which they referred – “to speak for the dead in order to protect the living”,<sup>43</sup> whether we have measured up is for others to say.

What I do know, is that in a perhaps symbolic way, the old pattern of following England has been reversed. Many English coroners, including their new first Chief Coroner, have told me that they admire and envy what New Zealand has done. We modelled a lot of what we have done on the State of Victoria model and perhaps temporarily passed them in some areas. They have since refined and remodelled, and passed us with their VFIM resource, formation of a Coroners Court of Victoria, in-house lawyers support for coroners, and centralisation of pathology resourcing. The English and Welsh reforms are making substantial improvements, as I have learnt on my regular presentations to them. Each time I go, I realise I have less and less to impart to them, but for a while it was a good feeling of a reversal of the apron strings.

We now have a more diversified bench. Noteworthy is that I think we have the most gender-balanced judicial bench. We started out with four female coroners; we now have seven out of 16 plus a Chief. In an interview with *LawTalk* in the early days I noted that it seemed to me to be a job that warranted attention from female lawyers, and it’s good to see how things have panned out.

I think for better or worse, the public profile of coroners has developed. Certainly media interest is high, and a significant part of my role of “educating the public”, which was set out in the 2006 Act (but curiously removed in the Bill), was taken up in being open to media for interviews and information, and in responding to literally hundreds of speaking requests to lay and professional groups both in New Zealand and overseas.

Coroners always have and always will be criticised as they speak truth to power. The daily task of a Chief Coroner involves dealing with a myriad of complaints, enquiries and other concerns. With the concurrence of the Judicial Complaints Commission, I tried to take a proactive stance and respond as fully as possible. This can involve difficult behind the scenes discussions when politicians become involved, such as individual Members of Parliament channelling concerns or complaints from one of their electorates. So far we have had very few complaints to the Commission and an even smaller number that have been upheld.

It has been an interesting experience, preparing this paper which has lead me to look back and reflect on, not just the last eight years but the whole time since 1978 when I first became involved. I think we owe the Law Commission and the parliamentarians who transformed the Law Commission vision into quite bold, reforming legislation, a huge debt (and I acknowledge the work done by the Hon Margaret Wilson DCNZM who was Attorney-General at a critical time).

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42 Above n 19.

43 At xii.

# WHY PROBLEM-SOLVING COOPERATIVE STRATEGIES ARE NECESSARY TO ACHIEVE THE GOALS OF REFORMS TO THE CIVIL JUSTICE SYSTEM

BY LES ARTHUR\*

This article argues that problem-solving cooperative strategies are essential to the overriding objectives of the modern civil justice system. Typically, the overriding objective of reforms is the just, speedy and inexpensive resolution of disputes. A fundamental impediment to this objective – an adversarial legal culture – is ameliorated by rules which seek to foster a more collaborative approach to both settlement and court-based adjudication. Rules which encourage cooperation in the conduct of proceedings are necessary for truncated litigation processes to reach correct decisions. Early settlement is promoted by pre-action protocols, which emphasise the candid exchange of information. Ultimately the success of the reforms rests largely on the extent to which the legal profession is able to set aside the adversarial imperative, which emphasises client autonomy, in favour of cooperative strategies which focus on the just and speedy resolution of the dispute.

## I. INTRODUCTION

The dominant feature of reforms to the civil justice system in England and Wales<sup>1</sup> and most recently Victoria, Australia is the amelioration of adversarial legal culture.<sup>2</sup> This change in legal culture is necessary because the adversarial culture is often regarded as an impediment to access to justice. Reforms in the jurisdictions mentioned seek to curb adversarial culture by imposing judicial control over the litigation process and encouraging cooperation in the conduct of litigation. Early settlement is promoted by pre-issue protocols which require the parties to disclose comprehensive information concerning the nature of the dispute. Alternative Dispute Resolution (ADR) is regarded as a legitimate alternative to court-based adjudication. Indeed, the Civil Procedure Act of Victoria empowers the court to compel parties to attend mediation.<sup>3</sup> While it seems clear that the unrestrained adversarial culture is inconsistent with the overriding objectives of modern reforms, the mitigation of adversarial culture raises fundamental jurisprudential questions about the nature of the civil justice system. Is settlement contrary to the administration of justice? To what extent does the obligation to cooperate in the conduct of proceedings undermine the independence of lawyers and unnecessarily impinge on client autonomy?

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1 See Lord Woolf *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System of England and Wales* (United Kingdom Department of Constitutional Affairs, 1996); Ministry of Justice (United Kingdom) *Civil Procedure Rules Practice Direction Protocols* <[www.justice.gov.uk](http://www.justice.gov.uk)>.

2 Victorian Law Reform Commission *Civil Justice Review: Report 14* (2008) <[www.lawreform.vic.gov.au](http://www.lawreform.vic.gov.au)>; Civil Procedure Act 2010 (Vic).

3 Civil Procedure Act, s 66: Court may order proceeding to appropriate dispute resolution.

This article contends that conceptually, settlement is entirely consistent with the administration of justice. The fact that settlement is largely promoted on pragmatic grounds does not necessarily detract from the benefits to the parties reaching an early consensual resolution. If the dispute is not resolved on a consensual basis, it is arguable that the rejection of the adversarial “hired-gun” approach to litigation in favour of a more cooperative problem-solving model is necessary to reach substantively correct decisions within a reasonable time at a reasonable cost.

## II. COOPERATIVE CULTURE: THE BASIC ELEMENTS

The objectives and strategies of the reforms outlined above are closely aligned with a cooperative approach to dispute resolution. In contrast to the adversarial imperative of winning, the ethical basis of cooperative culture is the fair and just resolution of disputes. In the context of court-based adjudication, fairness refers to the vindication of legal rights in accordance with the application of the correct law to the correct facts. Adjudication is inherently adversarial to the extent that it produces winners and losers. Further, it seems likely that powerfully stated and well-researched oppositional argument is a reasonable approach to determine the correct law.<sup>4</sup> However, substantive justice can be impeded by trial strategies which are more concerned with winning rather than the orderly discovery of the truth.<sup>5</sup>

Adjudication based on a collaborative ethic elevates the genuine quest for the truth over winning in relation to the discovery of facts. As has been observed by a number of scholars, truth can be a problematic concept.<sup>6</sup> The scope of the inquiry into truth is also bound by cost-benefit analysis<sup>7</sup> and the limits of human omniscience.<sup>8</sup> Nevertheless cooperative culture regards the discovery of truth at a reasonable cost as fundamental to allowing courts to deal with cases justly. Judicial case management and rules which require parties to cooperate in the conduct of litigation is evidence of reforms based on the important relationship between truth and fairness.<sup>9</sup> Fairness in the context of settlement is broader than adjudication. If the parties choose to bargain in the “shadow of the law”,<sup>10</sup> then fairness is measured in terms of the extent to which the agreement reflects reasonably grounded legal entitlements, subject to commercially motivated trade-offs. In some cases, the

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4 It is beyond the scope of this paper to discuss theories of adjudication. For discussion on these see Richard A Posner “The Problematics of Moral and Legal Theory” (1998) 111 Harv L Rev 1637.

5 *McCabe v British American Tobacco Services Ltd (No 2)* [2002] VSC 112. This case involved the withholding/ destruction of documents which appeared crucial to establishing the critical facts; and *White Industries v Flower and Hart* [1998] FCA 806 in which the Court criticised the law firm (Flower and Hart) about the way in which they had conducted the proceedings by using delaying and obstructionist strategies which amounted to abuse of process.

6 See Carrie Menkel-Meadow “The Trouble with the Adversary System in Post-modern, Multicultural World” (1996) 38(1) Wm & Mary L Rev 5 at 7.

7 *Three Rivers District Council v Bank of England (No 3)* [1996] 3 All ER 558 (QB); *Three Rivers District Council v Bank of England (No 3)* [2000] 2 WLR 15 (CA), Auld LJ dissenting; *Three Rivers District Council v Bank of England (No 3) (Summary Judgment)* [2001] UKHL 16, [2001] 2 All ER 513.

8 See Adrian Zuckerman “Court Adjudication of Civil Disputes: A Public Service to be Delivered With Proportionate Resources, Within a Reasonable Time and at Reasonable Cost” (2006) Australian Institute of Judicial Administration <www.aija.org.au>.

9 Ministry of Justice (United Kingdom), above n 1, r 1.4.2(a) encouraging the parties to cooperate with each other in the conduct of the proceedings.

10 A phrase originally used by Robert H Mnookin and Lewis Kornhauser “Bargaining in the Shadow of the Law: The case of divorce” (1979) 88(5) Yale LJ 950.

interests of the parties will not be satisfied by the “*limited remedial imagination*” of the law and an agreement which meets the parties’ non-legal interests will represent the optimal outcome.<sup>11</sup> It is in the area of settlement that the interest-based collaborative negotiating strategies described by Fisher, Ury and Patton, and Mnookin are particularly useful in promoting fair, cost-effective agreements which satisfy the joint interests of the parties.<sup>12</sup> In order to fully exploit the settlement opportunities provided by justice reforms, it is necessary for lawyers to acquire the problem-solving and collaborative skills eloquently described by Professor Julie Macfarlane in her recent book.<sup>13</sup> In accordance with the principle of fairness described above, settlement must be just and not be “*just about settlement*”.<sup>14</sup>

The second fundamental principle of cooperative culture is built around a problem-solving ethos which recognises the validity of process pluralism. Process pluralism is a term coined by Carrie Menkel, which refers to the idea that adjudication and settlement are equally legitimate dispute-resolution processes.<sup>15</sup> Ultimately, the process selected ought to be determined after careful professional analysis of the parties’ needs and interests. Process pluralism rejects the idea that there is a preordained hierarchy of dispute-resolution processes. That said, given the inherent uncertainty and cost of litigation, even litigation conducted under the reforms described in this paper, settlement is always likely to be the primary mode of dispute resolution.

Before considering in more detail how elements of collaborative culture underpin modern reform initiatives and how such initiatives might be fully exploited to promote the overriding purpose of law reform, it is useful to briefly explain why adversarial legal culture is an impediment to justice.

### III. ACCESS TO JUSTICE AND THE ADVERSARIAL IMPEDIMENT

The overarching objective of reforms to the civil justice is to promote access to justice.<sup>16</sup> Access to justice is typically promoted by reforms which seek to mitigate adversarial legal culture, conceived of in terms of a raft of reforms which are designed to enable the courts to deal with cases justly.<sup>17</sup> A core institutional strategy in promoting access to justice is the mitigation of adversarial culture. Adversarial legal culture is commonly held to be a major barrier to access to justice. This is because the adversarial approach to dispute resolution tends to increase the time and cost of resolving disputes without necessarily enhancing the fairness of the settlement or the accuracy of judicial

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11 Carrie Menkel-Meadow “From Legal Disputes To Conflict Resolution and Human Problem Solving” in Carrie Menkel-Meadow (ed) *Dispute Processing and Conflict Resolution: Theory, Practice and Policy* (Ashgate, Dartmouth, 2003) xiv.

12 Roger Fisher, William Ury and Bruce Patton *Getting to Yes: Negotiating Agreement Without Giving In* (2nd ed, Random House, London, 1999); Robert Mnookin, Scott Peppet and Andrew Tulumello *Beyond Winning: negotiating to create value in deals and disputes* (Harvard University Press, Cambridge, 2000).

13 Julie Macfarlane *The New Lawyer: How Settlement is Transforming the Practice of Law* (UBC Press, Vancouver, 2008).

14 Hazel Genn *Judging Civil Justice* (Cambridge University Press, Cambridge, 2009).

15 Menkel-Meadow, above n 11. See also Lord Woolf, above n 1.

16 Ministry of Justice (United Kingdom), above n 1; and Victorian Law Reform Commission, above n 2.

17 Ministry of Justice (United Kingdom), above n 1, r 1.1(1) which states: “These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly”; Civil Procedure Act, s 7: “Overarching purpose... is to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute.”

decision making. Adversarial culture is a broad term which can be usefully analysed by reference to its objectives, strategies and consequences.

### *A. The Adversarial Imperative – Winning*

Many lawyers and clients traditionally conceive dispute resolution as combat; the objective of the battle is to win. A fair outcome is not the goal of adversarial legal culture in settlement or court-based adjudication. Accordingly, the negotiating style commonly associated with lawyers is competitive and positional. The archetypal strategy associated with competitive legal negotiation is to aggressively adopt an unyielding position. Mnookin describes how hardball negotiating strategies, which include withholding critical information and unrealistic posturing supported by the threat of litigation, unnecessarily increases the transaction costs of resolving disputes.<sup>18</sup> The competitive nature of adversarial negotiation flows directly from the win-lose outcome of adjudication, the only difference being the audience. In adjudication it is only necessary to persuade the judge of the legal merits of the case – the impact on the party of such arguments are irrelevant.

The importance of winning to the adversarial mindset and the impact of unrestrained adversarial culture on the legal system is described by Geoffrey Davies as:<sup>19</sup>

... the compulsion which litigants and especially their lawyers have to see the other side who must be defeated; the “no stone unturned mentality” is a compulsion to take every step which could conceivably advance the prospects of victory or reduce the risk of defeat. Both, in turn, increase the labour intensiveness and consequently the cost and delay of dispute resolution and, especially as between parties of unequal means, render it unfair.

In an unreformed legal system, the intensity of the proceedings, particularly the right of a party to invoke expensive interlocutory processes and draw on expert evidence is largely governed by party resources. The justification for this adversarial principle is that a forensic inquiry into the facts is necessary to improve the likelihood that the case will be decided fairly.<sup>20</sup> While this justification for leaving no stone unturned appears attractive it has been noted that:<sup>21</sup>

All too often, such tactics are used to intimidate the weaker party and produce a resolution of the case which is either unfair or is achieved at a grossly disproportionate cost or after unreasonable delay.

A more severe criticism of unrestrained adversarial culture is that the justification for allowing the parties virtually unrestricted access to the full panoply of interlocutory procedures is flawed because it lacks an important quality: “a genuine search for the truth”.<sup>22</sup> The view that the imperative of winning ousts the genuine search for the truth is conveyed by Judge Marvin Frankel who treats

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18 Mnookin, above n 12.

19 Geoffrey L Davies “Fairness in a Predominantly Adversarial System” in Helen Stacey and Michael Lavarch (eds) *Beyond the Adversarial System* (Federation Press, Sydney, 1999) 102 at 111.

20 Neil Andrews “The Adversarial Principle: Fairness and Efficiency: Reflections on the Recommendations of the Woolf Report” in Adrian Zuckerman and Ross Cranston (eds) *Reform of Civil Procedure: Essays on ‘Access to Justice’* (Clarendon Press, Oxford, 1995) 169.

21 Lord Woolf *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (Department of Constitutional Affairs, 1995) at para 5 of “The need for case management by the courts”.

22 Menkel-Meadow, above n 6, at 13.

with disdain the claim that a trial is an orderly inquiry for the discovery of the truth, rather lawyers aim at victory, not in aiding the court in discovering the facts.<sup>23</sup>

The adversarial imperative of winning is tempered by the legal profession's overriding duty to the court. The use of court procedures for collateral reasons will amount to abuse of process.<sup>24</sup> Nevertheless, there seems little doubt that a significant financial barrier to court-based adjudication is the legitimate use of interlocutory procedures under the guise of discovering the truth. The often disproportionate cost of such processes in relation to establishing the facts disputed by the parties is exacerbated by the "hired-gun" conception of lawyering, which emphasises client autonomy and promotion of the client's best interests. This model of lawyering is largely concerned with the broader issues relating to access to justice. Indeed, the adversarial imperative of winning is dismissive of consequences:<sup>25</sup>

... an advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and amongst them to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring on others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, although it be his unhappy fate to involve his country in the confusion.

Arguably access to justice necessarily tempers adversarial culture and imposes restraints on party autonomy. A balance must be achieved between largely unfettered party autonomy and a disregard for consequences and the objective of promoting access to justice. Modern law reforms attempt to achieve this balance by replacing party autonomy with judicial control of the litigation process and by encouraging cooperation between the parties in the conduct of litigation.<sup>26</sup> In these ways, the adversarial imperative of winning is replaced by a cooperative ethic which values fairness and the discovery of the truth at a reasonable cost over the adversarial imperative of winning regardless of the fairness of the substantive outcome or the time and costs expended.

### *B. Cooperative Culture and Reform of Court-based Adjudication*

The central feature of reforms to promote access to justice in the context of court-based adjudication is to improve the conduct of parties and their lawyers in relation to proceedings before the court. In England and Wales, conduct in relation to interlocutory matters is determined by the judiciary. Judicial case management is governed by the overriding objective of "... improving access to justice by reducing the inequalities, cost, delay and complexity of civil litigation".<sup>27</sup> Clearly the pragmatic aim of these reforms is to promote access to justice by reducing the distorting impact of adversarial strategies described earlier in this paper. Further the mandate to judges includes "encouraging the parties to cooperate with each other in the conduct of the proceedings".<sup>28</sup> The notion of parties cooperating in litigation is antithetical to the conventional adversarial model of

23 Marvin Frankel "The Search for the Truth: An Umpireal View" (1975) 123(5) U Pa L Rev 1031.

24 *White Industries v Flower and Hart*, above n 5.

25 Lord Brougham's defence of Queen Caroline before the House of Lords; quoted by David Mellinkoff in *The Conscience of a Lawyer* (West Publishing Company, St Paul, 1973) at 188–9.

26 Ministry of Justice (United Kingdom), above n 1.

27 Lord Woolf, above n 21.

28 Ministry of Justice (United Kingdom), above n 1, Civil Procedure r 1.4(2)(a).



litigation. Litigation is perceived as an antagonistic combat which is governed by the imperative of winning. Winning will always be the goal of litigation, the sea change anticipated by the injunction to cooperate is that the parties are encouraged to engage in a joint learning and information sharing exercise in order to determine who the winner should be. This cooperative approach is entirely compatible with the rule of law, which in this context means the application of the correct law to the facts and the main aim of civil justice reform, that of promoting access to justice.

While the injunction to cooperate obviously represents a radical departure from traditional adversarial strategy, questions remain about the extent to which reforms embrace a cooperative ethic and the effectiveness of reforms in achieving the stated objective of promoting access to justice.

### *C. Civil Justice Reforms – Improving the Conduct of Parties*

The sea change expected in the conduct of parties involved in disputes is succinctly stated by the Victorian Law Reform Commission,<sup>29</sup> which, in formulating procedures to enhance access to justice seeks to mitigate adversarial culture and emphasise the values of “cooperation candidness and respect for the truth”.<sup>30</sup>

These values inform the paramount duty of litigants to “further the administration of justice”.<sup>31</sup> The paramount obligation of lawyers’ duty, to further the administration of justice is not novel. What is novel is that the duty applies to parties,<sup>32</sup> and overrides lawyers’ conventional duties to clients.<sup>33</sup> Further, the overriding obligations are grounded in the premise that “[h]igh standards of conduct ... are in the best interests of the parties to the dispute”.<sup>34</sup> The required standard of conduct, “which applies to parties ... in any civil proceedings”<sup>35</sup> importantly includes the obligation “to act honestly”;<sup>36</sup> and the obligation to cooperate in the conduct of proceedings.<sup>37</sup> The meaning of the duty to cooperate is contextualised by specific duties, such as the duty to minimise delay,<sup>38</sup> and the duty to narrow the issues in dispute.<sup>39</sup> These obligations, which are supported by sanctions,<sup>40</sup> and reinforced by case-management provisions,<sup>41</sup> seem to be squarely aimed at not only mitigating adversarial culture, but promoting a more collaborative problem-solving litigation culture.

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29 Civil Procedure Act, s 3: “party – means party to a civil proceeding”.

30 Ysaiah Ross *Ethics in Law: Lawyers’ Responsibility and Accountability in Australia* (4th ed Butterworths, Chatswood, 2005) cited in Victorian Law Reform Commission Report, above n 2, at 150.

31 Civil Procedure Act, s 16.

32 Section 10.

33 Section 13(2).

34 Victorian Law Reform Commission Report, above n 2, at 152.

35 Civil Procedure Act, s 16.

36 Section 17.

37 Section 20.

38 Section 25.

39 Section 23.

40 Part 2.4.

41 Part 4.2.

#### D. *Reform of Court-based Adjudication: The Limits of Cooperative Culture Truth and Fairness*

The common theme of reforms discussed above is to improve fairness and cost effectiveness of adjudication by emphasising the collaborative value of cooperation in establishing the truth. The rejection of adversarial trial strategies reduces the cost of litigation and improves the probability that the decision will be based on the correct facts. However, even if the collaborative values embedded in reforms are embraced by lawyers and parties, the relationship between truth, fairness and cost will always be problematic.

As noted by Carrie Menkel-Meadow “truth is illusive, partial, interpretable, dependent on the characteristics of the knowers as well as the known, and most importantly complex.”<sup>42</sup> Given the complexity of what constitutes “the truth” and the limits on judicial omniscience all that can be reasonably expected of a legal system is that the procedures adopted are based on a genuine search for the truth. While not overcoming conceptual problems concerning the nature of truth, a legal system which rates truth as a basic value will more likely avoid the distortions which occur when the purpose of unrestrained interlocutory procedures is often to obstruct rather than disclose the truth.<sup>43</sup> A further practical constraint on establishing the truth is that even a genuine search for the truth based on cooperation between the parties is constrained by the public service ethos which requires that the search for the truth take into account judicial and party resources. This ethos and the constraint on fairness imposed by the philosophy of the Woolf reforms is described by Lord Hobhouse in the following way:<sup>44</sup>

... under Part 1 of the civil procedure rules now in force it is the overriding objective, and the duty of the courts and the parties, that cases should be dealt with justly and that this includes dealing with cases in a proportionate manner, expeditiously and fairly, without undue expense and by allotting only a proportionate share of the courts resources while taking into account the need to allot resources to other cases. This represents an important shift in judicial philosophy from the traditional philosophy that previously dominated the administration of justice. Unless a party’s conduct could be criticised as abusive or vexatious, the party was treated as having a right to his day in court in the sense of proceeding to a full trial having fully exhausted the interlocutory pretrial procedures.

The critical point about these judicial observations, in the context of the argument advanced in this paper is that overarching obligations, which tend to promote collaborative problem-solving strategies, are essential to minimising the tensions inherent in the role that case management has in achieving the overarching objectives of the civil justice system.

#### E. *Cooperative Culture and Restraint on Party Autonomy in Adjudication*

The cooperative goal of achieving a fair outcome based on the genuine search for the truth at a reasonable cost necessarily undermines party autonomy. Party autonomy, which is the cornerstone of the “hired-gun” model of adversarial lawyering, is incompatible with overriding obligations

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42 Menkel-Meadow, above n 6, at 5.

43 Lord Woolf, above n 21.

44 *Three Rivers District Council v Bank of England (No 3) (Summary Judgment)* [2001] UKHL 16, above n 7, at [153]. The principles of effective case management identified by Lord Hobhouse in relation to balancing the interests of the community and judicial resources with the merits of the case are evident in the decision in *Aon Risk Services v Australian National University* [2009] HCA 27 at [5] per French CJ, (2009) CLR 239 175 at 182. A party attempted to amend its claim after the trial had already begun which required an adjournment of the trial.

which make respect for the truth and fairness, rather than winning, touchstones of the civil justice system. This restraint on party autonomy is explicitly recognised by the Civil Procedure Act, which states that overarching obligations:<sup>45</sup>

... prevail over any legal obligation, contractual obligation or other obligation which a person to whom the overarching obligations apply may have, to the extent that the obligations are inconsistent.

This obligation undermines client autonomy, to the extent that the scope of zealous client representation is limited by the goal of achieving a just decision within a reasonable time at a reasonable cost. Arguably this restraint on party autonomy is justified to the extent that party conduct of proceedings is not traditionally motivated by concern for the correct application of the law or the community interest in the efficient use of scarce judicial resources.

#### *F. Effectiveness of Reforms Based on Cooperative Principles*

In England and Wales the reforms to the civil justice system have been in force for about a decade.<sup>46</sup> The sky has not fallen in on the legal profession and indeed, as noted above, there is evidence that a degree of culture change has occurred, brought about by rules which encourage cooperation and active judicial intervention, which is required to “force cooperation”.<sup>47</sup>

While there is ample evidence that the early identification of issues and exchange of information promotes settlement,<sup>48</sup> it seems that litigation which proceeds to trial has not achieved the savings in time, cost and complexity anticipated by the reforms. There are a number of possible explanations why case management informed by cooperative principles has not effectively delivered timely justice at a reasonable cost. As observed by Zuckerman,<sup>49</sup> some judges have found it difficult to come to terms with the implications of resource and time constraints, which inform the overriding objective of dealing with cases justly.<sup>50</sup>

Secondly, and perhaps more importantly, although court control of litigation has generally improved litigation culture,<sup>51</sup> the rules which promote party compliance with cooperative and reasonable litigation practice also potentially increases the cost of litigation. Such increased costs could arise from satellite litigation, which contests the extent of a litigant’s duty to cooperate in the conduct of litigation. In this context the objective of promoting access to justice appears to conflict with the adversarial imperative of winning and the economic incentive of lawyers to engage in protracted litigation.<sup>52</sup> While robust implementation of prescriptive rather than discretionary rules by judges may help, particularly in relation to the early identification of issues

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45 Civil Procedures Act 2010 (Vic), s 12. However, this does not apply to law relating to the Doctrine of Privilege, s 6 Charter and Privilege are not overridden.

46 They were introduced in April 1999.

47 Comment *LawTalk* 741 (New Zealand, 16 November 2009) at 20.

48 John Peysner and Mary Seneviratne *The Management of Civil Cases: the courts and the post-Woolf landscape* (United Kingdom Department for Constitutional Affairs, 2005) at 8 and 35.

49 Zuckerman, above n 8.

50 *Three Rivers District Council v Bank of England (No 3) (Summary Judgment)*, above n 7.

51 Zuckerman, above n 8, at 20; Peysner and Seneviratne, above n 48, at 10–12.

52 The Zuckerman article makes the point that lawyers are typically paid by the hour without an upper limit and therefore have an economic incentive to engage in protracted litigation. Zuckerman, above n 8.

and limiting discovery, the overriding objectives of reform turn on lawyers ultimately embracing the collaborative philosophy embedded in the reform.

This analysis seems to apply even if the cost of litigation is motivated by the application of a professional “precautionary principle” rather than the input method of paying for legal services. The term precautionary principle is used by Chief Justice Black to describe the “no stone left unturned” approach used by careful practitioners in the interests of their client.<sup>53</sup> Even if the “no stone left unturned” approach is motivated by fairness rather than winning, the early identification of issues should reduce the cost and complexity of litigation.

#### *G. Summary: The Role of Cooperative Culture in Reforming Court-based Adjudication*

Both the Woolf reforms and the reforms to civil justice enacted by the Civil Procedure Act are in part based on the goal of achieving a just outcome in adjudication. This means a decision which is in accordance with the substantive legal merits of the case. The concept of justice is subject to a cost-benefit analysis which recognises that procedural compromises are necessary because there is not a limitless supply of public money to be thrown at the provision of legal services. Court control of litigation, based on fostering cooperation between the parties, has improved litigation culture. Unfortunately, the cost-shifting rule, which is used to enforce rules which aim to encourage cooperation between the parties, can lead to an increase in litigation costs. There is no easy solution to this problem. Clearly prescriptive rules which result in cost-effective and limited discovery, the early identification of issues and intolerance of delays would be of assistance in promoting the cause of accessible justice. Ultimately, however, it is suggested that the cooperative philosophy embedded in the reforms will not fully achieve the objective of promoting access to justice until the legal profession and the judiciary act in accordance with the cooperative objectives and strategies.

### IV. THE RELATIONSHIP BETWEEN ADJUDICATION AND SETTLEMENT

Even if the legal profession embraces collaborative problem-solving solutions, court-based adjudication will generally be more time consuming, more expensive and the outcome less certain than disputes which are resolved by settlement. Taking these reasons into account, reforms to the civil justice system typically promote settlement as the primary form of dispute resolution. Early settlement is encouraged by “pre-issue protocols” which require the parties to engage in a comprehensive, good-faith, informal exchange of information before proceedings are issued.<sup>54</sup> Settlement is also encouraged by various alternative dispute-resolution processes which include, negotiation, mediation and judicial settlement conferences. Perhaps understandably, the institutional focus on settlement has led to a backlash from more conventionally-minded jurists who argue that consensual processes are only concerned with settlement, as distinct from just settlement,<sup>55</sup> and undermine the public service value of adjudication.<sup>56</sup>

Collaborative culture does not privilege settlement or adjudication. Rather the goal of problem-solving cooperative culture mirrors the overriding purpose of reforms which “is to facilitate the

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53 Comment *LawTalk*, above n 47.

54 Ministry of Justice (United Kingdom), above n 1; and Civil Procedure Act, s 34: Pre-litigation requirements, specifically s 34(2)(a).

55 Hazel Genn, above n 14.

56 Hazel Genn, above n 14; Owen M Fiss “Against Settlement” (1983) 93(6) Yale LJ 1073.

just, efficient, timely and cost-effective resolution of the real issues in dispute.”<sup>57</sup> While for the reasons noted above, settlement is, in practice, the primary form of dispute-resolution process it is important to recognise that the goal of refurbished procedures is also to promote access to court-based adjudication. The relationship between settlement and adjudication is arguably more complementary than contradictory. Adjudication is vital to settlement in so far as the development of precedent is useful for parties who may wish to bargain in the “shadow of the law”.<sup>58</sup> Early settlement is necessary to conserve judicial resources for cases which require adjudication.<sup>59</sup> In some circumstances settlement may enable parties to craft an agreement which satisfies their joint interests which transcend the limited “remedial imagination of the law”.

### *A. Cooperative Culture and Settlement*

A fundamental premise of cooperative culture is that early and fair settlement of a dispute is promoted by the early exchange of information. The raw material of good-faith negotiation is the early exchange of information. As noted by Mnookin, parties to a dispute can “...by agreement, reciprocally trade information without protracted interrogations, depositions, and document requests”.<sup>60</sup> Mnookin’s suggested strategy for minimising the transaction costs of settling disputes, finds expression in modern reform initiatives, which emphasise the importance of pre-action protocols.

Pre-issue protocols are a feature of the Woolf reforms.<sup>61</sup> For some types of disputes, specific pre-action protocols exist; in all other cases the parties are expected to follow the general Practice Direction Protocols.<sup>62</sup> The Direction provides specific guidance; the court will expect the parties, in accordance with the overriding objective to act reasonably in exchanging information “and generally in trying to avoid the necessity for the start of proceedings”.<sup>63</sup> Claims have to be made in writing and such claims have to be answered promptly. Normally, this pre-action phase will include “the parties conducting genuine and reasonable negotiations with a view to settling the claim economically and without court proceedings”.<sup>64</sup>

One measure of the success of pre-issue protocols is the dramatic decline in cases issued since the introduction of the Civil Procedure Rules for England and Wales in 1999.<sup>65</sup> “Vanishing trials” is a term which has been coined to describe the impact of pre-action protocols and settlement culture

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57 Civil Procedure Act, s 7.

58 Mnookin, above n 10.

59 This point is clearly made by Gleeson CJ when he stated “The courts have never had the capacity to resolve by judicial decision all, or even most, of the civil cases that are brought to them”: M Gleeson *State of the Judicature* (paper presented at the 35th Australian Legal Convention, Sydney, 25 March 2007).

60 Mnookin, above n 12.

61 See Lord Woolf, above n 1; Civil Procedure Act; Michael Legg and Dorne Boniface “Pre-action Protocols” (paper presented at the Non-Adversarial: Implications for the Legal System and Society Conference, Melbourne, May 2010).

62 Ministry of Justice (United Kingdom), above n 1.

63 Ministry of Justice (United Kingdom), above n 1, Civil Procedure r 4.1.

64 Rule 4.2.

65 Peysner and Seneviratne, above n 48, at 8 and 35.

on the reduction of cases filed in court.<sup>66</sup> The merits of parties abandoning adversarial strategies, including withholding of information and invoking the litigation train to achieve the disclosure of information, are obvious. Also, as observed by one District Court Judge, pre-issue protocols assist with the early identification of issues:<sup>67</sup>

... the legal profession generally are looking much earlier at the files ... before issuing proceedings ... [and] direct[ing] their minds to all those aspects that formerly they tended to leave way on into the case, and very often very close to the end of it.

Critics of pre-issue protocols point out that the early and extensive preparation required for compliance with the protocols results in the front loading of costs. Professor Zander complains that:<sup>68</sup>

The effect [of the protocols] is to front-load costs unnecessarily if the case would have settled without it. It is possible that in some of those cases the settlement will come earlier or be more soundly based by virtue of more information. But that is mere speculation.

Given the relationship between information and decision making these comments are perplexing. As a general proposition, the fair resolution of disputes turns on the quality of the information available. If the parties wish to bargain in the shadow of the law as is often the case between strangers litigating over money, as with an insurance claim, early disclosure of information greatly assists with the sound resolution of the dispute. This seems to be the general experience of personal injury lawyers in England where the change in legal culture “forced” by pre-issue protocols appears to have assisted with the early resolution of disputes.<sup>69</sup> The importance of exchanging information cost effectively to reach fair outcomes is emphasised by Mnookin, and underpins the rationale for the introduction of pre-issue protocols.<sup>70</sup> In the minority of cases which do not settle, disclosure of information assists in narrowing issues and therefore reduces the cost of litigation.

### *B. Cooperative Culture and Process Pluralism*

A cooperative problem-solving approach to dispute resolution eschews a hierarchical division between settlement and adjudication, in favour of promoting accessible processes which satisfy the needs and interests of clients.

The relationship between collaborative problem solving and process pluralism is succinctly expressed by Menkel-Meadow:<sup>71</sup>

Legal problem solving is not just about adversarial argument or persuasion about what is right for the client: it is about understanding a range of possible goals for clients and those with whom they interact, and seeking both substantive outcomes and appropriate processes to satisfy the needs and interests of clients and those engaged in activity with the client.

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66 Julie Macfarlane “The Evolution of the New Lawyer: How Lawyers are Reshaping the Practice of Law” (2008) 1 *Journal of Dispute Resolution* 61, citing Mark Galanter “The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts” (2004) 1 *Journal of Empirical Legal Studies* 459.

67 Peysner and Seneviratne, above n 48, at 11–12.

68 Michael Zander *The State of Justice* (Sweet & Maxwell, London, 2000) at 41.

69 Peysner and Seneviratne, above n 48, at 13.

70 Mnookin, above n 12.

71 Menkel-Meadow, above n 11, at xxi.

This notion of legal problem solving is clearly antithetical to adversarial legal culture on a number of levels. Firstly, adversarial legal culture is primarily concerned about “winning”, meaning that often the parties do not care about the other side’s interests. Collaborative culture contends that, even in the litigation context, high standards of conduct are in the best interests of all the parties to the dispute. This premise underpins pre-issue protocols and active case management. Winning is obviously important to litigants, winning on the substantive merits of the case and not as a result of procedural machinations is the core objective of a legal system based on collaborative principles. The importance of rules which encourage “co operation in the conduct of proceedings”<sup>72</sup> are intended to ensure that the parties receive information necessary to assess their legal rights on the basis of the facts of the case, cost effectively. As demonstrated by the post-Woolf reforms experience in England and Wales, sharing of information often results in settlement, which presumably satisfies the parties’ interests. In cases where facts and law are contested, judicial settlement conferences which reality test possible litigation outcomes have a high success rate.<sup>73</sup> Cooperative problem solving acknowledges the public service value of adjudication as a process for vindicating legal rights and developing precedent, which is essential for parties who wish to bargain in the shadow of the law. These objectives are assisted by the refurbishment of civil procedure based on cooperative practice.

The importance of process pluralism is the recognition that the dispute-resolution process is determined by the interests of the parties rather than by dogmatic claims concerning the innate superiority of adjudication over settlement or indeed by the claimed superiority of particular ADR processes. The idea of process pluralism is incorporated into modern law reform which together with recasting procedural rules to expedite adjudication on the substantive merits promotes settlement and ADR as alternatives to adjudication.

## V. CONCLUSION

This article has argued that the replacement of adversarial litigation culture with a more cooperative culture is necessary to promote access to justice. Justice has been defined in two ways. Judicial justice means the application of the correct law to the “true” facts by a judge. Consensual justice refers to settlement which may be based on perceived legal rights or based on a broader notion of interests which includes consideration of non-legal rights. The common thread between judicial and consensual justice is the collaborative idea that prompt and comprehensive disclosure of information and interests is essential to the just and efficient resolution of disputes. Cooperative culture diminishes client autonomy to the extent that partisan interests are subservient to the broader community interests in the just, cost-effective, expeditious resolution of disputes.

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72 Ministry of Justice (United Kingdom), above n 1, r 1.4.2(a).

73 Peysner and Seneviratne, above n 48, at 42.

# ILLEGALITY IN THE UNDERLYING TRANSACTION: A DEFENCE TO DISHONOURING LETTERS OF CREDIT?

BY DR ZHIXIONG LIAO\*

This paper raises doubts over the seemingly prevailing view that illegality in the underlying contract for international trade should be accepted as an exception to the autonomy principle of documentary letters of credit. Contrary to the seemingly prevailing view, this paper argues that there are logical flaws in the “illegality exception” arguments. It suggests that where commercial documentary letters of credit for international trade are involved, the “illegality exception” would be much less likely than expected to be accepted, especially in most common law jurisdictions. It also submits that the public policy concerns over letters of credit being used to facilitate illegal transactions could be better addressed by public law, such as specific statutory provisions, rather than by an ill-founded and loosely formulated “illegality in the underlying contract defence” in private law.

## I. INTRODUCTION

The principle of autonomy is fundamental for the operation of documentary letters of credit which are widely used in the context of international sale and finance. This principle provides a separation of letters of credit from the underlying contract, which renders letters of credit popular as a prompt and certain tool of payment and security in international trade. However, public policy requires this principle not to operate in certain circumstances. In addition to the fraud exception (and possibly the nullity exception), illegality in the underlying contract has been proposed and argued by some academics to be another exception to the principle of autonomy for documentary letters of credit, which seems to be the prevailing view. This paper is to reconsider the issue whether illegality in the underlying contracts for international sale should be an exception to the autonomy principle where commercial letters of credit used in international trade as a means of payment of the price are involved.

After a brief overview of the autonomy principle and the development of exceptions, this paper will firstly discuss international documents/practice, international law and the current positions of some common law jurisdictions that may be relevant to the issue. Critiques will then be made on the arguments for an “illegality exception”; followed by discussions on practical difficulties for the proposed “illegality exception”.

Finally, conclusions and submissions are to be made accordingly.

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## II. THE INDEPENDENCE/AUTONOMY PRINCIPLE AND DEVELOPING EXCEPTIONS

Documentary letters of credit are widely used in international trade and finance. A documentary letter is a banker's promise to pay against the presentation of specified documents. "The fundamental principle governing letters of credit ... is that the obligation of the issuing bank ... is independent of the performance of the underlying contract for which the credit was issued".<sup>1</sup> The doctrine of strict compliance and the doctrine of autonomy are fundamental to the operation of letters of credit.<sup>2</sup> As a combined effect of these doctrines, the bank, when it examines the documents, unless required or allowed otherwise by the letter of credit, has to focus on the documents alone, examine them on their face, and ignore any extraneous circumstances including the underlying transactions. This presents a risk that a fraudulent beneficiary might try to claim payment by presenting documents which appear conforming on their face when the beneficiary in fact has no right to receive payment. The bank may also be liable if it makes a payment where the law prohibits it to pay in the circumstance. The law, therefore, has to identify and carve out circumstances where the bank is entitled to look beyond the presented documents and look at extraneous circumstances when making the payment decision. The development of law in this regard is to establish exception(s) to the general principle. An exception "may sometimes act to destroy the independence of the letter of credit and to relieve the issuer of the letter of credit from its obligation to pay the beneficiary", with the effect as a defence to the non-payment under the letter of credit.<sup>3</sup>

Fraud seems to be a well-recognised exception to the principle of autonomy.<sup>4</sup> It has been argued that some other grounds, such as unconscionable conduct, termination or completion of the underlying contract, nullity or non-existence of the underlying contract, and illegality or violation of the public policy have emerged as real or potential exceptions to the autonomy principle.<sup>5</sup>

Regarding the issue whether illegality in the underlying contract should be an exception, it seems that most academics in this area are in favour of the adoption of such an illegality exception, that is, illegality in the underlying transaction or contract should be a defence to non-payment under the letter of credit.<sup>6</sup> It may be worthwhile to discuss the current positions in this regard in the relevant international law or documents and in some common law jurisdictions, and to summarise the suggested "justifications" for the "illegality exception" argument, before making analyses and critiques on such arguments.

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1 *Bank of Nova Scotia v Angelica-Whitewear* [1987] 1 SCR 59 at 81 per Le Dain J.

2 See International Chamber of Commerce [ICC] Uniform Customs and Practice for Documentary Credits [UCP] 500, arts 2, 13, 14 and 15; and UCP 600, arts 5, 7, 8, 14 and 15.

3 Gerald T McLaughlin "Letters of Credit and Illegal Contracts: The Limits of the Independence Principle" (1989) 49 Ohio St LJ 1197 at 1197.

4 See *United City Merchants v Royal Bank of Canada* [1983] AC 168 (HL) at 183. See also the United States Revised Uniform Commercial Code [Revised UCC] art 5-109.

5 See, for example, Agasha Mugasha "Enjoining the beneficiary's claim on a letter of credit or bank guarantee" (2004) JBL 515 at 515. See also D Warne and N Elliot *Banking Litigation* (2nd ed, Sweet & Maxwell, London, 2005) at 259.

6 See, for example, McLaughlin, above n 3, Mugasha, above n 5 and N Enonchong "The Autonomy Principle of Letter of Credit: An Illegality Exception?" (2006) LMCLQ 404. See also Michelle Kelly-Louw "Illegality as an exception to the autonomy principle of bank demand guarantees" (2009) 42 Comp. & Int'l LJ S Afr 339; Roger J Johns and Mark S Blodgett "Fairness at the Expense of Commercial Certainty: The International Emergence of Unconscionability and Illegality as Exceptions to the Independent Principle of Letters of Credit and Bank Guarantees" (2011) 31 N Ill ULR 297.

### III. CURRENT POSITIONS IN RELEVANT INTERNATIONAL LAW OR DOCUMENTS AND SOME COMMON LAW JURISDICTIONS

#### A. *The UCP*

The Uniform Customs and Practice for Commercial Documentary Credits (UCP) is a publication by the International Chamber of Commerce (ICC). ICC published the first version of UCP in 1933 and issued the current version “UCP 600” in 2007. UCP 600 contains rules relating to the application, issuing, advising, confirming, negotiating, reimbursement, and standard requirements on related documents. It also contains rules concerning the relationship between letters of credit and the underlying contracts,<sup>7</sup> and between documents and the related goods/services/performance.<sup>8</sup>

Although the purpose of the UCP is to provide “universally used rules on documentary credits”,<sup>9</sup> UCP is not binding unless it is incorporated into the domestic law of a particular jurisdiction or incorporated into the contracts by the parties.<sup>10</sup> It is noted that to date no jurisdiction has clearly incorporated UCP into its domestic law.<sup>11</sup> Therefore, UCP itself is not “law”, but model terms of contract for the parties to adopt.

UCP offers no help in answering the question whether illegality of the underlying contract is a defence to payment demands under letters of credit. UCP 600 (as with UCP 500) says nothing as to whether there are any exceptions to the autonomy principle,<sup>12</sup> nor is there any guidance as to the formulation of an exception. It is open for each jurisdiction to develop their respective exceptions. Different jurisdictions may recognise different exceptions, and they may also formulate the “same” exception in different ways. The effect of this problem is amplified by the absence of provisions in the UCP concerning governing law and jurisdiction. A party is very likely to engage in “forum shopping”, seeking to take advantage of the jurisdiction with the most favourable exceptions to its particular claim, which consequently decreases certainty in commercial relationships and allows a plaintiff to dictate where a dispute will be resolved to the detriment of the defendant.<sup>13</sup> As different jurisdictions are very likely to have different or even completely conflicting conclusions on whether a particular transaction is illegal, the uncertainty problem will be even more significant if an “illegality exception” is to be adopted.

#### B. *The UNCITRAL Convention*

Unlike UCP, The United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (UNCITRAL Convention) is an international treaty and thus an international “law”. Notably,

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7 UCP 600, art 4.

8 UCP 600, art 5.

9 ICC “Revised ICC rules on documentary credits make progress” (26 October 2005), <[www.iccwbo.org/News/Articles/2005/Revised-ICC-rules-on-documentary-credits-make-progress/](http://www.iccwbo.org/News/Articles/2005/Revised-ICC-rules-on-documentary-credits-make-progress/)>.

10 Article 1 of the UCP 600 provides that the rules contained apply “when the text of the credit expressly indicates that it is subject to these rules” and the parties can expressly modify or exclude those rules.

11 See Ricky J Lee “Strict Compliance and the Fraud Exception: Balancing the Interests of Mercantile Traders in the Modern Law of Documentary Credits” (2009) 5 *Macquarie J Bus L* 137 at 145–146.

12 Whereas the principle is well enshrined by the UCP provisions, namely, arts 3, 4 and 9 of UCP 500 and arts 4, 5 and 7 of UCP 600.

13 See EP Ellinger “The UCP-500: considering a new revision” (2004) *LMCLQ* 30 at 43–44.

it specifically provides for an illegality exception. Article 19 of the Convention, “Exception to Payment Obligation”, provides that in certain circumstances, including the circumstance where the payment demand “has no conceivable basis”,<sup>14</sup> the guarantor/issuer has a right to withhold the payment. Article 19(2) lists “types of situations in which a demand has no conceivable basis”, including the situations where “the underlying obligation of the principal/applicant has been declared invalid by a court or arbitral tribunal”.<sup>15</sup> Further in art 20, the Convention provides that the court may on application and “on the basis of immediately available strong evidence” issue a “provisional order” to withhold or block the payments under the guarantee or stand-by letter of credit if “there is a high probability”<sup>16</sup> that a situation listed in art 19(1) presents or if the letter of credit was used “for a criminal purpose”.<sup>17</sup>

It is therefore arguable that the UNCITRAL Convention as international law adopts an illegality exception because the court may issue an injunctive order to withhold the payment if the “the underlying obligation of the principal/applicant has been declared invalid by a court or arbitral tribunal”.<sup>18</sup> It has been pointed out that this is a “narrow” exception as it only applies *after* the underlying obligation has been declared invalid by a court or tribunal.<sup>19</sup>

Two points must be noted in this regard. Firstly, the scope of the UNCITRAL Convention is limited to Independent Guarantees and Stand-by Letters of Credit, not applicable to commercial documentary letters of credit that are commonly used in international trade as a means of payment of the price. Even though, arguably, the Convention has adopted an “illegality exception” to the autonomy principle, it does not flow logically that such an “illegality exception” also applies to circumstances where traditional commercial documentary letters of credits used in international trade are involved. Arguably, the title of the Convention suggests the contrary, that is, illegality in the underlying contract should not be a defence to non-payment under the credit where classic commercial documentary letters of credit are involved. Otherwise, the title and arts 19 and 20 of the Convention should have been different.

Secondly, there is also an obvious practical difficulty for the application of the UNCITRAL Convention even if we leave aside the above point and assume that the illegality exception provided in the Convention can be extended to commercial letters of credit. Since the Convention came into existence in 1995, to date, more than 20 years after, there have been only nine countries that have signed the Convention so far and the United States, being a signatory, has not ratified it yet. The other eight signatory countries are Belarus, Ecuador, El Salvador, Gabon, Kuwait, Liberia, Panama and Tunisia,<sup>20</sup> all of which have shares in the international trade pie that are extremely limited or even negligible. None of the major international trade players, such as the United States, China,

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14 United Nations Convention on Independent Guarantees and Stand-by Letters of Credit [UNCITRAL Convention], art 19(1)(c).

15 Article 19(2)(b).

16 Article 20(1).

17 Article 20(3).

18 Article 19(2)(b).

19 Michelle Kelly-Louw “Selective Legal Aspects of Bank Demand Guarantees” (Doctoral thesis, University of South Africa, 2008) at 282.

20 United Nations Commission on International Trade Law “Status 1995-United Nations Convention on Independent Guarantees and Stand-by Letters of Credit” <[www.uncitral.org/uncitral/en/uncitral\\_texts/payments/1995Convention\\_guarantees\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/payments/1995Convention_guarantees_status.html)>.

Japan, the United Kingdom, Germany, Australia, among others, are members of the Convention. Such a situation renders the Convention not really “international” law in a practical sense.

The above shows that no “international law” has adopted illegality in the underlying transaction as a defence to payment demands under commercial documentary letters of credit used in international trade as a means of payment of the price.

### C. *The English Position*

It seems that the United Kingdom is the jurisdiction most prepared to adopt the illegality exception, which is illustrated by a number of cases. *Group Josi Re v Walbrook Insurance Co Ltd*<sup>21</sup> was, prior to 2003, “the only English case in which illegality (of the underlying contract) has been considered as affecting payment under a letter of credit”.<sup>22</sup> In that case:<sup>23</sup>

... an underwriting agency, Weavers, wrote primary risks on the London market for a pool of overseas insurers. Weavers also arranged and managed reinsurance of its pool members by outside reinsurers. The plaintiffs, Group Josi, one of the reinsurers, agreed with Weavers that the latter would pay over to them loss reserves held in respect of the reinsures in exchange for a letter of credit under which Weavers would be entitled to draw down against debit notes stating that Group Josi were liable for the amounts claimed under the reinsurances. Group Josi brought proceedings against Weavers and the reassured companies to restrain them from drawing down under the letters of credit.

One of the grounds for this claim, as Group Josi argued, was that the letters of credit and the underlying reinsurance contracts were “illegal and unenforceable” because “Group Josi was not authorized to carry on insurance business in Great Britain under the Insurance Companies Acts 1974–82”.<sup>24</sup>

The argument was rejected at first instance. Group Josi appealed. The Court of Appeal found on the facts that the reinsurance contract was not illegal. Despite this finding, Staughton LJ alone went on to consider whether illegality of the underlying contract is a defence under a letter of credit. He said:<sup>25</sup>

[I]n my judgment illegality is a separate ground for non-payment under a letter of credit. That may seem a bold assertion, when Lord Diplock in the *United City Merchants* case said that there was “one established exception” [i.e. fraud]. But in that very case the House of Lords declined to enforce a letter of credit contract in part for another reason [besides fraud], that is to say the exchange control regulations of Peru as applied by the Bretton Woods Agreements Order in Council 1946. I agree that the Bretton Woods point may well have been a kind of its own, and *not an indication that illegality generally is a defence under a letter of credit*. But it does perhaps show that established fraud is not necessarily the only exception.

It seems to me that there must be cases when illegality can affect a letter of credit. Take for example a contract for the sale of arms to Iraq, at a time when such a sale is illegal. The contract provides for the opening of a letter of credit, to operate on presentation of a bill of lading for 1000 Kalashnikov

21 *Group Josi Re v Walbrook Insurance Co Ltd* [1996] 1 WLR 1152 (CA).

22 *Mahonia Ltd v JP Morgan Chase Bank (No 1)* [2003] EWHC 1927 (Comm), [2003] 2 Lloyd’s Rep 911 at [48] per Colman J.

23 At [48].

24 At [48].

25 *Group Josi Re v Walbrook Insurance Co Ltd* [1996] 1 WLR 1152 (CA) at 362 (emphasis added).

rifles to be carried to the port of Basra. I do not suppose that a Court would give judgment for the beneficiary against the bank in such a case.

He continued:<sup>26</sup>

Turning to the present case, if the reinsurance contracts are illegal, and if the letters of credit are being used as a means of paying sums due under those contracts, and if all that is clearly established, would the Court restrain the bank from making payment or the beneficiary from demanding it? In my judgment the Court would do so.

From these statements, it seems that Staughton LJ is prepared to accept the possibility that illegality in the underlying contract may be a defence to non-payment under a letter of credit. However, it should be noted that such statements were made on hypothetical circumstances rather than on the facts of the case, hence being only obiter dicta, but not law. On the facts, the underlying reinsurance contracts were held not illegal. Furthermore, the letter of credit involved in the case was essentially a stand-by letter of credit, but the statements talked about a traditional commercial letter of credit used in international trade as a means of payment of the price. The underlying contracts in the case were reinsurance contracts, but the underlying contract referred to in the hypothetical case (selling for 1000 Kalashnikov rifles) is a contract for the sale of goods in international trade, a totally different type of contract. With all due respect, the learned judge did not talk about any of those differences at all. Therefore, such statements should be treated with caution.

*Mahonia Ltd v JP Morgan Chase Bank (No 1)* is another case where the “illegality exception” was discussed.<sup>27</sup> In this case, each of the three parties: Mahonia, JP Morgan Chase Bank (first defendant) and a subsidiary of Enron (ENAC), entered into a swap agreement with the other parties. According to the swap agreement between Mahonia and ENAC, Enron applied to the WestLB AG (second defendant) for a letter of credit as a security in favour of Mahonia. Shortly after the letter of credit was issued, Enron and its 13 subsidiaries, including ENAC, went into bankruptcy. Under the letter of credit, the bankruptcy was an event of default entitling Mahonia to demand for the payment under the letter of credit. JP Morgan presented conforming documents to WestLB AG on behalf of Mahonia. WestLB AG refused to pay and argued that the purpose of the swaps transactions was to provide Enron with a loan disguised as income on a derivative transaction without the disclosure of Enron’s deficient accounts to the Securities and Exchange Commission, which was illegal under the United States’ law and thus contrary to the English public policy. Mahonia applied to the Queen’s Bench Division (Commercial Court) for a summary judgment that the illegality defence be struck out.

The issue was whether illegality in the underlying transactions could be a defence to the non-payment under the letter. Colman J noticed the conflict between two public policy considerations – the special function of letters of credit and the need to insulate them from the underlying transactions on one hand, and the public policy principle of *ex turpi causa* on the other.<sup>28</sup> He discussed *Group Josi Re v Walbrook Insurance* and referred to Staughton LJ’s “unlawful arms transaction” example. He found “it almost incredible that a party to an unlawful arms transaction

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26 At 362.

27 *Mahonia Ltd v JP Morgan Chase Bank (No1)* [2003] EWHC 1927 (Comm), [2003] 2 Lloyd’s Rep 911.

28 At [68].

would be permitted to enforce a letter of credit which was an integral part of that transaction” even if the letter of credit itself is not illegal.<sup>29</sup> He then gave “an even more extreme example” and stated:<sup>30</sup>

I cannot believe that any Court would enforce a letter of credit so secure payment for the sale and purchase of heroin between foreign locations in which such underlying contracts were illegal.

Colman J came to the conclusion that “there is at least a strongly arguable case” that the letter of credit could not be enforced against the bank on the basis that in certain circumstances the illegality of the underlying contract can taint the letter of credit and thereby render it unenforceable.<sup>31</sup> He based his reasoning on Lord Diplock’s approach in *United City Merchants v Royal Bank of Canada*<sup>32</sup> and stated:<sup>33</sup>

If a beneficiary should as a matter of public policy (ex turpi causa) be precluded from utilizing a letter of credit to benefit from his own fraud, it is hard to see why he should be permitted to use the courts to enforce part of an underlying transaction which would have been unenforceable on grounds of its illegality if no letter of credit had been involved, however serious the material illegality involved. To prevent him doing so in an appropriately serious case such as one involving international crime could hardly be seen as a threat to the lifeblood of international commerce.

He therefore dismissed Mahonia’s application that the Court should strike out the bank’s defence of illegality in the underlying transactions.

Mahonia, after failure in the summary application, brought the case to the English Commercial Court for a full trial.<sup>34</sup> Cooke J found that there was no illegality in the underlying contract, and the beneficiary was not privy to any unlawful purpose. The Court thus on the facts held that West LB AG as the issuer of the letter of credit was obligated to pay an apparently conforming demand.<sup>35</sup>

If only for the judgment of the case itself, it was unnecessary for the Court to decide whether in law illegality of the underlying contract would render the letter of credit unenforceable. However, Cooke J went on to consider this issue and largely agreed with Colman J’s view that letters of credit could be tainted by the illegality of the underlying contracts and thus unenforceable despite the autonomy principle,<sup>36</sup> although he had different views regarding the elements for such an “illegality exception”.

It should be noted again, however, such statements were still obiter dicta. The underlying contracts were held not illegal; they were swap agreements rather than contracts for the sale of goods in international trade; the letters of credits were essentially stand-by letters of credit rather than the traditional documentary letters of credits used in international trade as a method of payment of the price. Colman J’s statements (and the heroin example) were made in the lower court and in a summary proceeding. Notwithstanding such statements suggest an inclination of the English courts to recognise illegality in the underlying contracts as a defence to non-payment under letters

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29 At [68].

30 At [68].

31 At [69].

32 *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168 (HL) at 183–184.

33 *Mahonia Ltd v JP Morgan Chase Bank (No 1)* [2003] EWHC 1927 (Comm), [2003] 2 Lloyd’s Rep 911 at [68].

34 *Mahonia Ltd v JP Morgan Chase Bank (No 2)* [2004] EWHC 1938 (Comm).

35 At [223].

36 See Kelly-Louw, above n 19, at 267.

of credit, they are not law. Even the “illegality exception” advocates acknowledge that English law has not yet accepted such an “illegality exception” to date.<sup>37</sup>

#### D. *The United States*

The Revised United States Uniform Commercial Code (Revised UCC), art 5, specifically provides that fraud and forgery are the exceptions to the autonomy principle of letter of credit,<sup>38</sup> but there is no explicit provision for a separate illegality exception in the Revised UCC,<sup>39</sup> which has caused controversy. Some argue that since there are provisions recognising fraud and forgery as exceptions in the Revised UCC, the absence of provision for an illegality exception implies that illegality in the underlying contract, in the absence of fraud or forgery, is not a recognised defence to payment demands under the letters of credit.<sup>40</sup> Others disagree with this. For instance, Professor McLaughlin argues that although there was no explicit provision for an illegality exception, it was still left open to accept an illegality exception, because the UCC did not exclude it as an exception either.<sup>41</sup> He based this argument on UCC s 5–103(b) as authority, which provides that “the statement of a rule in this article does not by itself require, imply, or negate application of the same or a different rule to a situation not provided for, or to a person not specified in the article”. McCullough also stated that fraud in the transaction may not be the only ground in the United States for an exception to the autonomy principle; if the underlying contract was illegal, it was perhaps appropriate to suspend the autonomy principle and enjoin payment on that ground.<sup>42</sup>

This divergence raises a question: whether or not illegality in the underlying contract, under the United States law, could be a separate defence to non-payment under letters of credit. A brief discussion of the revision history and the nature of the Revised UCC art 5 might be helpful to answer this question.

The original UCC art 5 was revised in 1995. Before the drafting committee was appointed, a special Task Force, consisting of eminent letter of credit specialists, was appointed to study the relevant case law, evolving technologies, and changes in customs and practices.<sup>43</sup> The Task Force identified significant issues, discussed them and made recommendations for the revision of art 5. They also substantially participated in the amendment of art 5. During the course of the recodification of art 5, the Task Force spelt out the exception to the autonomy principle of Letters of Credit so that the exception applied only where a required document is forged or materially fraudulent or honour of the presentation would facilitate a material fraud by the beneficiary on

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37 See Enonchong, above n 6, at 410.

38 Revised UCC, art 5, s 5–109.

39 See Enonchong, above n 6, at 408.

40 See Enonchong, above n 6, at 408. See also PS Turner “Mahonia v J.P. Morgan Chase Bank: The Enron L/C and the Issuing Bank’s Defence of Illegality” (2006) 8 JPSL 733.

41 See Gerald T McLaughlin ‘Exploring Boundaries: A Legal and Structural Analysis of the Independence Principle of Letter of Credit law’ (2002) 119 BLJ 501 at 527–528; see also McLaughlin, above n 3, at 1217–1235.

42 See BV McCullough *Banking Law* (Vol No 12: International Banking – Letters of Credit) (looseleaf ed, 1981–) at 234.04[3][g]; and BV McCullough *Letters of Credit* (looseleaf ed, 1987–) at 5.04[3][g]; both cited in Kelly-Louw, above n 19, at 274–275.

43 See “Prefatory Note” to Revised UCC art 5; see also Jim Barnes “The UCP in Court ‘Illegality’ as Excusing Dishonour of L/C Obligations” (2005) 11 ICC’s DCInsight 7 at 7.

the issuer or the applicant.<sup>44</sup> Barnes, a leading member of the Task Force, indicated that they did consider but they “did not enlarge the exception to include ‘illegality’”.<sup>45</sup> They limited an issuer’s extraordinary defences (and applicant’s injunction actions) to drawings that would unduly exploit the autonomy principle.<sup>46</sup> They focused on letter of credit policy and not on the existence of other public policy grounds.<sup>47</sup> In determining the scope of defences to payment obligation under a letter of credit, they “gave zero attention to the law applicable to *guaranty, suretyship, or other security arrangements*”.<sup>48</sup> In Barnes’s view, letters of credit policy requires illegality in the underlying contract should *not* be a defence, but other public policy might require this problem to be redressed; he thus suggests that “relief based on illegality must be sought *after* the bank pays”.<sup>49</sup>

As to the nature of the Revised UCC art 5, as part of a statutory code, those provisions can be a codification or modification of existing common law rules. Generally, unless being substituted or modified by the code, the relevant existing common law rules on the subject matter would not be precluded. But if we look at the title of UCC, the words “uniform” and “code” might indicate that such a code is trying to cover as wide range as possible of recognised rules on the related subject matter in the particular area. If this is so, the absence of an illegality defence in the Revised UCC more likely than not implies that as a rule illegality has not been recognised as a separate defence in the United States. Turner, an eminent specialist in the area, also argues that there should be no general defence based on illegality in the underlying contract; and even if such a defence were to be acknowledged it should be narrowly construed and be available only in the case of criminal or other serious illegality and, analogously to the defence of fraud, be available only when payment to the beneficiary would be obviously pointless or unjust.<sup>50</sup> In relation to McLaughlin’s argument for an illegality defence, Professor Kenneth found himself “more persuaded of the merits of his general approach than of his specific conclusions”.<sup>51</sup>

The above observation is consistent with the prevailing view in the United States that because illegality is not included in s 5–109, it means that the bank must pay despite the illegality of the underlying contract.<sup>52</sup> Even before the Revised UCC art 5 came into effect, when the prior UCC art 5 s 5–144(2) was still in operation, there had been case authorities refusing to accept illegality in the underlying contract as a defence to payment under a letter of credit. In *KMW International v*

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44 Barnes, above n 43, at 7.

45 At 7.

46 At 7.

47 At 7.

48 At 7 (emphasis added).

49 At 8.

50 Turner, above n 40, at 733.

51 E Scott Kenneth “Introduction: Scholarship in Banking Law: An introduction to the Symposium” 49 Ohio St LJ 1183 at 1183–1184.

52 See Barnes above n 43; J Barnes comments on *Mahonia Ltd v West LB AG* [2004] EWHC 1938 (Comm) in JE Byrne and CS Byrne (eds) *2005 Annual Survey of Letter of Credit Law and Practice* (Institute of International Banking and Law Practice, Montgomery Village, 2005) at 331; B Wunnicke, DB Wunnicke and PS Turner *Standby and Commercial Letter of Credit* (3rd looseleaf ed, Aspen Publishers) where the authors discuss the fraud exception, but mention nothing of the existence of an illegality exception; RD Aicher, DL Cotton and TK Khan “Credit Enhancement: Letters of Credit, Guaranties, Insurance and Swaps (The Clash of Cultures)” in JE Byrne and CS Byrne (eds) *2005 Annual Survey of Letter of Credit Law and Practice* (Institute of International Banking and Law Practice, Montgomery Village, 2005) at 19–21. See also Enonchong, above n 6, at 408.



*Chase Manhattan Bank NA*, the Court opined that “there is nothing in the U.C.C . . . which excuses an issuing bank from paying a letter of credit because of supervening illegality”.<sup>53</sup> Some other cases also pointed to the same direction. For instance, in *New York Life Assurance Company v Hartford National Bank and Trust Company* the Court held that a bank that has issued a standby letter of credit may not refuse to pay on the ground that the credit was issued to secure an illegal penalty clause in the underlying contract.<sup>54</sup> In *Prudential Insurance Company of American v Marquette National Bank of Minneapolis*, the Court arrived at a similar conclusion.<sup>55</sup> It is also observed that generally the United States courts have refused to allow illegality in the underlying transaction to be a defence to payment under the letter of credit.<sup>56</sup>

There have been attempts to put illegality in the underlying contract into the fraud exception category and to use it as a defence to payment under the credit, but those attempts failed. In *Western Security Bank NA v Superior Court* the California Court viewed presumed illegality in the underlying transaction as constituting fraud.<sup>57</sup> The Court in the appellate decision sought to promote the California public policy and to support California legislation prohibiting the collection of deficiencies in real estate foreclosures. The beneficiary’s draw under the letter of credit would have allowed the beneficiary to collect the deficiency. The Court viewed the deficiency as “illegal” under the anti-deficiency statute and thus held that the beneficiary’s presentation was fraudulent and that the issuer was entitled to dishonour by reason of the fraud. The decision was reversed by the California Supreme Court,<sup>58</sup> and it brought about clarifying legislation by the California legislature. Arguably, the attempts to squeeze illegality in the underlying contract into the category of fraud (the United States’ “fraud in the underlying transaction”) in order to use it as a defence under UCC demonstrate that the United States’ courts feel they are bound to apply the UCC and no provisions in the UCC for an illegality defence means that illegality in the underlying contract has not been recognised as a separate defence in the United States.

Barnes pointed out that declarations by courts that the underlying obligation is illegal and unenforceable will not prevent payment under the letters of credit; and in such instances, relief based on illegality could only be sought after the payment.<sup>59</sup>

After the English judgments of *Mahonia*, another question arises: will it affect the United States’ position in this regard? Barnes observed that banks and lawyers in the United States are inclined to think that *Mahonia* “got it backwards” because there are vital differences between the law applicable to (classic) commercial letters of credit used in international trade as a means of payment of the price and surety bonds.<sup>60</sup> He points out that after *Mahonia* efforts to enjoin letter

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53 *KMW International v Chase Manhattan Bank NA* 606 F 2d 10 (2nd Cir 1979) at 16; see also *Centrifugal Casting Mach Co Inc v American Bank and Trust Co* 966 F 2d 1348 (10th Cir 1992) at 1352; both cited in Enonchong, above n 6, at 408.

54 *New York Life Insurance Company v Hartford National Bank & Trust Co* 378 A 2d 562 (SC Conn 1977).

55 *Prudential Insurance Company of American v Marquette National Bank of Minneapolis* 419 F Supp 734 (3d Cir 1976).

56 AN Oelofse *The Law of Documentary Letters of Credit in Comparative Perspective* (Interlegal CC, Pretoria, 1997) at 419.

57 *Western Security Bank NA v Superior Court* 269 Cal App (Cal Ct App 1993), remanded with directions to vacate, 888 P 2d 243 (Cal 1995).

58 See *Western Security Bank v Superior Court* 933 P2d 597 (Cal 1997); See also Turner, above n 40.

59 See Barnes, above n 43, at 7.

60 At 7.

of credit payments based on claims that the underlying obligations are illegal seem to be much more promising and for new transactions *Mahonia* presents a challenge,<sup>61</sup> however, after a brief discussion, he ultimately concluded:<sup>62</sup>

*Mahonia's* treatment of illegality is very unlikely to have any effect on US courts enforcing US law-governed L/Cs, and non-US courts enforcing L/C obligations governed by US law may well be persuaded to apply that law, including the uniform statutory provisions on L/C independence and the limited fraud exception to independence.

Therefore, it could be concluded that in the United States, illegality in the underlying contract is not a defence to payment under commercial documentary letters of credit, and this position is very unlikely to be affected by the English judgments of *Mahonia*.

### E. Australia

In respect of the Australian position, Mugasha listed “illegality or violation of public policy” as a separate heading when he discussed grounds enjoining payments under letters of credit and bank guarantees in Australia.<sup>63</sup> Dixon is also of a similar view.<sup>64</sup> It is submitted that their point of view in this regard is under-argued and not convincing.

In addition to the fraud exception, some Australian courts seem to have recognised other exceptions to the autonomy principle in the way of taking into account the situations of the underlying transactions. Almost all of the cases, however, were concerned about bank guarantees (performance bonds) used in the construction industry rather than letters of credit in international trade. Despite this, an observation of them might still help to figure out what the possible position of the “illegality defence” to payment under letters of credit might be in Australia, as it has been suggested that the autonomy principle is equally fundamental for both letters of credit and bank guarantees to operate and thus the same principles govern both of them although no convincing arguments or justifications were given.<sup>65</sup>

Some Australian cases created an “underlying contract” exception,<sup>66</sup> namely, the terms or situations of the underlying contracts were held to be able to affect the bank guarantees and render them unenforceable. In *Barclay Mowlem Construction Ltd v Simon Engineering (Australia) Pty Ltd*, the applicant sought to restrain the beneficiary from demanding payment under a performance bond, which emphatically declared that it was payable unconditionally on demand by the beneficiary but also provided that the “contract is by reference made a part hereof”.<sup>67</sup> The Court held that the applicant could rely on the wording of the underlying contract to restrain the beneficiary from demanding payment.<sup>68</sup> In *ADI Ltd v State Electricity Commission of Victoria*, the Court by an interlocutory order restrained the beneficiary from demanding payments of performance bonds relying upon a stipulation in the underlying contract which prevents the beneficiary from calling

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61 At 7.

62 At 8.

63 See Mugasha, above n 5, at 523–524.

64 See Bill Dixon “As Good As Cash? The Diminution of Autonomy Principle” (2004) 32 ABLR 391.

65 See Mugasha, above n 5, at 516.

66 See Dixon, above n 64, at 402.

67 *Barclay Mowlem Construction Ltd v Simon Engineering (Australia) Pty Ltd* (1991) 23 NSWLR 451 (NSWSC).

68 See Mugasha, above n 5, at 529.

upon the issuer to meet its obligation under the performance bond.<sup>69</sup> Byran J's stated "if the contract is *avoided* or if there is a *failure of consideration*" the payment demand could be restrained.<sup>70</sup>

Such cases should be read with caution. Even Mugasha, a promoter of the "illegality exception", suggested that these cases are "exceptional",<sup>71</sup> and in these cases, the autonomy principle was "misapplied".<sup>72</sup> He also suggested that these cases were so decided because the incorporation of the terms of the underlying contract turned the bank guarantee from unconditional to conditional, and in the particular context (domestic construction industry).<sup>73</sup> He also noted that in some other cases the Australian courts are reluctant to interfere with commercial letters of credit because of their function in international trade.<sup>74</sup> Therefore, this line of cases do not support a general "illegality defence" to non-payment under the classic letter of credit used in international trade as a means of payment of price.

Some other cases seem to create a so-called "statutory unconscionability exception" in Australia.<sup>75</sup> In *Olex Focas Pty Ltd v Skodaexport Co Ltd*, the Court held that unconscionable conduct under general law is *not* a ground for issuing an injunction prohibiting payment of a bank guarantee, but that statutory unconscionability is.<sup>76</sup> The Court held that an injunction could be issued because of an infringement of s 51AA of the Trade Practices Act 1974 (Cth), which provides that a corporation must not engage in conduct that is unconscionable within the meaning of the unwritten law.<sup>77</sup>

Some might argue that the "statutory unconscionability exception" is in essence an "illegality exception", but it should be noted that it was accepted as a defence simply because the conduct in the underlying transactions were contrary to the particular provisions of a statute (for example, s 51AA of the Trade Practice Act 1974 (Cth) as discussed above). Had there been no such a specific statutory prohibition, the outcome of the judgments would have been substantially different.

Another might-be relevant case is *Sirius International Insurance Co (Pub) v FAI General Insurance Ltd*.<sup>78</sup> In this case, an irrevocable stand-by letter of credit was issued by Westpac Ban, an Australian bank, on the application of FAI, an Australian insurance company, in favour of Sirius, a Swedish reinsurance company, as security required by Sirius, who agreed to act as fronting reinsurer and hence assumed the risk, in the event of the insolvency or default of FAI, Sirius have nonetheless to pay Agnew, the insured. A side letter negotiated and agreed between Sirius and FAI provided that Sirius would not draw down under the letter of credit unless one of the two conditions was satisfied. As Lord Steyn indicated in the House of Lords' decision, the House of Lords in this case had been expecting to deal with important issues regarding the autonomy principle applicable to letters of credit.<sup>79</sup> In this case, however, the Court of Appeal and House of Lords had no issues

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69 *ADI Ltd v State Electricity Commission of Victoria* (1997) 13 BCL 337 (VSC).

70 At 340.

71 See Mugasha, above n 5, at 529.

72 At 531.

73 At 531.

74 At 531.

75 Dixon, above n 64, at 403.

76 *Olex Focas Pty Ltd v Skodaexport Co Ltd* [1998] 3 VR 380, (1996) 134 FLR 331 (VSC).

77 See Mugasha, above n 5, at 518–519.

78 *Sirius International Insurance Co (Pub) v FAI General Insurance Ltd* [2004] UKHL 54, (2004) WLR 3251.

79 At [3].

as to whether the side letter had effect on Sirius' entitlement to draw down the stand-by letter of credit. The issue was whether one of the two conditions set out in the side letter had to be satisfied so that payment could be made out under the letter of credit. This case shows how the payment under a stand-by letter of credit could be closely connected to or even dependent on an underlying document.

It should also be noted that none of those cases was directly related to illegality in the underlying contract. Furthermore, none of them concerned classic documentary letters of credit, but performance bonds or bank guarantees instead. Even if the "statutory unconscionability exception" might be argued in essence as an "illegality exception", it is too far-fetched to infer that an "illegality defence" has been or should be recognised by Australian courts where classic documentary letters of credit commonly used in international trade are involved. These cases do suggest that Australian courts are open-minded as to new exceptions to the autonomy principle. However, it seems that Australian courts are vigilant about the differences between documentary letters of credit used in international trade, and bank guarantees and performance bonds, and are reluctant to recognise a general "illegality exception" where the classic documentary letters of credit are involved.

#### F. *New Zealand*

In New Zealand, there is a current statute, the Illegal Contracts Act 1970, dealing with illegal contracts. Section 6 of the Act provides that illegal contracts are to be of no effect, but subject to provisions of this Act and of any other enactment.<sup>80</sup> Section 7 of the Act provides that "notwithstanding the provisions of section 6, but subject to the express provisions of any other enactment", the court may grant "such relief by way of ... variation of the contract, validation of the contract in whole or part or for any particular purpose, or otherwise howsoever as the court in its discretion thinks just". The combined effect of ss 6 and 7 is that an illegal contract is unnecessarily declared ineffective although "of no effect" being a default rule, but rather the court has a wide discretion to decide the effect of an illegal contract including validation of an illegal contract. The restriction on such discretionary power of the court is "express provisions of any other enactment".

If this is so, even if in circumstances where a letter of credit itself is illegal (under New Zealand law), it is still possible that the court may grant a relief of "validation of the contract" under s 7 of the Illegal Contracts Act unless this is prohibited by express provisions of any other enactment. This means even if the letter of credit itself is illegal, the illegality is unnecessarily a defence of non-payment under the letter of credit. A logical inference is that where the illegality is found in the underlying contract, it is even less likely that the illegality becomes a defence to the violation of a bank's mandate to pay under the legitimate letter of credit, unless otherwise provided by any provisions of an enactment.

To date there have been neither cases nor legislation in New Zealand that have directly addressed whether illegality in the underlying contract can be a defence to payment under a letter of credit. The Anti-Money Laundering and Countering Financing of Terrorism Act 2009 might be relevant and the recent Supreme Court's decision in *Westpac NZ Ltd v Map* may be an indication of the preference of New Zealand courts.<sup>81</sup>

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80 Illegal Contracts Act 1970, s 6(1).

81 *Westpac NZ Ltd v Map & Associates Ltd* [2011] NZSC 89, [2011] 3 NZLR 751.

The Anti-Money Laundering and Countering Financing of Terrorism Act, among others, sets up an example of under what circumstances (for instance, where the payment itself or the underlying activity is an activity of money laundering or financing of terrorism – an illegal activity) a court may grant an injunction to stop the payment, notwithstanding such a payment is a contractual obligation. Under the Act, there is an overriding duty for the banks and any other relevant persons to comply with the Act and non-compliance is not excused by contractual obligations. The High Court may, on application of the relevant Anti-Money Laundering and Countering Financing of Terrorism (AML/CFT) supervisor, grant, rescind or vary an injunction requiring a person to do an act or thing if the statutory requirements are met.<sup>82</sup> The High Court may also, on the application of the relevant AML/CFT supervisor, grant an injunction restraining a person from engaging in conduct that constitutes or would constitute a contravention of a provision of the Act, if the statutory requirements are met.<sup>83</sup> It is conceivable that without this Act and any other enactment, a bank cannot easily breach its mandate to make out a payment under a contract, simply by alleging possible illegality in the underlying transaction. This legislation suggests that a general conception of illegality may not be a defence to non-payment under letters of credit, but rather specific legislation is required, as otherwise most of this legislation would be largely redundant.

The recent Supreme Court's decision in *Westpac NZ Ltd v Map & Associate Ltd* is not a case directly related to non-payment under letters of credit because of the illegality in the underlying contract, but rather a case where the bank refuses to follow the client's instructions to make out the payment under the letter of credit for fear of liability that may arise from breach of trust for aiding fraud.<sup>84</sup> This case, however, shows how high the bar could be for a defence to failure to honour customers' instructions. In this case, MAP, a New Zealand chartered accountants firm, had agreed in 2006 to act as a deposit agent for parties involved in the sale of approximately 94 per cent of the shareholdings in Prodem, a private Bolivian Bank.<sup>85</sup> BIV, a Venezuelan State Bank, entered into an agreement to purchase the shareholdings and agreed to deposit the purchase price with MAP pending completion of the due diligence and settlement of the sale. MAP opened in its own name a foreign currency account with Westpac. In December 2012, MAP provided Westpac with a sealed envelope containing instructions for the transfer of the funds, but Westpac was directed not to open the envelope until MAP authorised it to do so. Then, over USD 49,000,000 was received and deposited into MAP's account with Westpac. During this time, Westpac did not receive instructions to disburse the money, but an alert that a large amount of payments from Bolivia should be treated with caution and also that BIV had assigned its rights in the Prodem shares to Bandes, another Venezuelan Bank. In February 2008, MAP instructed Westpac to act on those instructions, but Westpac declined, arguing that some of the parties to be paid did not appear to be shareholders. Westpac continued to decline payment of the funds after making enquiries and advised MAP to apply to the High Court for an order.

The High Court ordered that Westpac was to act on the instructions and held that Westpac had no defence to MAP's claims for breach of mandate and was, therefore, liable for interest and

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82 Anti-Money Laundering and Countering Financing of Terrorism Act 2009, ss 85 and 86.

83 Sections 87 and 88.

84 *Westpac NZ Ltd v Map & Associate Ltd* [2011] NZSC 89, [2011] 3 NZLR 751.

85 The facts are set out in details in the New Zealand Court of Appeal decision *Westpac Banking Corp Ltd v MAP & Associates Ltd* [2010] NZCA 404, [2011] 2 NZLR 90.

costs.<sup>86</sup> Both the Court of Appeal and the Supreme Court substantially upheld the High Court's decision.<sup>87</sup> Tipping J in the Supreme Court observed that as a general principle liability to perform contracts is generally strict, and a defence to breach of contract should not be easily available, especially for banks, which are better able to bear the loss and manage the risks than customers.<sup>88</sup> The Court of Appeal and the Supreme Court reaffirmed that a bank's principal duty is to act in accordance with its customers' wishes; and the long-standing principle that banks should honour their customers' instruction should not be easily undermined.

Although this is not a case directly on point regarding whether illegality in the underlying contracts could be a defence to non-payment under letters of credit, it suggests that New Zealand courts take a conservative position in accepting breach of bank's mandate. It seems that this case poured cold water on the argument that New Zealand should adopt illegality in the underlying contract as an exception to the autonomy principle of letters of credit.

From the above discussion, it can be seen that none of the selected common law jurisdictions have actually adopted an "illegality exception" to the autonomy principle. The most likely jurisdiction that might adopt the illegality exception is the United Kingdom, but as analyses below show, there are still significant barriers to overcome for the adoption of illegality in the underlying contract as a defence to non-payment under classic documentary letters of credit used in international trade as a means of payment of the price.

#### IV. CRITIQUES ON THE ARGUMENTS FOR THE "ILLEGALITY DEFENCE"

Arguments for the "illegality in the underlying contract defence" to non-payments under documentary letters of credit can be summarised as the followings: a) the English case of *Group Josi* and the two *Mahonia* cases suggest that illegality in the underlying transactions should be an exception to the autonomy principle of letters of credit; b) "no reason why" or "hard to see why"<sup>89</sup> the principle of *ex turpi causa* which justifies the fraud exception should not "equally apply" to illegality in the underlying contract; c) regarding the autonomy principle and its exceptions, "same principles should equally" apply to bank guarantees, stand-by letters of credit and documentary letters of credit. It is submitted such arguments are not as strong as they appear to be, for a number of reasons, *inter alia*, the existence of logical flaws in the arguments.

Firstly, almost all the arguments for the "illegality exception" are based on the Judges' opinions in the English case of *Group Josi* and the two *Mahonia* cases. It is true that those statements suggested an "illegality exception" is now more likely to be accepted in the United Kingdom than before, as pointed out in part III; however, none of those statements, pointing in favour of an "illegality exception", were *ratio decidendi*; they were merely *obiter dicta*. None of the letters of credits involved in those cases were a traditional commercial documentary letter of credit used in international trade as a means of paying the price. No illegality in the underlying transactions was found by the courts based on the facts. Such opinions have not yet been cited with approval by the English Court of Appeal or the House of Lords. The hypothetical examples given by the Judges

86 *MAP & Associates Ltd V Westpac Banking Corp Ltd (No 2)* HC Auckland CIV-2008-404-1373, 10 March 2009.

87 *Westpac Banking Corp Ltd v MAP & Associates Ltd* [2010] NZCA 404, [2011] 2 NZLR 90 (CA); *Westpac NZ Ltd v Map & Associate Ltd* [2011] NZSC 89, [2011] 3 NZLR 751 (SC).

88 At [14] per Tipping J.

89 *Mahonia Ltd v JP Morgan Chase Bank (No 1)* [2003] EWHC 1927 (Comm), [2003] 2 Lloyd's Rep 911 at [68].

in those cases are extremely exceptional, that is, where the underlying transactions are a sale of Kalashnikov rifles to Iraq,<sup>90</sup> or a sale of heroin.<sup>91</sup> All of these factors suggest that such opinions should be treated with caution.

Secondly, the arguments for the “illegality exception” either intentionally or inadvertently ignore the undeniable distinctions between bank guarantees and stand-by letters as a category, and classic commercial documentary letters of credit used in international sale as another. Almost all of the arguments for a general “illegality exception” are mainly based on the obiter dicta in the English case of *Group Josi* and the two *Mahonia* cases, but they fail to recognise or place sufficient weight on the fact that none of these cases involved a classic commercial documentary letter of credit used in international trade (but rather stand-by letters of credit were in issue). They also fail to justify why classic commercial documentary letters of credit used in international trade should be subject to the same rule regarding the “illegality exception” as stand-by letters of credit. The two categories of bank instruments have substantially different functions and contexts of use, although the autonomy principle applies to both (but unnecessarily *equally* applies to both). For traditional commercial documentary letters of credit, payment under the credit is a *primary* obligation of the underlying contract, that is, the payment of the price of the goods or services; whereas for stand-by letters of credit or bank guarantees or performance bonds, the payment obligation is *secondary* or *collateral* to the underlying contract, functioning only as a surety or security (collateral to the main contract). The purpose of performance bonds and bank guarantees (and stand-by letters of credit) is “not to act as a conduit for the payment of the price [which is the purpose of commercial letters of credit] ... but to cajole the seller into performance, particularly performance of his physical obligations under the contract of sale, and the bond is consequently closely linked to that contract”.<sup>92</sup> Therefore, performance bonds (and bank guarantees and stand-by letters of credit) are “less independent” from the underlying contracts than classic commercial letters of credit used as a means of payment of the contractual price.<sup>93</sup> Although Lord Denning, in *Edward Owen v Barclays Bank International*, stated, in obiter dictum, that “[a]ll this leads to the conclusion that the performance guarantee stands on a similar footing to a letter of credit”,<sup>94</sup> Eveleigh LJ made such comments in *Potton Homes Ltd v Coleman Contractors Ltd*:<sup>95</sup>

In attributing to the bond many similarities to a letter of credit, I do not regard Lord Denning as saying that one should approach every case upon the basis that the bond is a letter of credit and to have no regard to the circumstances which brought it into existence.

Such fundamental differences justify the different treatments where different categories of bank instruments are involved. As the United States Uniform Commercial Code § 5–103 comment 1 (2009) points out, only staunch recognition of [the independence] principle by the issuers and the courts will give letters of credit the continuing vitality that arises from the certainty and speed of payment under letters of credit. To that end, it is important that the law does not carry into letter of credit transactions rules that properly apply only to secondary guarantees or to other

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90 *Group Josi Re v Walbrook Insurance Co Ltd* [1996] 1 WLR 1152 (CA) at 362.

91 *Mahonia Ltd v JP Morgan Chase Bank (No 1)* [2003] EWHC 1927 (Comm), [2003] 2 Lloyd’s Rep 911 at [68].

92 Charles Debattista “Performance bonds and letters of credit: a cracked mirror image” (1997) JBL 289 at 303.

93 At 301.

94 *Edward Owen Engineering Ltd v Barclays Bank International* [1978] QB 159, [1978] 1 All ER 976 per Lord Denning at 171–172.

95 *Potton Homes Ltd v Coleman Contractors Ltd* [1984] 28 BLR 19 (CA) at 27.

forms of engagement.<sup>96</sup> It is not convincing to argue that “illegality exception/defence” should be adopted merely based on discussions about bank guarantees, performance bonds or stand-by letters of credit, without justifications why such a fundamental distinction should be ignored. It is also inappropriate using those concepts interchangeably or in a vague or slippery way when the “illegality exception” is argued for.

Thirdly, the arguments for the “illegality exception” fail to recognise the distinction between fraud and illegality in the underlying contract. Almost all of the arguments for an “illegality exception” heavily rely upon the *ex turpi causa* principle, which justifies the fraud exception, but fail to provide plausible reasons why the same principle should be *equally* applicable to both.<sup>97</sup> The Latin maxim *ex turpi causa non oritur actio* means “from a dishonourable cause an action does not arise.” Based on this principle, a person will be unable to pursue a cause of action if such action arises as a result of his/her own wilful, illegal act. Dishonesty or the knowledge of the illegality is required. The principle may not be *equally* applicable to both fraud and the “illegality in the underlying transaction”, since there are significant differences between them. There must be dishonesty for a fraud to be established; whereas parties to a transaction may not be aware of the illegality in the transaction. In an international sale scenario, for fraud, *the seller* (beneficiary of the letter of credit) is more likely to defraud the issuing bank and the applicant of the letter of credit, that is, the seller commits fraud and the innocent buyer bears the risk; whereas for an “illegal underlying transaction”, it is more likely that *the buyer* knows about the illegality and voluntarily assumes the risk of the illegal goods being confiscated by the government. In an illegal underlying transaction, although there could be circumstances where neither of the parties are aware of the illegality, the more common situation is that both the seller and buyer are aware of the illegality (conspiracy) and voluntarily assume the risk; whereas in a fraud case, the seller and buyer are more likely to have conflicting interest and fraud is only unilaterally committed by the seller (beneficiary). Furthermore, the “illegality exception” will cause much more serious harm to the autonomy principle than the fraud exception. It is arguable that the presentation of documents fraudulently made to the issuing bank is a breach of an implied contractual obligation under the letter of credit contract itself, that is, documents required by the letter of credit and presented for payment must be genuine, and a breach of such an essential term of the letter of credit contract gives rise to the bank the right to dishonour its obligation to pay under the letter of credit contract. This means the independence or separation of the letter of credit from the underlying contract has not been fundamentally undermined. For the “illegality in the underlying contract defence”, however, the bank’s dishonouring of its obligation under the letter of credit contract must rely on a situation in the underlying contract rather than the letter of credit contract itself, which significantly violates the independence of the letter of credit.

They are also differences regarding what kind of interests are being harmed. For fraud, the beneficiary seller will get unjust enrichment at the cost of the buyer. What is protected from the fraud exception is a private interest based on fairness. Whereas for an illegal underlying transaction exception the aim is to protect public interest, in most circumstances both parties to the illegal underlying transaction obtain a benefit at the cost of society. Public, rather than private, interest being harmed does not mean the justification for an illegality exception in private law is stronger

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96 UCC § 5–103 cmt 1 (2009).

97 If illegality in the underlying contract is to be recognised as a defence, the rationale of the recognition would be the same as fraud, namely, the maxim *ex turpi causa*. See *Mahonia Ltd v JP Morgan Chase Bank (No 1)* [2003] EWHC 1927 (Comm), [2003] 2 Lloyd’s Rep 911at [68] per Colman J.



than that for a fraud exception. Public interest could and should be better protected by public law. Deviation from the autonomy principle will not work better than a statute declaring what kinds of payments are prohibited by law.

The ways of counteracting are also different. For fraud, the recognition of a fraud exception, or payment in cash in advance will be an effective way to eliminate the possibility of fraud; whereas for illegality, a payment in cash in advance or in arrears will not do anything to the illegality of the underlying transaction. Therefore, an illegality exception will not effectively prevent the illegal transaction, although the parties to an illegal transaction may get more difficulties regarding the time and method of payment. There must be statutes preventing the illegal transaction itself, and/or the payment for illegal transactions, regardless of the methods of payment. For example, if selling or buying heroin is illegal, the legislation may make this clear and prohibit the illegal transaction itself, and the financing, including any payment for such a transaction, whether the financing or payment is made in a form of cash or a letter of credit.<sup>98</sup> Circumstances where illegality in the underlying transaction entitles the court to grant injunctions should be carved out by express provisions of an enactment (as found under ss 86–88 of the Anti-Money Laundering and Countering Financing of Terrorism Act New Zealand). In this circumstance, the court may grant an injunction on the request of the relevant public body, relying on a particular statute, rather than a general, poorly defined and highly problematic “illegal underlying contract exception”.

## V. PRACTICAL DIFFICULTIES FOR THE “ILLEGALITY DEFENCE”

In addition to the logical flaws in the arguments for an “illegality exception”, there are also practical difficulties for the proposed “illegality exception”. Firstly, different jurisdictions very likely have significantly different conclusions as to whether a particular transaction is illegal. For example, trading of Compound Pseudoephedrine HCl Sustained Release Capsules (CONTACONT) under Chinese law is totally legal but would be illegal under New Zealand law.<sup>99</sup> Much greater differences can be found with “illegality” than “fraud” in different jurisdictions. Most jurisdictions have similar ideas as to what constitutes a “fraud”, but whether a particular transaction is “illegal” could be fundamentally different in different jurisdictions as the “illegality” must be determined against the law of a particular jurisdiction, which may be considerably different from one jurisdiction to another. Uniformity of law, although difficult, is highly desirable for the promotion of international trade. Adoption of a highly controversial “illegality exception”, which inevitably closely connects to different results of determining the existence of illegality in a particular transaction by different jurisdictions, will not only harm the efforts for the uniformity of international business law, but will also significantly encroach the autonomy principle of documentary letters of credit and subsequently harm international trade. Where the major international trade players (for example, the United States) do not accept an “illegality exception”, a jurisdiction adopting such an exception will make it an “exception” to, and hence the risk of being alienated from, the international market. As discussed above, the UNCITRAL Convention arguably adopts a very narrow “illegality defence” regarding non-payments under independent guarantees and stand-by letters of credit (not commercial documentary letters of credit), but none of the major international trade players has ratified this Convention, which renders it not really “international” law in a practical sense.

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98 The Anti-Money Laundering and Countering Financing of Terrorism Act is a good example of this.

99 See Misuse of Drugs Act 1975, ss 6 and 7. See also discussions below on the hypothetical case of Compound Pseudoephedrine HCl Sustained Release Capsules.

A logical inference from the unwelcomeness of the Convention is that it is already difficult for the “major jurisdictions” to adopt an “illegality exception” where only independent guarantees and stand-by letters of credit are involved, it will be even more difficult if classic commercial letters of credit are included, taking into account the “lifeblood” function of the latter.

Secondly, it is highly difficult to formulate the “illegality exception”. If an “illegality exception” is to be adopted, the elements of it must be made clear. What qualifications should the illegality defence be subject to? The *obiter dicta* in the English case of *Group Josi* and the *Mahonia* cases suggest an “illegality exception” but none of them, however, clearly set out the elements of the “illegality defence”. There are also differences in this regard between the two *Mahonia* cases. Colman J in *Mahonia (No 1)* put in place a series of factors that a court should consider and weigh up in determining whether the illegality defence applies, namely, the gravity of the illegality, connection between the letter of credit and the underlying contract, and whether the parties are privy to the illegality, among others.<sup>100</sup> Whereas Cooke J in *Mahonia (No 2)* emphasised as an overriding factor the close degree of connection between the letter of credit and the illegality of the underlying transaction.

Thirdly, there are also other practical issues regarding the proposed “illegality exception”. For example, standard and time of proof of the alleged illegality, the gravity of illegality required, and what the issuing/corresponding bank’s duties are. Such issues/concerns also point against the adoption of a general “illegality exception”.

In relation to standard of proof of the alleged illegality, Staughton J in *Group Jos* stated that the illegality of the underlying contract must be “clearly established”. It has been pointed out this is a very high standard of proof, and consequently, the illegality defence will succeed only in very rare cases.<sup>101</sup> This may suggest the “illegality defence” has little significance in practice. The time of evidence is “even more of a problem”.<sup>102</sup> Colman J stated:<sup>103</sup>

... the fact that the bank did not have clear evidence of such illegality at the date when payment had to be made would not prevent it having a good defence on that basis if such clear evidence were to hand when the Court was called upon to decide the issue.

It would be too harsh and impractical in most circumstances to require the bank to clearly establish the illegality in the underlying contract at the time of dishonouring the letter of credit. Under UCP 600, the bank has “a maximum of five banking days following the day of presentation” to determine if a presentation is complying and once the documents presented are complying on the face of them the bank must pay.<sup>104</sup> This implies that the bank has little time to investigate and collect sufficient evidence to meet the high standard of proof, that is, “clearly establish”. Another factor is the accessibility of relevant documents (for example, the underlying contract). When the documents are presented for payment, the underlying contract is not included. The bank has no right or obligation to go beyond the documents presented unless otherwise agreed. On the other hand, making evidence, obtained after the dishonouring, admissible at trial does not alleviate the bank’s concern in practice as the bank must make the decision to pay or not on the basis of the very limited evidence available at hand and within the short time frame.

100 *Mahonia Ltd v JP Morgan Chase Bank (No 1)* [2003] EWHC 1927 (Comm), [2003] 2 Lloyd’s Rep 911at [64]–[69].

101 See Enonchong, above 6, at 413–414.

102 *Group Josi Re v Walbrook Insurance Co Ltd* [1996] 1 WLR 1152 (CA) at 1164.

103 *Mahonia Ltd v JP Morgan Chase Bank (No 1)* [2003] EWHC 1927 (Comm), [2003] 2 Lloyd’s Rep 911 at [69].

104 UCP 600 2007, art 14(b).

The gravity of the illegality in the underlying contract is also in issue. Colman J in *Mahonia (No 1)* stated that the illegality must be of a sufficiently serious nature to trigger the *ex turpi causa* principle.<sup>105</sup> What amounts to “sufficiently serious illegality”? Cooke J in *Mahonia (No 2)* stated that the illegality would be “sufficiently serious” if the contravention involves “any elements of deceit or intentional wrongdoing”.<sup>106</sup> Enonchong argued that this “deliberate wrongdoing” test is not the only basis on which trivial and serious illegality could be distinguished and the test may not provide the right answer in every case.<sup>107</sup> Kelly-Louw suggested that if the illegality is not linked to a criminal element, it should not be deemed to be sufficiently serious, but of a mere technical nature.<sup>108</sup> Similarly, Mugasha suggested if the illegality is of a technical nature, for example, contrary to import or export regulations or failure by the applicant to comply with the licensing requirements in the applicant’s country, it could not be a defence to non-payment under the letter of credit.<sup>109</sup>

These tests suggested are not without problems. Firstly, it is not always easy to determine whether a provision of a statute or regulation is of “technical nature”, and sometimes a breach of “licensing requirements” may be a criminal offence.<sup>110</sup> Secondly, it is not clear which jurisdiction’s law is to be relied on in determining whether the *prima facie* criminal offence presents. Mugasha further proposed:<sup>111</sup>

Perhaps the test should be whether the underlying contract is manifestly illegal under the law that governs such a contract *and* if the law governing the letter of credit or bank guarantee considers the transaction manifestly illegal as measured by *international standards*.

This test is still problematic. It would be difficult to find “international standards” as to what amounts to a “manifestly illegal” contract. As pointed out in the above discussions, different jurisdictions may have completely different laws and/or standards as to whether a particular transaction is illegal. Where there is no consensus on whether a particular transaction is illegal or not, how can there be commonly recognised “international standards” as to the seriousness of an illegality?

Another problem with the proposed “illegality exception” is the bank’s duty in relation to the illegality suspected/discovered in the underlying transaction. The English cases of *Group Josi* and *Mahonia* did not make clear what the duties and obligations of the banks are in relation to illegality in the underlying contract. In the United States the conception is that if the illegality defence is recognised, banks would be compelled to determine whether payment under the letter of credit will be used for an illegal purpose and this will place them in additional difficulties in examining the documents.<sup>112</sup> If, however, the banks are not obliged but only entitled to invoke the “illegality defence”, no bank will be willing to take the risk of breaching its mandate even if it has clear evidence of illegality in the underlying contract. There is no point for a bank to do an investigation

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105 *Mahonia Ltd v JP Morgan Chase Bank (No 1)* [2003] EWHC 1927 (Comm), [2003] 2 Lloyd’s Rep 911 at [65].

106 *Mahonia Ltd v JP Morgan Chase Bank (No 2)* [2004] EWHC 1938 (Comm) at [430].

107 See also Enonchong, above n 6, at 417.

108 See Kelly-Louw, above n 19, at 281.

109 See Agasha Mugasha *The Law of Letters of Credit and Bank Guarantees* (Federation Press, NSW, 2003) at 189–190.

110 For example, importing controlled drugs into New Zealand without a licence: see Misuse of Drugs Act, s 6.

111 Mugasha, above n 111, at 190 (emphasis added).

112 See Enonchong, above n 6, at 412.

on its own cost and to take the risk of being sued for something that it is not obliged to do under the law.

Finally, a general, loosely defined “illegality exception” is open to abuse and may produce unfair situations in practice and harm international trade. For instance, as a hypothetical scenario, a contract for sale of CONTACONT was concluded between a Chinese seller and a New Zealand buyer, with a choice of law clause that the contract of sale was exclusively governed by China law. On the application of the New Zealand buyer, a New Zealand bank issued a letter of credit in favour of the Chinese seller. The sale and purchase of the CONTACONT, which is commonly used as an anti-flu drug in China, is absolutely legal under Chinese law. However, it is a criminal offence to import this drug into New Zealand without a license.<sup>113</sup> If the New Zealand buyer failed to obtain such a license, can the buyer apply to a New Zealand court to restrain the bank from paying the seller (beneficiary) against the confirming documents presented? The underlying contract of sale is lawful under the governing law (Chinese law), but unlawful under New Zealand law in certain circumstances (the failure of obtaining an import license). Is the statutory provision requiring the import license of a “technical nature”? If an “illegality in the underlying contract defense” is allowed and an injunction is granted to restrain the bank from paying against the apparently confirming documents, it will be totally unfair and unjust. As indicated in the New Zealand mussel case, it is the New Zealand buyer’s duty to make clear the import restrictions and to obtain the license.<sup>114</sup> Its failure to obtain the license results in the transaction being “criminally illegal” under the New Zealand law, although it is absolutely legal under the governing law of the contract. The Chinese seller might be totally ignorant about the New Zealand drug control system and have done nothing wrong, however, by not being paid by the issuing bank relying on a “illegality exception” it has to put up with the problem and bear the loss caused by the culpable New Zealand buyer.

The existence of the huge logical flaw, the ignorance of the reality of international trade, and other problems as mentioned above substantially impair the plausibility of the arguments for the “illegality exception” to the autonomy principle of documentary letters of credit.

## VI. CONCLUSION

As to whether illegality in the underlying contract should be a defence to payment under documentary letters of credit, the UCP 500 and UCP 600 are totally silent. None of the common law jurisdictions discussed has actually adopted such an “illegality exception”, whether the bank instruments involved are bank guarantees, stand-by letters of credit, or classic commercial documentary letters of credit. The strongest pieces of “evidence” pointing in favour of an “illegality exception” are: a) the opinions made by some judges in the English case of *Group Josi* and the *Mahonia* cases; and b) art 19 of the UNCITRAL Convention provides for an “illegality exception” to the autonomy principle. Most of the arguments for an “illegality exception” are based on these two points, in addition to the point that the principle of *ex turpi causa* on which the fraud exception is based should be equally applicable to illegality in the underlying contract.

The opinions made by some judges in the English case of *Group Josi* and the two *Mahonia* cases are *obiter dicta* only. Therefore, the UNCITRAL Convention is the only law to date that

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113 Misuse of Drugs Act, ss 6 and 7.

114 Case 123: CISG 35 (2); 49 Germany: Bundesgerichtshof; VIII ZR 159/94 8 March 1995, Published in German: Entscheidungen des Bundesgerichtshofs in Zivilsachen (BGHZ) 129, 75.

recognises the “illegality exception”, although none of the major players in the world have ratified this Convention. It must be noted, however, neither any of the above English cases (and cases in other jurisdictions discussed) nor the UNCITRAL Convention is directly about classic commercial documentary letters of credit used in international trade as a means of payment of the price. It is not logical to extend the “illegality exception” (assuming it is adopted) from bank guarantees and stand-by letters of credit to commercial documentary letters of credit, looking at the undeniable fundamental differences between them. Taking into account the “lifeblood” function of commercial letters of credit in international trade, it is even more difficult to argue for an “illegality exception” where commercial letters of credit rather than bank guarantees or stand-by letters of credit are concerned.

Similarly, it is not convincing to justify the “illegality exception” by simply arguing that there is “no reason why the principle of *ex turpi causa* should not be equally applicable to illegality in the underlying contracts”, ignoring the substantial differences between the fraud exception and the proposed “illegality in the underlying contract defence”.

There are also many practical difficulties to overcome before the proposed “illegality exception” is accepted by law. Different jurisdictions are very likely differing in determining whether a particular transaction is illegal or not. It is extremely difficult to formulate the “illegality exception”, with significant uncertainties regarding, *inter alia*, elements of the exception, the gravity of the illegality required, standard and time of proof of the illegality and whether the bank is obliged to refuse payment where illegality is discovered. A general, loosely defined illegality exception is easily exposed to abuse, resulting in unfairness and injustice and hence damaging to international trade. For all of the above reasons, the “illegality exception” to the autonomy principle is much less likely to be accepted than expected by the advocates in most common jurisdictions, especially, where classic commercial documentary letters of credit used in international trade as a means of payment of the price are involved.

There are, of course, public policy concerns about illegal transactions in international trade. Such concerns, however, should not be addressed by the introduction of an ill-founded, loosely defined, highly controversial and problematic “illegality exception” to the autonomy principle of payments under documentary letters of credit. Specific enactments, such as the New Zealand’s Anti-Money Laundering and Countering Financing of Terrorism Act (especially, ss 85 and 86) is a much better way to address the public policy concern for the protection of public interest.

# LEGAL PROFESSIONAL PRIVILEGE AND NEW ZEALAND'S TAXATION LAW

BY JOEL MANYAM\*

## I. INTRODUCTION

The income tax system in New Zealand as well as in comparable jurisdictions, such as that of Australia, are heavily reliant on taxpayers voluntarily complying with their duties to furnish any required information to the respective taxation authorities. Such compliance is reinforced by the sanction that information can be obtained coercively. This information is required in order to ensure that taxpayers are correctly reporting on their income, in order to ensure that correct assessments are made regarding the tax that is payable on such income.

The Commissioner of Inland Revenue (Commissioner) has extensive powers to obtain information from taxpayers. These include the power to request information from any person in relation to the administration and enforcement of the Inland Revenue Acts and in the absence of compliance with such request, to seek a court order compelling the production of the required information. The Commissioner also has statutory power to seek access to business premises as well as private dwellings. The Commissioner is also empowered to apply in writing to a District Court Judge to hold an inquiry in order to obtain such information. Alternatively, the Commissioner can conduct such inquiry himself and require any evidence to be given on oath whether orally or in writing. In exercising such powers, the Commissioner is subject to the requirement of reasonableness, pursuant to s 27 of the New Zealand Bill of Rights Act 1990 (BOR Act). The Commissioner is also often engaged in litigation with taxpayers. In the course of such litigation, the Commissioner often uses the discovery process in court proceedings, to seek the production of documents from the taxpayer. These extensive powers to seek information from the taxpayer are, however, subject to a significant restraint on the Commissioner. Such restraint being a taxpayer's right to claim legal professional privilege (LPP). LPP is a common law right, which for taxation purposes is embodied in s 20 of the Tax Administration Act 1994 (TAA 1994). As s 20 is not a complete code, it is necessary to resort to the common law doctrine on LPP in order to understand its scope and rationale.

There have been numerous reports in New Zealand in the last few years which have questioned the need for LPP in the taxation context. In marked contrast to these reports, the courts at the highest level, namely the Privy Council, Australian High Court, Supreme Court of Canada and House of Lords have been emphatic in their defence of the right to claim such privilege. LPP has been affirmed by these courts not merely as a rule of evidence, but more significantly as a substantive right founded on important public policy considerations. Furthermore, the courts have been resoundingly consistent in holding that LPP is not subject to any statutory qualification or abrogation unless the statute is express in doing so or LPP has been abrogated by necessary

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implication. Unlike public interest immunity, LPP is not subject to a balancing exercise but is absolute in nature and can only be waived by the taxpayer claiming it.

## II. TAXATION CONTEXT AND SIGNIFICANCE OF LPP

New Zealand's taxation department, Inland Revenue, has invasive statutory powers<sup>1</sup> to obtain information from taxpayers.<sup>2</sup> A significant restraint on the Commissioner's powers is LPP as outlined in s 20 of the TAA 1994. Section 20 was originally enacted in 1958, as a direct consequence of the New Zealand Court of Appeal decision in *Commissioner of Inland Revenue v West-Walker*.<sup>3</sup> *West-Walker* held that the Commissioner's powers to obtain information were not absolute but subject to the common law doctrine of privilege in respect of communications between a lawyer and client. Section 20, unlike the common law, extends privilege to confidential communications between two legal practitioners in their respective professional capacities.<sup>4</sup>

However, s 20 is not a comprehensive code regarding privilege in the taxation context, as it completely omits any provision for an important component of privilege, namely litigation privilege. This is a component of LPP, in respect of communications with third parties in relation to litigation or information prepared by a taxpayer, lawyers or third parties, merely in anticipation of litigation. There is also provision in s 20, for an application to be made to a District Court Judge, for a determination in cases where the claim of privilege is disputed. Thus, LPP includes privilege for both legal advice and litigation.<sup>5</sup>

Although not included in s 20, LPP in the taxation context has been held to extend to advice given by in-house lawyers who work as salaried employees, for either the taxpayer or Commissioner. The Full High Court of Australia in *Waterford v The Commonwealth of Australia*, was divided on the issue of whether privilege extended to legal advice, by an employee legal adviser.<sup>6</sup> However, the New Zealand High Court in *Miller v Commissioner of Inland Revenue*, has concluded that privilege does extend to in-house lawyers,<sup>7</sup> provided they are acting as lawyers and not in some other non-legal capacity, such as a company director or manager.<sup>8</sup>

Less than 15 years ago, however, the Commissioner added his voice to what had by then developed into a galvanised call for change to LPP in the taxation context, in New Zealand.<sup>9</sup>

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1 These wide powers are pursuant to ss 16, 17, 18 and 19 of the Tax Administration Act 1994.

2 The Privy Council in *New Zealand Stock Exchange v Commissioner of Inland Revenue* [1992] 13 NZTC 8,147 at 8,49 commented that the whole rationale of taxation would break down if the Commissioners had no power to obtain confidential information about taxpayers who may be negligent or dishonest.

3 *Commissioner of Inland Revenue v West-Walker* [1954] NZLR 191 (CA).

4 Section 20(1)(a)(i).

5 In the New Zealand Court of Appeal decision in *Auckland District Law Society v B* [2002] 1 NZLR 721 (CA) at 755, Tipping J, observed: "That privilege must include legal professional privilege (both for advice and for litigation)".

6 *Waterford v The Commonwealth of Australia* (1987) 163 CLR 54.

7 *Miller v Commissioner of Inland Revenue* (1997) 18 NZTC 13,001 (HC).

8 In *Case Y8* (2007) 23 NZTC 13076, a decision of New Zealand's first instance tax court, the Taxation Review Authority, counsel for the taxpayer argued that privilege can only apply for in-house counsel, if they are acting in the capacity of a legal advisor and not in some other capacity, such as a company director or manager.

9 Pursuant to a government discussion document, Inland Revenue Department *Tax and Privilege: a proposed new structure* (May, 2002).

A number of reports had specifically commented on LPP,<sup>10</sup> “as causing difficulties in the administration of the tax system.”<sup>11</sup>

If difficulties are being caused, in the manner being claimed, the response of the Commissioner should not be to seek a change in the law but to avail himself of the statutory mechanism in s 20(5), which allows for the intervention of a District Court Judge, to determine disputed claims of privilege.

It is glaringly inconsistent for the Commissioner to be seeking such a significant change in what may be the last bastion of protection for a taxpayer, when in the course of discovery proceedings in litigation, the Commissioner readily accepts a taxpayer’s claim for privilege. A taxpayer’s legally enshrined right to claim privilege in the taxation context, must not be viewed against the very narrow backdrop of, “the basic principle that Inland Revenue should have access to all factual information that is available”.<sup>12</sup> The taxpayer’s right to claim privilege must be safeguarded as the increasing complexities of taxation law, make it inevitable that taxpayers will need expert legal advice.<sup>13</sup> Secondly, although the courts in curial proceedings seek to establish the truth with accuracy and efficiency, they have consistently accepted the principle that their role is subject to the limitations of LPP. This was recently, lucidly articulated by McHugh J in the Australian High Court decision in *Mann v Carnell*:<sup>14</sup>

Thus, the common law has adjudged that the search for truth, which usually has primacy in curial proceedings, must give way to the considerations inherent in legal professional privilege. Even though the privilege admittedly “frustrates access to communications which would otherwise help courts to determine with accuracy and efficiency, where the truth lies in disputed matters”,<sup>15</sup> other aims of the system of administration of justice outweigh the general undesirability of the truth being obscured.

If the highest courts of New Zealand, Australia, Canada and England, accept that judicial proceedings must be conducted subject to privilege, it is quite incongruous for the Commissioner to consider that this same privilege should be altered to suit the convenience of administering New Zealand’s tax system.

Thirdly, there is no plausible reason why taxation should be singled out for a significant change concerning LPP. Other areas of law, such as criminal law, which has an identical interface with the state as taxation law, has not been subjected to a similar clamour for change to LPP as it applies to the rights of an accused person. There are already firm safeguards in place, against any abuse of

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- 10 (i) Organisational Review Committee *Report on the Organisational Review of the Inland Revenue Department* (April 1994).  
 (ii) Ronald Davidson *Wine-Box Inquiry – Commission of Inquiry into Certain Matters relating to Taxation* (Department of Internal Affairs, August 1997).  
 (iii) Committee of Experts on Tax Compliance *Tax Compliance: Report to the Treasurer and Minister of Revenue* (9 December 1998).  
 (iv) Law Commission *Tax and Privilege – Legal Professional Privilege and the Commissioner of Inland Revenue’s Powers to Obtain Information* (NZLC R67, 2000).
- 11 Inland Revenue Department, above n 9, at 1.  
 12 Inland Revenue Department, above n 9, at 7.  
 13 In *Baker v Campbell* (1983) 153 CLR 52 at 130, Dawson J noted: “The complexity of revenue laws is such that the availability of legal advice in relation to them is as *necessary* and desirable as it is in any other area of the law.”(emphasis added).  
 14 *Mann v Carnell* [1999] HCA 66; (1999) 74 ALJR 378 at 397.  
 15 *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 581, per Kirby J.



LPP. LPP will not apply for instance, where it is invoked for transactions involving fraud.<sup>16</sup> LPP will also not apply in cases of self-incrimination in the context of the exercise of the Commissioner's powers to obtain information as illustrated in *Commissioners of Customs and Excise v Ingram* and *Singh v Commissioner of Inland Revenue*.<sup>17</sup>

These being the compelling justifications for retaining LPP in its current form in the taxation context, an analysis of the common law doctrine of privilege and its operation must now follow.

### III. THE COMMON LAW DOCTRINE OF LEGAL PROFESSIONAL PRIVILEGE

Although s 20 of the TAA 1994 seeks to codify the law on LPP in the taxation context, it is not a complete code. There is a significant component of LPP, namely litigation privilege for example, which s 20 does not deal with at all.<sup>18</sup> This makes it necessary to examine the nature of LPP at common law and its scope in order to better comprehend the provisions in s 20.

#### A. Nature and Rationale of the Common Law Doctrine of LPP

The doctrine of LPP has had a long,<sup>19</sup> and well-established history,<sup>20</sup> as an integral part of the law.<sup>21</sup> Despite this, the courts have until as recently as 2005, struggled with accepting the parameters of the doctrine. For instance in *Three Rivers District Council v Bank of England*, the English Court of Appeal provided a rather narrow interpretation of legal advice privilege, which was overruled by the House of Lords.<sup>22</sup> It becomes imperative therefore, to determine what the doctrine of privilege is, its purpose and the policy justifications for its existence and scope. As articulated by New Zealand's Chief Justice in her dissenting opinion in *Auckland District Law Society v B*, privilege provides protection from disclosure of confidential communications between a client and lawyer which are exchanged for the purpose of the lawyer providing and the client receiving legal advice.<sup>23</sup> Although the privilege is referred to as *legal professional privilege*, the privilege is in

16 *Finers (a firm) v Miro* [1991] 1 All ER 182.

17 *Commissioners of Customs and Excise v Ingram* [1948] 1 All ER 927; *Singh v Commissioner of Inland Revenue* (1996) 17 NZTC 12,471 (HC).

18 In contrast to this position in New Zealand, it appears that s 20B(2) of the English Taxes Management Act 1970, provides for a limited form of litigation privilege – see the observations of Lord Hoffman in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563 at 608. Lord Hoffman alluded to litigation privilege as applying to documents relating to the conduct of an appeal by for example, a taxpayer in person.

19 North J in *Commissioner of Inland Revenue v West-Walker*, above n 3, at 219 alluded to privilege as, “an ancient privilege ... since the days of Elizabeth I”.

20 Kirby J in *Federal Police v Propend Finance* (1997) 71 ALJR 327 at 373 observed that Legal Professional Privilege had been upheld by the Common Law since at least the 16th century. In *R v Derby Magistrates' Court, ex parte B* [1996] 1 AC 487 at 504, Lord Taylor of Gosforth noted that the first known case cited was *Berd v Lovelace* (1577) Cary 62. The historical evolution of the privilege is described by Lord Simon of Glaisdale in *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171 at 237–239.

21 In *Goldberg v Ng* (1995) 185 CLR 83 at 93 it was noted that, “[i]t is now settled law in this country that legal professional privilege is a substantive general principle.”

22 *Three Rivers District Council v Bank of England* [2005] 1 AC 610.

23 *Auckland District Law Society v B* [2002] 1 NZLR 721 at 723 per Elias CJ in a decision by New Zealand's Court of Appeal. The dissenting view of the Chief Justice was upheld by the Privy Council in *B v Auckland District Law Society* [2003] UKPC 38, [2003] 2 AC 736.

actual fact that of the client. It can therefore only be waived by the client.<sup>24</sup> The lawyer is therefore bound to keep details of the communication confidential and can be sued for any disclosure of such confidential communication.<sup>24</sup> As noted by Lord Lloyd of Berwick in *R v Derby Magistrates' Court, ex parte B*, “once the privilege is established the lawyer’s mouth is shut for ever”.<sup>25</sup>

The lawyer and client relationship is in this respect quite unique in comparison to other confidential relationships and respective communications made in the course of them. Other relationships in which confidential communications occur are those such as between banker and customer,<sup>26</sup> doctor and patient, accountant and client, husband and wife, parent and child, priest and penitent. These other non-lawyer-client communications do not receive the same level of protection as in the case of lawyer-client communications. This is because these other communications will lose their status of confidentiality if there is a higher or overriding interest in the administration of justice that requires their disclosure. So for instance in *W v Egdell*, W, who had been confined to a mental institution, through his solicitors, consulted Dr Egdell, a psychiatrist, to report on his mental state.<sup>27</sup> After preparing the report, the psychiatrist sought the permission of W’s solicitor to forward it to the assistant medical director of the hospital in which W was being held as a mental patient, but was refused. Despite the objection by W’s solicitor, Dr Egdell forwarded the report to the hospital, which forwarded it to the Home Office. W began proceedings, seeking an injunction to prevent the Mental Health Review Tribunal from disclosing or considering Dr Egdell’s report. In dismissing the action, the English Court of Appeal opined that the law treated such duties of confidentiality not as absolute but as liable to be overridden where there was held to be a stronger public interest in disclosure.<sup>28</sup>

The lawyer-client confidentiality is however, in contrast, absolute in nature or the privilege is said to enjoy an absolute status. The privilege of lawyer-client communications is absolute in that it will not yield to any higher or overriding interest, such as that of the courts requiring full disclosure to be made so decisions can be made in light of all relevant facts relating to a dispute. The courts have on numerous occasions, accepted that their inquisitorial role is always subject to the absolute nature of privilege enjoyed in respect of lawyer-client communications. The High Court of Australia in *Mann v Carnell*, acknowledged that although the search for truth is a primary objective in court proceedings, it must succumb to the absolute nature of LPP.<sup>29</sup>

In the specific taxation context in New Zealand, the absolute nature of LPP had been accepted in the leading New Zealand Court of Appeal decision,<sup>30</sup> in *Commissioner of Inland Revenue v*

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24 In *Commissioner of Inland Revenue v West-Walker* [1954] NZLR 191(CA) at 208, Fair J in delivering the leading judgment in New Zealand’s Court of Appeal, acknowledged that the privilege was that for the client and may be waived by him.

25 In *R v Derby Magistrates' Court, ex parte B*, above n 20, at 509. See *Wilson v Rastall* (1792) 4 Durn & E 753 at 759, per Buller J.

26 This was alluded to in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563 at 587.

27 *W v Egdell* [1990] 1 All ER 835.

28 At 848.

29 *Mann v Carnell* [1999] HCA 66, (1999) 74 ALJR 378 at 397, at [112].

30 In the more recent New Zealand Court of Appeal decision in *R v Uljee* [1982] 1 NZLR 561 (CA) at 570, Richardson J noted, “[t]he leading authority in this court on the privilege is *Commissioner of Inland Revenue v West-Walker* [1954] NZLR 191.” The *West-Walker* decision was also referred to in the House of Lords decision in *Three Rivers District Council v Bank of England (No 6)* [2005] 1 AC 610.

*West-Walker*.<sup>31</sup> The facts in *West-Walker*, concerned a notice pursuant to s 163 of the Land and Income Tax Act 1923, which had been served on Mr West-Walker, the defendant solicitor. It required him to furnish to the Commissioner, information or documents relating to the income, financial position and related transactions of his client. The Court acknowledged that s 163 authorised the Commissioner to ask any person or to demand from anyone, anything at all which the Commissioner considered to be either necessary or relevant for his purpose. The question for the Court was whether, despite the wide nature of the statutory provision, the defendant as a solicitor had a valid claim to privilege and could be excused in law, from furnishing the required documentation. The Court held that privilege was not abrogated by the statutory provision in question. Accordingly, privilege could be claimed by the solicitor on behalf of his client, as a legitimate response to demands that had been made by the Commissioner of Taxes pursuant to s 163. It followed, that the common law privilege was held to prevail as an implied exception to a statutory requirement if income tax legislation which on its wording required "every person" to furnish any information which the Commissioner considered necessary.

However, less than 15 years ago in New Zealand and despite the decision in *West-Walker*, the absolute nature of privilege was challenged again in *Auckland District Law Society v B*.<sup>32</sup> The principal question raised for determination by the Court of Appeal, was whether the common law LPP of solicitors who obtained legal advice in litigation proceedings to which they were parties, was abrogated by the Law Practitioners Act 1982 (LPA 1982), to enable a complaint of professional misconduct to be investigated. A majority of the Appeal Court held that the privilege was excluded by necessary implication pursuant to the investigative process provided for by s 101 of the LPA 1982. On appeal, the Privy Council in *B v Auckland District Law Society*, held that solicitor-client privilege was absolute in nature and could not be overridden by competing interests, such as those provided for pursuant to the LPA 1982.<sup>33</sup>

The comparative position in the English jurisdiction is identical to that in New Zealand and Australia in that LPP is absolute. In *R v Derby Magistrates' Court, ex parte B*, for instance, the question was in respect of the scope of s 97 of the Magistrates' Court Act 1980 and whether it overrode solicitor-client privilege.<sup>34</sup> The applicant issued proceedings for judicial review of a decision by the stipendiary magistrate for Derby, to issue summonses pursuant to s 97. The summonses required him and his solicitor to produce certain privileged documents in the course of committal proceedings against the applicant's step-father. The documents sought were in particular all attendance notes and proofs of evidence which disclosed instructions the applicant had given to his solicitors, for the defence of the charge of murder. The stipendiary magistrate's approach in respect of solicitor-client privilege was that it had to be determined by considering which of the two competing interests prevailed. These were first, the public interest which protected confidential communications between a solicitor and client and secondly, the public interest in securing the production of all relevant and admissible evidence for the proper trial of the action. In the stipendiary magistrate's opinion, the balance was firmly in favour of production of such evidence, as the preeminent consideration was the need to secure a fair trial of the applicant's step-father. Lord Taylor of Gosforth had to determine whether solicitor and client privilege could

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31 *Commissioner of Inland Revenue v West-Walker*, above n 3.

32 *Auckland District Law Society v B* [2002] 1 NZLR 721 (CA).

33 *B v Auckland District Law Society* [2003] UKPC 38; [2003] 2 AC 736.

34 *R v Derby Magistrates' Court, ex parte B*, above n 20.

only be established subject to such a balancing exercise or whether once claimed, it was absolute. His Lordship concluded that if LPP was ever to have been subjected to a balancing exercise, then that had occurred once and for all in the 16th century.<sup>35</sup> Further, that ever since, privilege had been uniformly applied in every case regardless of the merits of any individual client.

The House of Lords also had to decide very recently in the directly relevant taxation context, whether statutory powers requiring disclosure of documents covered by LPP, could nonetheless be enforced. In *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax*, the applicant, a well-known merchant bank, had devised and promoted a scheme.<sup>36</sup> The consent of a special commissioner was sought pursuant to s 20(7) of the Taxes Management Act 1970, whereby a notice under s 20(1) would be issued requiring the bank to disclose the instructions it had given and the legal advice it had received in turn, in respect of the scheme. The bank argued that the consent being sought ought not to be granted as a s 20(1) notice could not secure the disclosure of documents that were protected by privilege. The special commissioner granted consent to the issue of the notice. The Divisional Court declined to grant the bank's application for judicial review of the exercise of the power to issue the notice. The bank's appeal to the Court of Appeal was dismissed and the House of Lords had to determine the issue of whether a taxation statute could override privilege. The House of Lords reaffirmed the absolute nature of privilege.<sup>37</sup> However, it also stated that due to the principle of legality, LPP could not be overridden by general or ambiguous words but only through express statutory language or by necessary implication. Since there was no language in the Taxes Management Act which expressly overrode LPP, the taxing authority could only succeed if it could establish that by necessary implication, LPP was excluded by the provisions of s 20(1).<sup>38</sup>

While the jurisdictions of New Zealand, Australia and the United Kingdom have held that solicitor-client privilege is absolute and permanent, the position in Canada is in stark contrast. The Supreme Court of Canada has in more than one decision, held that solicitor-client privilege is not absolute. It is accordingly subject to exceptions which relate to the wider public interest, such as the public safety exception. A vivid illustration of this, is in the Supreme Court of Canada decision in *Smith v Jones*.<sup>39</sup> The case involved a claim for privilege in respect of a doctor's report. The appellant, Jones, had been charged with aggravated sexual assault of a prostitute. His lawyer referred him to a psychiatrist, Smith, for a forensic psychiatric assessment. It was hoped that the report on the assessment, would assist in preparing the defence or with submissions on sentencing in the event of a guilty plea. Dr Smith's findings provided the basis for his belief that Mr Jones posed a continuing danger to the public. He subsequently learned that his concerns would not be addressed at Mr Jones's sentencing hearing. Dr Smith accordingly took proceedings so that his report and opinion would be considered in the sentencing of Mr Jones. The Supreme Court of Canada held that solicitor-client privilege should be set aside in situations where the facts raise real concerns that an identifiable individual or group was in imminent danger of death or serious bodily harm. It was held that on the facts, solicitor-client privilege had to be set aside in the wider interest

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35 At 508.

36 *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563.

37 Much more recently in *Three Rivers DC v Bank of England (No 6)* [2005] 1 AC 610 at 646, the House of Lords confirmed that if a communication or document qualifies for legal professional privilege, the privilege is absolute.

38 At 585; The concept of necessary implication had the notion of an implication that was compellingly clear.

39 *Smith v Jones* (1999) 169 DLR (4th) 385.

of protection of the general public. The view was also expressed that the category of exceptions to privilege were not foreclosed and could be extended in the future to protect national security.<sup>40</sup>

### B. *The Rationale for LPP*

Since privilege is absolute and permanent, unless waived by the client as is the legal position in Australia, the United Kingdom and New Zealand, the rationale for the privilege needs to be explored.

The justification for privilege has been articulated as a necessary requirement in the public interest, of ensuring that the rule of law is upheld. In order for this to occur, the ordinary citizen must be able to participate as fully as possible in the administration of the law through the justice system. To facilitate such participation, the citizen must be able to exercise the right of full and free access to both legal advice as well as to the services and skills of an advocate if a citizen's interaction with the law involves litigation before the courts. So a prime rationale for privilege has been the need to ensure that the ordinary citizen has access to the law both in terms of lawyers' expertise in the law as well as their skills in regard to the operation of the justice system. The justice system involves the courts, judges who preside over them and advocacy in an adversarial system which creates the incentive for the presentation of the best possible case on behalf of a client in order to allow the courts to accurately apply the law. The courts have recognised that access by the citizenry who are unskilled in matters relating to the law, to lawyers who are skilled, is an essential requirement which must be facilitated, especially when the law is quite a demanding and difficult discipline. Jessel MR in *Anderson v Bank of British Columbia*, recognised that due to the complexity and difficulty of the law, an ordinary citizen as a party to litigation in the courts, would find it absolutely necessary to have access to the assistance of professional lawyers, if the client's interests were to be properly represented.<sup>41</sup>

In the Australian context, the High Court of Australia in the significant decision of *Grant v Downs* alluded to the rationale of privilege as being for the promotion of the public interest.<sup>42</sup> This was because privilege assisted and enhanced the administration of justice by facilitating the representation of clients by legal advisers as the law was a complex and complicated discipline. In the Supreme Court of Canada decision in *Andrews v Law Society of British Columbia*, McIntyre J articulated the reliance that was placed by the justice system on the existence of the legal profession and the competent discharge of its duties to its clients, the courts and society:<sup>43</sup>

It is incontestable that the legal profession plays a very significant – in fact, a fundamentally important – role in the administration of justice, both in the criminal law and the civil law ... I would observe that in the absence of an independent legal profession, skilled and qualified to play its part in the administration of justice and the judicial process, the whole legal system would be in a parlous state.

The pivotal role of lawyers in the operation of the law was re-emphasised more recently by the Supreme Court of Canada in *Lavallee, Rackel & Heintz v Canada (AG)* Arbour J on behalf of the

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40 At 402, per Cory J.

41 *Anderson v Bank of British Columbia* (1876) 2 Ch D 644 at 649.

42 *Grant v Downs* (1976) 135 CLR 674 at 685.

43 *Andrews v Law Society of British Columbia* [1989] 1 SCR 143 at 187–188.

Court commented on the right to the effective assistance of counsel, being considered as one of the principles of fundamental justice.<sup>44</sup> However, such observations have been made in respect of lawyers in the overall legal system. Lawyers fulfil a unique role when they appear as advocates for a client in criminal and taxation matters. This most often occurs when the client is in direct confrontation with the might of the state, represented by either the police or prosecutor and/or Commissioner. As noted by Arbour J in *Lavallee*, in the context of a criminal investigation, the privilege acquires an additional dimension.<sup>45</sup> This is because the citizen as privilege holder is facing the state as a “singular antagonist” and for this reason requires an arsenal of constitutionally guaranteed rights.<sup>46</sup> In the New Zealand Court of Appeal decision in *R v Uljee*, Richardson J alluded to privilege in criminal cases as vital in serving the protection of the security of the individual when pitted against the power of the state.<sup>47</sup> An identical dynamic is also very much evident when the citizen is pitted against the Commissioner, in a tax investigation or dispute or when involved in litigation proceedings.

The rationale for privilege also takes into account that litigation in respect of both civil and criminal matters, occurs in the context of an adversarial system. This is predicated on the presence of an impartial and independent judge who presides over the trial of an action. However, the system operates on the assumption that also present at the trial will be lawyers for the opposing parties. The lawyers will be expected to argue quite conflicting perspectives. They will be responsible for introducing evidence and presenting argument before the judge or judge and jury, which could involve vigorous confrontation, yet all designed to have the best argument succeed.<sup>48</sup> In order to enable what can at times be quite a confrontational process to take its course, privilege is an essential element in arming the advocate for participation in the eventual trial of the matter. In *Attorney-General (NT) v Maurice* Gibbs CJ opined that without the privilege, no one could safely consult a legal practitioner and the administration of justice in accordance with the adversarial system would be greatly impeded or even rendered impossible to operate.<sup>49</sup>

The rationale for absolute privilege extends to the encouragement it provides to a client to be full and frank in the disclosure made to counsel to enable the best judgment to be exercised on the most effective manner in which to present the case at trial or in order to provide the best possible legal advice which would be in the best interests of the client. As highlighted by Rehnquist J in the United States Supreme Court decision in *Upjohn Co v United States*, when commenting on the purpose of privilege, he noted that it was:<sup>50</sup>

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44 *Lavallee, Rackel & Heintz v Canada (Attorney General)* (2002) SCC 61, [2002] 3 SCR 209 at 299.

45 At 279.

46 *Irwin Toy Ltd v Quebec (Attorney General)* [1989] 1 SCR 927 (SCC) at 994. In the Australian context in *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 490, Deane J commented on the efficacy of privilege as a bulwark against tyranny and oppression. A similar view was expressed by McEachern CJBC in the Canadian decision, *Hodgkinson v Simms* (1988) 55 DLR (4th) 577 (CA) at 581.

47 *R v Uljee*, above n 31, at 572.

48 In *Regional Municipality of Ottawa-Carleton v Consumers' Gas Co Ltd* (1990) 74 DLR (4th) 742 at 748–749, O'Leary J noted that the adversarial system was based on the assumption that if each side presented its case in the strongest light, the court will be best able to determine the truth.

49 At 480.

50 *Upjohn Co v United States* (1981) 449 US 383.

... to encourage full and frank communication between attorneys and their clients ... The privilege recognises that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client.

In *Smith v Jones*, the Supreme Court of Canada also outlined the justification of privilege specifically in relation to its encouragement of candour in communications:<sup>51</sup>

Clients seeking advice must be able to speak freely to their lawyers secure in the knowledge that what they say will not be divulged without their consent.

...

The privilege is essential if sound legal advice is to be given ... Family secrets, company secrets, personal foibles and indiscretions all must on occasion be revealed to the lawyer by the client. Without this privilege clients could never be candid and furnish all the relevant information that must be provided to lawyers if they are to properly advise their clients.

### C. The Scope of LPP

Authors such as Zuckerman have argued that its scope is rather wide and ought to be narrowed.<sup>52</sup> The courts have also warned of the need to ensure that privilege is jealously guarded to ensure it operates within recognised boundaries.<sup>53</sup> In the Australian High Court decision in *Attorney-General (NT) v Maurice* Gibbs CJ commented on the reason for confining privilege within strict legal limits.<sup>54</sup> It was because of the inherent conflict between the public interest of making available as much evidence in a particular case and the competing public interest in the administration of justice that there be proper legal representation of a client's interests. In the English Court of Appeal decision in *Parry-Jones v Law Society*, Dip lock LJ appeared to very narrowly define the scope of LPP, as the right to withhold admissible evidence from a court, or a tribunal exercising judicial functions.<sup>55</sup> It was this narrow view that has been referred to as the "traditional doctrine of privilege".<sup>56</sup> However, as the Supreme Court of Canada in *Solosky v The Queen* has highlighted, this traditional doctrine has been elevated to a new plane.<sup>57</sup> Privilege is no longer regarded merely as a rule of evidence which acts as a shield to prevent privileged materials being tendered in evidence in a courtroom.<sup>58</sup> The courts have been unwilling to so restrict the scope of privilege and have extended its reach well beyond those narrow constraints.

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51 *Smith v Jones* (1981) 449 US 383 at 389. In *Waugh v British Railways Board* [1980] AC 521, [1979] 2 All ER 1169 (HL) at 1182, Lord Edmund-Davies observed that, "[j]ustice is better served by candour than suppression". In *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) ALJR 339 at [113], Kirby J opined: "The tide of the privilege is ebbing doubtless out of a recognition that 'justice is better served by candour than by suppression'".

52 Adrian Zuckerman "Legal Professional Privilege and the Ascertainment of Truth" (1990) 53 MLR 381.

53 *Waugh v British Railways Board*, above n 52, at 543B–D, per Lord Edmund-Davies; *Ventouris v Mountain* [1991] 1 WLR 607 at 611–612, per Bingham LJ and *Balabel v Air India* [1988] Ch 317 at 331–332.

54 *Attorney-General(NT) v Maurice*, above n 47, at 487.

55 *Parry-Jones v Law Society* [1969] 1 Ch 1, [1968] 1 All ER 177.

56 *Solosky v The Queen* (1979) 105 DLR (3d) 745 (SCC) at 757.

57 At 757.

58 At 757, per Dickson J.

Lord Edmund-Davies in the House of Lords decision in *Waugh v British Railways Board*, outlined the two limbs of privilege but added that courts had failed to maintain the clear distinction between the two elements, with the respective elements being:<sup>59</sup>

- (a) communications between client and legal adviser, and
- (b) communications between the client and third parties made for the purpose of obtaining information to be submitted by the client's professional advisors for the purpose of obtaining advice upon pending or contemplated litigation.

However, 25 years after the decision in *Waugh*, there was still a difference in judicial opinion as to what the scope of legal advice privilege was. The House of Lords in *Three Rivers District Council v Bank of England*, reaffirmed this two-fold categorisation of LPP.<sup>60</sup> Lord Scott of Foscote made direct reference to the modern case law on LPP, which had divided it into two categories, namely legal advice privilege and litigation privilege.<sup>61</sup> The scope of litigation privilege extended to cover all documents brought into being for the purposes of litigation. Legal advice privilege on the other hand extended to cover communications between lawyers and their clients, pursuant to which legal advice was sought and provided. Each of these two categories need further examination and will be discussed in turn.

### 1. Legal advice privilege

The High Court of Australia, has on numerous occasions emphasised that privilege is not in respect of documents but rather in the communications between lawyer and client, although these communications may be incorporated or contained in documents. In *Commissioner of Australian Federal Police v Propend Finance Pty Ltd*, Kirby J noted how it had been repeatedly emphasised, that the protection afforded by privilege was in respect of such communications.<sup>62</sup> It was not the documents which attracted privilege, still less the information within them. However, Kirby J accepted that in practical terms, regarding search warrants, orders of discovery and subpoenas, proof of past communications would in the ordinary course involve documents. Kirby J also acknowledged that with advances in information technology, there was a wide range of material forms that were used in effecting communication. These ranged from photocopies of original documents to audio/video tapes and computer software. The scope of this particular head of privilege was disputed in *Three Rivers District Council* with a division of judicial opinion on the matter. The specific issue in contention related to the scope of meaning to be attributed to the phrase, "legal advice". The facts in *Three Rivers*, concerned an independent inquiry into the proper discharge of the statutory duties of the Bank of England (Bank), in relation to the Bank's supervisory responsibilities in regard to the Bank of Credit and Commerce International SA (BCCI). The Bank's supervisory role was under scrutiny by the inquiry as under the United Kingdom Banking Act 1979 and 1987, it had a supervisory role in relation to banks and financial institutions carrying on business in the United Kingdom. The Bank had a team of officials which prepared and communicated information and instructions to the Bank's solicitors for the purposes of presenting the Bank's case to the inquiry. The Bank's solicitors gave advice on the preparation and presentation of the Bank's evidence to the inquiry. After publication of the inquiry's report,

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59 *Waugh v British Railways Board*, above n 52.

60 *Three Rivers District Council v Bank of England* [2005] 1 AC 610.

61 At 642.

62 *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 71 ALJR 327 at 378.



the Bank was sued by respective claimants. As part of the civil action that ensued, discovery was sought by these claimants in respect of documents that had been brought into existence by officials of the Bank for the purpose of being passed on to the Bank's legal advisers. The privileged status of the communications in these documents was challenged by the claimants as the Bank claimed it had the right to withhold them on the ground that they were subject to the protection from disclosure pursuant to legal advice privilege. The issue had been determined by the English Court of Appeal which had ruled that legal advice privilege extended only to those communications that had occurred for the purpose of seeking or obtaining advice on the Bank's legal rights and obligations. Such privilege did not extend to communications relating to the presentation of the Bank's evidence to the inquiry in order to ensure that criticism of it in the inquiry report, would be minimised. The Bank appealed to the House of Lords, which allowed the appeal. The Bank's successful appeal, vividly illustrates the difference in opinion by the courts on the scope of this important aspect of privilege. The House of Lords held that privilege extended to communications relating to the presentation of evidence before the inquiry. This was because the inquiry report and its pronouncements on the Bank's performance, could well become amenable to judicial review. In other words the advice in relation to the presentation of evidence before the inquiry, was in respect of the Bank's rights, liabilities and obligations in relation to public law matters. It therefore followed that legal advice privilege could be claimed where the communications related to the Bank's performance from a public law perspective.

## 2. *Communications by a third party to a client or the client's legal adviser*

This category of privileged communication has been described as follows:<sup>63</sup>

Information from third parties, whether oral or documentary, is protected by the claim for professional privilege, if it was called into existence either; (1) by the lawyer for the purpose of litigation, actual or contemplated, or (2) by the client for the purpose of submission to the lawyer for the purpose of litigation actual or contemplated.

Communications incorporated in a document between a third party and the solicitor or client for the sole purpose of providing information for litigation will also attract privilege.<sup>64</sup> It does not matter who brings the document into existence, merely that it is brought into existence for the requisite purpose. In *Buttes Gas and Oil Co v Hammer* Lord Denning observed as follows:<sup>65</sup>

It is not necessary that they should have come into existence at the instance of the lawyer. It is sufficient if they have come into existence at the instance of the party himself with the dominant purpose of being used in the anticipated litigation.

A vexed question concerns communications made but not exclusively in relation to litigation. The problem faced by the courts has been that of determining how close the connection must be between the preparation of the document and the anticipation of litigation in order to gain the protection of LPP.

A majority of the Australian High Court in *Grant v Downs*, held that privilege must be confined to documents brought into existence for the *sole purpose* of submission to legal advisers for advice

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63 *Alfred Crompton Amusement Machines Ltd v Commissioners of Customs & Excise (No 2)* [1972] 2 QB 102 (CA) at 109 per Forbes J. See also *Guardian Royal Exchange Assurance Ltd v Stuart* [1985] 1 NZLR 596 (CA) at 605 per Tompkins J.

64 *Wheeler v Le Merchant* (1881) 17 Ch D 675 at 682, per Jessell MR; at 683, per Brett LJ; at 684–685, per Cotton LJ.

65 *Buttes Gas and Oil Co v Hammer* [1981] QB 223 (CA), [1980] 3 All ER 475 at 484.

or use in legal proceedings.<sup>66</sup> Barwick CJ in his dissenting opinion stated the relevant principles as follows:<sup>67</sup>

... a document which was produced or brought into existence either with the *dominant purpose* of its author, or of the person or authority under whose directions, whether particular or general, it was produced or brought into existence, or using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.

This dissenting view expressed by Barwick CJ has now been fully embraced by the unanimous decision of the Australian High Court in *Esso Australia Resources Ltd v Federal Commissioner of Taxation*.<sup>68</sup> *Esso Australia Resources Ltd*, has now unequivocally established for the purposes of Australian law, that the test for LPP in the case of documents prepared for the purpose of obtaining legal advice, is that the documents were prepared for the *dominant* purpose of seeking legal advice.

The matter was also considered by the House of Lords in *Waugh v British Railways Board*.<sup>69</sup> Here, the report in question was prepared for dual purposes, namely for railway operation and safety purposes as well as for the purpose of obtaining legal advice in anticipation of litigation. The first of these purposes had been more immediate than the second, but both had been described as being of equal rank or weight. The House was persuaded by Barwick CJ's formulation of the test in his dissenting opinion in *Grant v Downs*, which had stated it in terms of a "dominant" purpose. Lord Wilberforce was persuaded by Lord Denning MR's formulation in the latter Law Lord's dissenting opinion in the Court of Appeal decision in *Waugh*, that the privilege extended only to material prepared "wholly or mainly" for the purpose of preparing the board's case.<sup>70</sup> Lord Denning MR's opinion was considered as being closely in line with the formulation of Barwick CJ. Lord Edmund-Davies noted the test formulated by Lord Denning MR, that, to be privileged, material which came into existence had to be "wholly or mainly" for the purpose of litigation and rejected the term "wholly" for the same reason that his Lordship did not prefer "solely" as postulated by the Australian High Court majority opinion in *Grant v Downs*. Lord Edmund-Davies accepted that the word "mainly" in the Lord Denning test was closer to what he regarded as the preferable test, which "lacked the element of clear paramountcy which should as I think, be the touch stone."<sup>71</sup> The House of Lords unanimously adopted the dominant purpose test as applicable.

In New Zealand, the Court of Appeal examined the issue in *Konia v Morely: Cullen v Attorney General*.<sup>72</sup> McCarthy P acknowledged that privilege could be claimed though a purpose giving rise to privilege was not the only reason for the document being brought into existence. The document's submission to a solicitor need not be the dominant or substantial purpose for its existence, but must, however, be "an appreciable purpose".<sup>73</sup> Richmond and Cooke JJ agreed with the view expressed

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66 *Grant v Downs*, above n 43, at 685.

67 At 677 (emphasis added).

68 *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49.

69 *Waugh v British Railways Board*, above n 52.

70 At 533.

71 At 1173.

72 *Konia v Morely: Cullen v Attorney General* [1976] 1 NZLR 455 (CA).

73 At 459.

by the President, with Cooke J noting that the purpose needed to be a “sufficiently substantial or appreciable purpose.”<sup>74</sup> “Appreciable purpose” seemed less clear than might otherwise be desired and the lingering question still appeared to be the alternative expression used by Cooke J. Thus it was difficult to define what “appreciable purpose” meant and it was not clear how “appreciable” the purpose had to be and whether it could mean “a sufficiently substantial” purpose. The problem in New Zealand still remained and was that described by Lord Wilberforce in *Waugh*, namely “how close must the connection be between the preparation of the document and the anticipation of litigation?”<sup>75</sup>

In *Guardian Royal Exchange Assurance of New Zealand v Stuart*, the New Zealand Court of Appeal revisited the question, and in this case the documents in question had been prepared for mixed purposes.<sup>76</sup> The Court was unanimous in ruling that, when litigation was in progress or reasonably apprehended, a report or other document obtained by a party or his legal adviser should be privileged from inspection or production in evidence if the dominant purpose of its preparation was to enable the legal adviser to conduct or advise regarding the litigation. Thus New Zealand has aligned itself with the decision by the House of Lords in *Waugh* as well as with the Australian High Court decision in *Esso Australia Resources Ltd*.

### 3. Communication with salaried employee solicitor

Disputes have arisen on whether communications with in-house lawyers will qualify for the protection afforded by LPP. Banks, insurance companies, accountancy firms, large corporates, such as multinationals, as well as government departments, such as Inland Revenue, have their own legal departments, which employ salaried personnel as legal advisers.<sup>77</sup> The question has been whether legal advice to their employers qualifies as privileged communications either because the advice is not given at arm's length or that the employee legal adviser was also fulfilling other non-legal roles within the employer organisation.<sup>78</sup>

The nature of such communications and whether they were privileged, was addressed in the English decision, *Alfred Crompton Amusement Machines Ltd v Commissioners of Customs & Excise (No 2)*.<sup>79</sup> Forbes J in the Queen's Bench Division held that privilege which protected communications between a client and professional legal adviser did not *extend* to communications with an organisation which had its internal legal advice division or department.<sup>80</sup> Forbes J's decision was considered by the English Court of Appeal in *Crompton Ltd v Customs & Excise*

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74 At 470.

75 *Waugh v British Railways Board*, above n 52, at 1173.

76 *Guardian Royal Exchange Assurance of New Zealand v Stuart*, above n 64.

77 In *Alfred Crompton Amusement Machines Ltd v Commissioners of Customs & Excise (No 2)*, above n 64, at 129 Lord Denning MR commented that: “Sometimes the employer is a great commercial concern. At other times it is a government department or a local authority. It may even be the government itself, like the Treasury Solicitor and his staff. In every case these legal advisers do legal work for their employer and for no one else”. In Tamberlin B and Bastin L “In-house counsel, legal professional privilege and ‘independence’” (2009) 83 ALJR 193 at 196 it was noted that, “[i]n recent years, the legal profession has seen a boom in the number of in-house counsel”.

78 In Tamberlin and Bastin L, above n 78 at 197, such advice had been referred to as “convenient” advice.

79 *Alfred Crompton Amusement Machines Ltd v Commissioners of Customs & Excise (No 2)*, above n 64.

80 Forbes J's comments were: “by no stretch of the imagination can the commissioners in this case be regarded as the lay clients of their own legal branch” at 364.

*Commissioners (No 2)*.<sup>81</sup> Lord Denning MR on behalf of the Court,<sup>82</sup> addressed the availability of privilege in the case of salaried legal advisers and concluded that communications by salaried legal advisers were protected by privilege.<sup>83</sup> Lord Denning MR's reasoning and conclusion was followed by the European Court of Justice in *AMS Europe Ltd v Commission of the European Communities*.<sup>84</sup> The unanimous decision of the Court of Appeal in *Alfred Crompton*, has subsequently been questioned by Vinelott J in the Chancery Division decision in *Derby & Co Ltd v Weldon*.<sup>85</sup> Despite Vinelott J's approach, it is worth noting that when *Alfred Crompton* was appealed to House of Lords, Lord Cross of Chelsea, in delivering the leading speech, accepted without challenge, the principle of law that the Court of Appeal had established.<sup>86</sup>

The issue has also been a contentious one in Australia and was addressed by a full bench of the High Court of Australia in *Waterford v The Commonwealth of Australia*.<sup>87</sup> However, the High Court in *Waterford* adopted a different approach with judges divided on the issue, resulting in the Court's inability to speak with one voice on the issue. Mason and Wilson JJ in their joint judgment, saw no reason to treat legal officers in government employment as not subject to the protections of LPP. In their view, the proper functioning of the legal system was in fact assisted by the freedom of clients to consult their legal advisers. Provided that there was in existence, a professional relationship which enabled the advice to have an independent character, despite an employer-employee relationship, was sufficient to have the employer client claim privilege in respect of relevant communications. Brennan J drew a distinction between legal advisers who were government employees and salaried employees of non-government employers. In Brennan J's view, the government employed lawyer had his or her independence protected by the respective Attorneys-General. Further protection of their independence occurred through laws relating to the public service and in certain cases pursuant to specific legislation. However, in the case of non-government employees, solicitors could not claim privilege, as they were significantly insulated from the sanctions of professional disciplinary bodies for breach of ethical standards when such breaches were committed in the interests of the employer. Further, the employment environment sheltered such employee lawyers from the disciplinary influence of the opinion of their professional peers. Accordingly, only government employee lawyers could claim privilege and not employee lawyers as a class.

However, Deane and Dawson JJ accepted that privilege could only apply to employee lawyers subject to qualifications. More recently, the Federal Court of Australia in *Seven Network Ltd v News Ltd* considered the issue of privilege in the context of an application for an order of

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81 *Alfred Crompton Amusement Machines Ltd v Commissioners of Customs & Excise (No 2)*, above n 64.

82 Karminski and Orr JJ concurring with Lord Denning MR.

83 At 376, Lord Denning MR observed: "Many barristers and solicitors are employed as legal advisers, whole time, by a single employer ... They are regarded by the law as in every respect in the same position as those who practise on their own account ... They are subject to the same duties to their client and to the court ... They and their clients have the same privileges."

84 *AM & S Europe Ltd v Commission of the European Communities* [1983] 1 All ER 705 at 733 where it was observed: "A lawyer in private practice who is a member or associate of a large firm may act for long periods for only one client. If his communications are protected, so it seems to me, should be those of the lawyer who is a member of the legal department of a company ... the salaried lawyer should for present purposes be treated in the same way as the lawyer in private practice."

85 *Derby & Co Ltd v Weldon* [1990] 1 WLR 1156.

86 *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2)* [1974] AC 405 at 430–431.

87 *Waterford v The Commonwealth of Australia*, above n 6.

discovery of 22 documents in respect of which privilege had been claimed.<sup>88</sup> The documents had been prepared by in-house counsel. The Federal Court recognised that merely being employed as a lawyer did not of itself engender a degree of independence. It was very much dependent on how the employment of the lawyer was structured and practically allowed to occur. The Court accepted that in certain cases, employee lawyers could be exclusively involved in advising and dealing with legal problems. There could also be situations where dealing with law-related matters may be one only of a range of matters, including commercial matters that an employee lawyer would be dealing with. The important yardstick against which privilege in respect of employee lawyers needed to be evaluated, was the existence of an appropriate level of independence. Such independence needed to be demonstrated in order to ensure that the ambit of privilege was being used within reasonable limits.

In situations where employee lawyers are engaged in legal as well as non-law-related roles, this does not of itself disqualify a claim for privilege. A claim for privilege in such cases will be one of fact and degree involving a balancing exercise to determine the importance of the identified purpose. It will not suffice to merely label a document as privileged in order to make a successful claim. The important consideration will be whether the document is in substance privileged with consideration being given to the content, context, evidence and form of the particular document.

The position in New Zealand regarding in-house counsel in the taxation context was directly in issue in the High Court decision *Miller v Commissioner of Inland Revenue*.<sup>89</sup> The plaintiffs sought discovery of numerous reports by the tax department's in-house lawyers. The reports had been taken into account by the Commissioner's senior officers in deciding whether particular statutory provisions, including those in relation to anti avoidance, were applicable.<sup>90</sup> The Commissioner responded by claiming LPP on the grounds that the relevant reports comprised confidential communications between a client and the client's legal adviser for the purpose of giving and receiving legal advice. Before deciding whether privilege could be claimed, Baragwanath J acknowledged that the position of in-house practitioners posed some real difficulties.<sup>91</sup> He concluded however, that they could claim privilege provided they were enrolled as a New Zealand practitioner under the LPA 1982 and held a current practising certificate as required by the Act.<sup>92</sup> Provided in-house lawyers were genuinely acting as lawyers and not in some other capacity, such as a company director or manager, there was no justification for drawing distinctions between in-house counsel and those lawyers in private practice, for the purposes of being able to claim privilege. More recently, the issue has arisen in *Case Y8*.<sup>93</sup> Pursuant to an application for discovery, the taxpayer sought to obtain numerous documents, including a number of legal opinions provided to the Commissioner by in-house lawyers. Judge Barber followed the New Zealand High Court decision in *Miller v Commissioner of Inland Revenue* and held that the in-house Inland Revenue

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88 *Seven Network Ltd v News Ltd* [2005] FCA 142.

89 *Miller v Commissioner of Inland Revenue* (1997) 18 NZTC 13,001 (HC).

90 The provisions were ss 99, 25(2) and 23 of the Income Tax Act 1976.

91 At 13.017, these being that: "While their privileges and obligations are as already stated they are paid by and are (usually) subordinate members within an entity whose senior personnel are frequently not legally trained".

92 This statute has been replaced by the Lawyers and Conveyancers Act 2006.

93 *Case Y8* (2007) 23 NZTC 13,076, a decision of New Zealand's first instance tax court, the Taxation Review Authority.

solicitors were giving advice to the Commissioner as his agents, staff or delegates and that such advice was privileged.<sup>94</sup>

The position adopted in New Zealand on privilege for advice from in-house lawyers, has generally also prevailed throughout the common law world. Worth noting is the Canadian decision in *Re Director of Investigation and Research and Shell Canada Ltd*, a decision of the Canadian Federal Court of Appeal, Jackett CJ, in delivering the unanimous judgment of the Court, noted that privilege applied where the communications were between Shell and its salaried lawyers just as would have been the case had the communications been between Shell and lawyers from a private law firm.<sup>95</sup> The Supreme Court of Ireland in *Geraghty v Minister for Local Government*, has also accepted that privilege can be claimed in respect of legal advice by in-house counsel.<sup>96</sup> An identical approach has also been adopted in the United States in *National Labor Relations Board v Sears Roebuck & Co* and *US Steel Corp v United States*.<sup>97</sup>

#### IV. SECTION 20 OF THE TAX ADMINISTRATION ACT 1994

Having traversed the scope of privilege at common law, the statutory enactment of it in s 20 of the TAA 1994, warrants some analysis as well as its impact on the common law doctrine of privilege.

##### **20 Privilege for confidential communications between legal practitioners and their clients**

- (1) **[Privileged matters]** Subject to subsections (2) and (3), any information or document shall, for the purposes of sections 16 to 19, 143(1)(b), 143A(1)(1)(b), 143B(1)(b), and 143F, be privileged from disclosure, if –
- (a) it is a confidential communication passing between –
    - (i) a legal practitioner in the practitioner’s professional capacity and another legal practitioner in such capacity; or
    - (ii) a legal practitioner in the practitioner’s professional capacity and the practitioner’s client, –
      - whether made directly or indirectly through an agent of either; and
  - (b) it is made or brought into existence for the purpose of obtaining or giving legal advice or assistance; and
  - (c) it is not made or brought into existence for the purpose of committing or furthering the commission of some illegal or wrongful act.

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<sup>94</sup> At 13,086.

<sup>95</sup> *Re Director of Investigation and Research and Shell Canada Ltd* (1975) 55 DLR (3d) 713 at 721. The Court followed *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2)*, above n 87, at 430–431.

<sup>96</sup> *Geraghty v Minister for Local Government* [1975] IR 300 at 312.

<sup>97</sup> *National Labor Relations Board v Sears Roebuck & Co* (1975) 421 US 132 at pp149, 154. *US Steel Corp v United States* (1984) 730 F 2d 1465. There has also in the United States context been academic comment on the matter of privilege and in-house counsel advice in Ronald Keller, “The Applicability and Scope of the Attorney-Client Privilege in the Executive Branch of the Federal Government,” (1982) 62 B U L Rev 1003.

- (2) **[Trust accounts]** Where the information or document consists wholly or partly of, or relates wholly or partly to, the receipts, payments, income, expenditure, or financial transactions of a specified person (whether a legal practitioner, the practitioner's client, or any other person), it shall not be privileged from disclosure if it is contained in, or comprises the whole or part of, any book, account, statement, or other record prepared or kept by the legal practitioner in connection with a trust account of the legal practitioner within the meaning of section 6 of the Lawyers and Conveyancers Act 2006.
- (3) **[Investment receipts]** Where the information or document consists wholly or partly of, or relates wholly or partly to investment receipts (being receipts arising or accruing on or after 1 April 1975 from any money lodged at any time with a legal practitioner for investment) of any person or persons (whether the legal practitioner, the practitioner's client or clients, or any other person or persons), it shall not be privileged from disclosure if it is contained in, or comprises the whole or part of, any book, account, statement, or other record prepared or kept by the legal practitioner in connection with a trust account of the legal practitioner within the meaning of section 6 of the Lawyers and Conveyancers Act 2006.
- (4) **[Legal communications]** Except as provided in subsection (1), no information or document shall for the purposes of sections 16 to 19, 143(1)(b), 143A(1)(b), 143B(1)(b), and 143F be privileged from disclosure on the ground that it is a communication passing between one legal practitioner and another legal practitioner or between a legal practitioner and the practitioner's client.
- (5) **[Determination of claim of privilege]** Where any person refuses to disclose any information or document on the ground that it is privileged under this section, the Commissioner or that person may apply to a District Court Judge for an order determining whether or not the claim of privilege is valid; and, for the purposes of determining any such application, the District Court Judge may require the information or document to be produced to the District Court Judge. An application under this subsection may be made in the course of an inquiry under section 18 to the District Court Judge who is holding the inquiry.
- (6) **[Application of section]** Subject to subsection (3), this section shall apply to information, books, and documents made or brought into existence whether before or after the commencement of this Act.
- (7) **[Definition of "legal practitioner"]** In this section, **legal practitioner** means a barrister or solicitor of the High Court, and references to a legal practitioner include a firm or an incorporated law firm (within the meaning of the Lawyers and Conveyancers Act 2006) in which he or she is, or is held out to be, a partner, director, or shareholder.

#### *A. Relationship of s 20 with the common law doctrine*

Section 20 introduces a number of new elements to the ambit of privilege as recognised by the Common Law. Firstly, s 20(1)(a)(i) allows negotiations between solicitors on behalf of their respective clients to be privileged for tax purposes, when the parties agree that their communications are confidential. As may have been apparent in the earlier analysis of the common law doctrine, there was no head of privilege for communications between a legal practitioner in his or her professional capacity and another such practitioner in a similar capacity.

Secondly, privilege appears to attach if the first limb of the common law doctrine is satisfied, this being that the communication was brought into existence in order to provide legal advice.

The analogy is the type of advice the client sought in *R v Uljee*.<sup>98</sup> There does not appear to be any reference to the second limb of privilege, namely, communications brought into existence by the client or third parties for purposes of actual or prospective litigation and for the dominant purpose of use in such litigation.

A significant question is whether s 20 codifies the law on LPP. Certainly, s 20(1) does appear to codify some aspects of the existing common law in respect of solicitor-client privilege. In *Green v Housden*, Henry commented as follows:<sup>99</sup>

On its true construction the Act must override the common law provisions as to legal professional privilege, otherwise section 20(1) is otiose and section 20(4) which extensively negates ordinary professional privilege would not be given its true effect.

However, it would be difficult to argue that the thrust of s 20 is effectively a codification of the common law doctrine. As its tenor indicates, there is a fair amount of what common law recognises which the section does not articulate. Firstly, there is the issue of whether privilege attaches in respect of copies of documents brought into existence solely for the purpose of obtaining legal advice even though the original would not have been protected by ordinary privilege. In *Watson v Cammell Laird & Co (Shipbuilders and Engineers) Ltd*, solicitors acting for a plaintiff in a claim for personal injuries refused to disclose copies of hospital case notes which they had made for the purposes of the action.<sup>100</sup> The English Court of Appeal held that the copy documents were privileged. In *R v Board of Inland Revenue, ex parte Goldberg*, Watkins LJ held that although an original document was not privileged, copies of it which had been brought into existence for the purpose of seeking legal advice were.<sup>101</sup> However, in *Dubai Bank Ltd v Galandari* the original affidavit was not privileged, but the defendants sought to claim privilege for the photocopies of the original.<sup>102</sup> The claim was rejected. This issue on which there is conflicting common law authority appears to be one on which s 20 appears to be silent.

Secondly, there is the issue of privilege in respect of communications between clients and foreign legal advisers. In *Great Atlantic Insurance Co v Home Insurance Co and Others*, Templeman LJ held that the whole of the memorandum was privileged as it was a communication between the plaintiffs and their American attorneys relating to a matter on which the American attorneys had been instructed to act as legal advisers to the plaintiffs.<sup>103</sup> Templeman LJ expressed the further view that:<sup>104</sup>

... all communications between solicitor and client where the solicitor is acting as solicitor are privileged subject to exceptions to prevent fraud and ... that the privilege should only be waived with great caution. This principle applies equally to communications between a client and his foreign lawyers or attorneys.”

While there is privilege in respect of communications with legal advisers abroad at common law, s 20 appears not to recognise such advisers due to the specific definition of a “legal practitioner”

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<sup>98</sup> *R v Uljee*, above n 31.

<sup>99</sup> *Green v Housden* (1992) 14 NZTC 9025 (HC) at 9031.

<sup>100</sup> *Watson v Cammell Laird & Co (Shipbuilders and Engineers) Ltd* [1959] 1 WLR 702.

<sup>101</sup> *R v Board of Inland Revenue, ex parte Goldberg* [1989] QB 267, [1998] 3 All ER 248.

<sup>102</sup> *Dubai Bank Ltd v Galandari* [1990] Ch 98, [1989] 3 All ER 769.

<sup>103</sup> *Great Atlantic Insurance Co v Home Insurance Co* [1981] 1 WLR 529.

<sup>104</sup> At 490.



as meaning a barrister or solicitor of the High Court (see s 20(7)). It is not clear if s 20, by not recognising such privilege, means that such is not recognised for the purposes of this provision. It is arguable that such privilege still exists although not articulated by s 20, as it could be argued that s 20 does not purport to represent a code on legal privilege.

Finally, research notes and diary notes which are prepared by a legal adviser for the purposes of giving legal advice or assistance, but which do not constitute a “communication” passing between two legal practitioners or between a legal practitioner and his or her client while privileged at common law, do not appear to be within the terms of s 20. In *Macedonia Pty Ltd v Federal Commissioner of Tax*, notes that a taxpayer’s solicitor had made as a result of a conference between himself and directors of the taxpayer were held to have been privileged.<sup>105</sup> These examples of common law privilege seemingly not articulated by the wording in s 20, appear to suggest that s 20, is not a complete code on privilege in New Zealand’s taxation law context, but that s 20 continues to operate alongside the common law doctrine of privilege. In *Commissioner of Inland Revenue v West-Walker*,<sup>106</sup> the New Zealand Court of Appeal was emphatic that the defence of privilege remained even if there were express statutory provisions which appeared to make inroads into the doctrine. If this valuable right that a citizen has, is to be done away with, it would require quite explicit statutory wording to this effect. The case of solicitor-client privilege has been explicitly dealt with in s 20 but this does not appear to have been the case, regarding the treatment of litigation privilege. Litigation privilege, it is submitted, still applies even though s 17 seems to have a wide compass. It is interesting to note that the wording of s 17 is substantially the same as the provisions of s 163 of the Land and Income Tax Act 1954, which were in issue in the decision in *West-Walker*.

## V. EXCLUSIONS FROM PRIVILEGE UNDER SECTION 20

Specifically excluded from the rubric of privilege are records kept by a legal practitioner in connection with a trust account of such practitioner. Also excluded are documents recording the investment of funds through a solicitor’s trust account. A more substantive exclusion from privilege is communications for furthering the commission of some illegal or wrongful act. Thus, any communications designed to break the law, are not privileged. Section 20 to this extent recognises this long-established exception to the common law doctrine of privilege. However, there is also no privilege in relation to communications for the commission of a “wrongful act”.

The term “wrongful act” does not appear to be defined. Such an act is significant in the taxation context, particularly in relation to the Report of the Commissioner of Inquiry into the conduct of the Inland Revenue Department and the Serious Fraud Office in relation to the transactions referred to in the wine-box documents, and to the adequacy of the New Zealand tax laws in particular respects.<sup>107</sup> It is worth noting that one of the terms of reference of the Inquiry was whether, having regard to the kinds of transactions referred to in the papers, any changes to the criminal law or the tax law should be made, in the opinion of the Commission, “for the purpose of protecting New Zealand’s income tax base from the effects of fraud, evasion and avoidance”.<sup>108</sup>

105 *Macedonia Pty Ltd v Federal Commissioner of Tax* 87 ATC 4565.

106 *Commissioner of Inland Revenue v West-Walker*, above n 3.

107 The terms of reference for the Inquiry as reproduced by the Court of Appeal in its judgment in *Fay Richwhite & Co v Davison* (1995) 17 NZTC 12,012.

108 See terms of reference of Inquiry in Ronald Davidson *Wine-Box Inquiry – Commission of Inquiry into Certain Matters relating to Taxation* (Department of Internal Affairs, August 1997).

In response to a call for a Royal Commission of Inquiry:<sup>109</sup>

... the Commissioner of Inland Revenue and the Director of the Serious Fraud Office had each issued public statements that there was no evidence of tax evasion, although the Commissioner added that the documents did show blatant tax avoidance.

Hardie Boys J referred to the public interest in the inquiry from allegations “of tax law abuse by major New Zealand companies.”<sup>110</sup>

While it is accepted that privilege will not apply in respect of fraud or evasion, which are illegal, the question remains in respect of tax avoidance. In *Inland Revenue Commissioner v Duke of Westminster*, Lord Tomlin observed that:<sup>111</sup>

... every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be.

Thus, tax avoidance is not an illegal act but is the arrangement or ordering of one’s affairs in order to ensure an optimum tax consequence.

In *Craven v White*, Lord Oliver alluded to this when commenting that:<sup>112</sup>

It is this reference to the motive of the taxpayer in engaging in a particular transaction which represents the significant alteration in approach and which raises immediately the question why the taxpayer’s motive for an action, otherwise lawful and effective, should lead to its being disregarded ... I am at one with those of your Lordships who find the complicated and stylised antics of the tax avoidance industry both unedifying and unattractive but I entirely dissent from the proposition that, because there is present in each of the three appeals ... the element of a desire to mitigate or postpone the taxpayer’s tax burdens, this fact alone demands from your Lordships a predisposition to expand from the scope of the [fiscal nullity] doctrine.

Thus, tax avoidance may appear “unedifying and unattractive” because of the motives of the perpetrators, but it should have no effect in deciding the lawfulness of a transaction. However, it appears that the Inland Revenue Department considers the term “wrongful act” to cover tax avoidance. A former Deputy Commissioner commented that “information or documents are privileged from disclosure if they are not made or brought into existence for the purpose of any illegal or wrongful act, for example, to encourage tax evasion or tax avoidance.”<sup>113</sup> It is suggested that Lord Oliver’s comments in *Craven v White*, provided a practical reference point for interpreting the phrase, “wrongful act” in s 20(1)(c). It would have to connote something less than “illegal” otherwise it would appear to be mere surplusage. On this reasoning then, it would appear to include civil wrongs, such as a breach of contract, and the narrow form of conspiracy discussed in *Crescent Farm (Sidcup) Sports Ltd*, which would not have nullified a claim for privilege at common law.<sup>114</sup>

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109 *Fay Richwhite & Co v Davison*, above n 113, at 12,015–12,016.

110 At 12,020.

111 *Inland Revenue Commissioner v Duke of Westminster* [1935] All ER 259 at 267.

112 *Craven v White* [1988] 2 All ER 495 (HL) at 521 and 527.

113 Adair R, Deputy Commissioner of Inland Revenue “The Commissioner’s Powers to Obtain Information and Documents: The New Zealand Experience” (paper presented to The New Zealand Society of Accountants Residential Tax Seminar, 1989) at 12–13.

114 *Crescent Farm (Sidcup) Sports Ltd v Sterling Offices Ltd* [1972] 1 Ch 553.

## VI. NOTICE UNDER SECTION 20

Of critical importance is the question of whether the Commissioner is legally obliged to give reasonable notice of his access powers or provide reasonable time in which a response may be tendered to an information request so that a client may claim privilege. The issue is certainly not academic as it became a very real issue on the facts of *Endeavour Productions Ltd v Petersen*.<sup>115</sup> Here the plaintiffs experienced a “spot audit” in that officers of the Inland Revenue Department went to the premises occupied by the plaintiffs unannounced on 2 June 1988. It was common ground that a number of files and documents were removed by departmental officers from the premises on that day. According to the second defendant, it was:<sup>116</sup>

... a very common practice adopted by the Department over many years, ... its main purpose [being] to make an unannounced visit to taxpayers to check the existence of material records, which, if warning was given, may not have been available to the inspector.

The fourth plaintiff said he believed some of the files and their contents would have been privileged from inspection by the Department as being covered by LPP, had there been an opportunity to object to the matter. The Department accepted that it could not exclude the possibility that some legally privileged material may have inadvertently been uplifted.

Yet six months prior to the judgment in *Endeavour* a Deputy Commissioner stated that:<sup>117</sup>

It should be noted that advance notice of a visit is not required although this is usually given. Circumstances may, however, warrant an unannounced visit (i.e. a spot audit) even outside business hours. An example would be where it is considered records may “disappear” such as payroll records. Unannounced visits are carried out judicially.

There was no elaboration on what “judiciously” meant and whether or not it included taking account of legal privilege. However, if the experience in *Endeavour* is any indication it would appear that “spot audits” though conducted judicially do not take into account issues of privilege.

The Commissioner’s later policy statement, in respect of access to the audit work papers maintained by an external auditor in relation to an audit assignment, did not appear to resile from the practice of conducting a “spot audit” as alluded to.<sup>118</sup> However, the statement does appear to recognise that “the Department accepts that on occasions, particular documents on an audit file may properly be subject to legal professional privilege (as contemplated by s 20)”. Towards the end of the statement it is noted that “in appropriate cases, legal professional privilege (as contemplated by s 20 of the TAA 1994) may apply to some documents or information.”

In the Australian Federal Court decision in *Citibank Ltd v Federal Commissioner of Taxation*, decisions determining LPP were left to officers who were competent and experienced, but who did not necessarily have any legal qualifications, in circumstances where the visit was made by some 37 officers who were instructed to complete the task within a maximum of two hours.<sup>119</sup> The Court expressed the view that this:<sup>120</sup>

115 *Endeavour Productions Ltd v Petersen* (1990) 12 NZTC 7132 (HC).

116 At 7134.

117 Adair, above n 114, at 5.

118 Text of the Department’s Policy Statement, Inland Revenue Department *Accountants’ Journal* (September 1991) at 33.

119 *Citibank Ltd v Federal Commissioner of Taxation* 88 ATC 4714.

120 At 4733, per Lockhart J.

... was in fact to pay little more than lip service to the recognition of the possibility of the claim being made.

Where the Inland Revenue Department decides to arrive unannounced as in *Endeavour* or “to take Citibank by surprise” as in *Citibank*, the taxpayer may resist on grounds of privilege or on grounds that he or she wants to seek legal advice, while the professional legal advisor may resist on grounds of privilege.<sup>121</sup> In the Federal Court decisions in *Citibank*, Lockhart J opined as follows:<sup>122</sup>

In addition the search should in fact have been conducted so that any claim for legal professional privilege that might be asserted by Citibank or by any of its clients whose documents were on Citibank’s premises and in whom the primary claim would repose, could be invoked ... It was incumbent upon Mr Booth to establish, when he decided to undertake the search on 15 June, a sufficient mechanism to enable Citibank to assert a claim for legal professional privilege. This was not done.

If the taxpayer knows that privilege exists, he or she should be able to resist the Commissioner’s attempts to get access to communications. However, if he or she is unsure about the position regarding the privilege status of documents but wishes to first seek legal advice and thereby prevents the revenue officer from inspecting the file, would that act be illegal? In *Swan v Scanlon*, Helman J of the District Court of Queensland, held that a temporary denial of access on reasonable grounds fell short of being an obstruction, as in such cases a short delay for the purpose of enabling the person from whom access is sought to obtain legal advice would appear generally to be reasonable.<sup>123</sup>

In *Fischer v Douglas: Ex parte Fischer*, it was said that the right to obtain legal advice was a common law right.<sup>124</sup> Should a taxpayer in New Zealand be faced with a need to exercise such a right in the face of imminent access by a revenue official, it would appear that the taxpayer would have protection under the BOR Act.

Section 28 of the BOR Act provides that an existing right or freedom shall not be held abrogated or restricted by reason of its non-inclusion in the BOR Act. There does not appear to be any inclusion of the right to obtain legal advice. Section 21 provides a right to be secure against unreasonable search or seizure of his person, property, correspondence or otherwise. The taxpayer could argue that the unannounced arrival by the revenue official to facilitate a “spot audit” is an unreasonable search as it abrogates his or her right to obtain legal advice.

However, there needs to be caution in being too reliant on s 21 of the BOR Act in respect of an information request by the Commissioner pursuant to s 17 of the TAA 1994. The New Zealand Court of Appeal in its decision in *Commissioner of Inland Revenue v New Zealand Stock Exchange; Commissioner of Inland Revenue v National Bank of New Zealand Ltd* expressed its view on this point as follows:<sup>125</sup>

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121 *Citibank Ltd v Federal Commissioner of Taxation*, above n 120, at 4730, per Lockhart J; and 20 ATR 292 at 302 per Bowen CJ and Fisher J (Full Federal Court).

122 At 4733.

123 *Swan v Scanlon* 13 ATR 420 at 424.

124 *Fischer v Douglas: Ex parte Fischer* [1978] Qd 27 (QSC).

125 *Commissioner of Inland Revenue v New Zealand Stock Exchange; Commissioner of Inland Revenue v National Bank of New Zealand Ltd* [1990] 3 NZLR 333 (CA) at 338.

... we are unable to regard the confidentiality of the relationships between banker and client and broker and client as supporting a reading down of the plain language of section 17(1). Sections 13 to 15 impose stringent secrecy obligations and section 20 provides expressly in relation to legal professional privilege. The statute thus reflects legislative balancing of the public interest affecting privacy on the one hand and in the ascertaining of liability for tax on the other.

The decision was upheld on appeal to the Privy Council and importantly it was also noted that the exercise of the powers conferred on the Commissioner pursuant to s 17, was not unreasonable for the purposes of the New Zealand BOR Act.<sup>126</sup> It may be helpful to note that s 5 of the BOR Act provides that the rights and freedoms in the Bill may be subject “only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.

The giving of notice by the Commissioner has suggested another avenue for asserting privilege. In *Perron Investments Pty Ltd v DFC of T*, a question that arose for determination by the Full Federal Court, was whether notices, requiring production to the Deputy Commissioner of documents which were prima facie privileged were bad.<sup>127</sup> Lockhart J decided that the notices were not bad insofar as they required the production of documents that might be the subject of privilege. Burchett J agreed that the notices were not invalidated by their failure to make express the fact that the obligations imposed by them did not extend to documents the subject of a proper claim of privilege.

Hill J answered the question by referring to *Commissioner of Inland Revenue v West-Walker*.<sup>128</sup> The notice served on the solicitor in this case contained no exclusion from the requirement to produce on the ground of privilege. It was held that the solicitor was entitled to decline to furnish the information and produce documents which would be protected in ordinary legal proceedings by privilege unless his client had previously asserted to his so doing. Hill J's additional and illuminating comments were as follows:<sup>129</sup>

It was never suggested by the Court of Appeal that the notice to the solicitor which sought inter alia all correspondence relating to certain transactions was itself void whether or not, as was pointed out by Fair J at p.203, all the documents and information which the solicitor possessed were documents which he was bound to produce as not being entitled to legal professional privilege. Rather, it was held that the solicitor was entitled to raise privilege as a defence in answer to proceedings for failure to comply with the notice.

Thus, Hill J appears to be clearly stating that, while a notice which refers to documents covered by privilege is not invalid, the avenue of seeking privilege is not to attack an otherwise valid notice, but to assert the defence of privilege. This reasoning is almost identical to the doctrine of promissory estoppel which, as is well established, is not a cause of action but a defence. The reasoning in relation to public interest immunity would be similar in that it is a defence not a cause of action. Privilege is a shield and not a sword. Thus, if production was sought and a taxpayer was prosecuted, the claim to privilege which had initially been made to the Commissioner would need to be maintained by an application to a court or as a defence to proceedings for prosecution. Alternatively Hill J suggested that:<sup>130</sup>

126 *Commissioner of Inland Revenue v New Zealand Stock Exchange; Commissioner of Inland Revenue v National Bank of New Zealand Ltd* [1992] 3 NZLR 1 (PC).

127 *Perron Investments Pty Ltd v DFC of T* 89 ATC 5038.

128 *Commissioner of Inland Revenue v West-Walker*, above n 3.

129 *Perron Investments Pty Ltd v DFC of T*, above n 128, at 5057.

130 At 5060.

... it would be open to the recipient of a notice to seek a declaration from a court having jurisdiction that it was entitled not to produce the document or furnish the information upon the ground of legal professional privilege.

## VII. JUDICIAL AND NON-JUDICIAL ATTEMPTS IN NEW ZEALAND TO EMASCULATE LPP IN THE TAXATION CONTEXT

There have been at least five documents, including official reports, that have sought to either limit the scope of LPP or recommend that it not apply in the taxation context. These attempts need to be highlighted, in order to emphasise the emergence of a clear attempt to remove this fundamental right that has long existed for taxpayers. Relatively recently, the Organisational Review Committee Report titled, *Organisational Review of the Inland Revenue Department* had expressed the view that, "...it might be appropriate to reconsider professional privilege in relation to revenue matters".<sup>131</sup> The rationale for the reconsideration appeared to have been the growing trend of openness in litigation as alluded to by the Report. This Report was followed three years later by the Report of the Wine-Box Inquiry.<sup>132</sup> The Report to the Treasurer and Minister of Revenue by a Committee of Experts on Tax Compliance, December 1998, expressed the view that the ambit of LPP was too wide and made recommendations to limit its scope. The New Zealand Law Commission in October 2000, issued Report 67 on, "Tax and Privilege", in which the majority sought to restrict LPP in s 20 of the TAA 1994, to litigation privilege only.<sup>133</sup> The latest attempt to seek to abolish LPP in the taxation context has been the Government Discussion Document, "Tax and Privilege: a proposed new structure", issued in May 2002.

The equivalent of s 20 first appeared in New Zealand in statutory form pursuant to s 16A of the Inland Revenue Department Act 1958. Its enactment was in response to the New Zealand Court of Appeal decision in *Commissioner of Inland Revenue v West-Walker*,<sup>134</sup> which held that the Commissioner's information gathering powers must be construed as subject to common law privilege having application to communications between a lawyer and a client. The purpose of s 16A was to encapsulate in statutory language the principle upheld in *West-Walker*, while preventing its application to trust accounts and other financial records.<sup>135</sup>

## VIII. CONCLUSION

As noted in the introductory portion of this article, the Commissioner's powers to seek access, conduct inspections and searches, make extracts or copies of books and documents, require the

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131 Organisational Review Committee *Report to the Minister of Revenue* (April 1994) at [10.10].

132 Ronald Davidson *Wine-Box Inquiry – Commission of Inquiry into Certain Matters relating to Taxation* (Department of Internal Affairs, August 1997).

133 Above at n 131 at [10.10].

134 *Commissioner of Inland Revenue v West-Walker*, above n 3.

135 This history to the enactment of statutory privilege in the taxation context pursuant to s 16A of the Inland Revenue Department Act 1952, is explicitly referred to in "Tax and Privilege: a proposed new structure", a Government discussion Document issued in May 2002 by the Policy Advice Division of the Inland Revenue Department, ch 2 at 5.

furnishing of written information and the production of books and documents are indeed formidable. The latitude of these powers was referred to as follows:<sup>136</sup>

State tax collections have the legal authority to pursue revenue as tenaciously as the Sheriff of Nottingham. They have unrestricted access to property and all books and documents which the Tax Commissioner considers necessary or relevant. And they can demand assistance and answers to questions even though the information obtained may be incriminating. Failure to comply invokes hefty penalties.

In the event that the force of the modern state is unleashed through the exercise of the Commissioner's powers against a single citizen, the only bulwark of any significance appears to be a claim for privilege. While privilege is a significant doctrine, it is narrowly defined and its boundaries are not unambiguous. Privilege has not stopped the Commissioner from acting in contravention of it, to the detriment of the taxpayer. There is a real danger that, were privilege to be abolished, the wide powers of investigation currently exercised by the Commissioner, would not only have virtually free reign but run the risk of being grossly abused as well illustrated by the facts in the Australian Federal and Full Federal Court decisions in *Citibank Ltd v Federal Commissioner of Taxation*.<sup>137</sup>

Instead of seeking to abolish the statutory enactment of the doctrine of privilege, the Commissioner should demonstrate a willingness to challenge the validity of claims using the provisions of s 20(5) of the TAA 1994. The level playing field has never existed in the taxation context, where the contest has inevitably been and continues to remain heavily tilted in favour of the Commissioner. Were the Commissioner to begin testing the validity to some claims, it could put on notice, those who per chance, may be abusing the doctrine. This may have the intended effect, of causing privilege to be used in the way it had always been intended, namely, as a bona fide protection for taxpayers.

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136 Editorial "Tax Taker, Welfare Giver" *New Zealand Herald* (Auckland, 7 January 1991).

137 *Citibank Ltd v Federal Commissioner of Taxation*, above n 120.

# CONSTITUTIONAL COOKBOOK: SEEKING PALATABLE INGREDIENTS FOR CONSTITUTIONAL REFORM IN NEW ZEALAND

BY GAY MORGAN\*

## I. INTRODUCTION

New Zealand is often encouraged to adopt a written constitution. This is due to an unease about the reliability of an unwritten constitution to effectively prevent arbitrary or abusive exercises of State power. There are two issues at play in such concerns. One is whether a convention-based “political” constitution can retain authority as the population grows and diversifies. The other is the persistent uncertainty, arising from the unwritten form, as to exactly what the rules are. I wish to argue that a written constitution may not resolve either issue, and might import more pathology than cure. This article will suggest some alternatives which might address these two concerns in a way that is palatable to New Zealand’s constitutional culture, and which would not import some of the pathologies which can and do arise within written constitutionalism. It will use United States as a cautionary tale, to illustrate those pathologies. After considering the nub of New Zealand’s constitutional culture, it will suggest possible uses of existing tools compatible with that constitutional culture, which could create a more robust written constitutional base. These could be used as workable, pragmatic evolutionary alternatives to the classic entrenched, higher-law constitution. It will also encourage consideration of the approaches of several “Scandinavian” models, and particularly that of Finland, as written constitutional systems, which were designed for and are working within highly democratic, constitutional cultures quite similar to that of New Zealand.

### A. *Setting the Scene*

For a constitution to maintain its legitimacy, and therefore its authority, it needs to be consistent with the existent constitutional culture. This is due to what I have called the “Tinkerbell Principle”. Constitutions do not bind, or function as constitutions, unless enough relevant people believe in them and their authority.<sup>1</sup> The world is littered with examples of written constitutions, even those

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1 Reportedly, the “Tinkerbell” metaphor around constitutionalism can be found in an older Canadian case. That makes it not just an illustrative metaphor but a useful and acceptable term of legal analysis, and it has been used in the literature. See C Stewart “The Rule of Law and the Tinkerbell Effect: Theoretical Considerations, Criticisms and Justifications for the Rule of Law” [2004] 4 Mq LJ 135–136 for the same proposition, that a legal doctrine can only effectively bind if enough relevant people have an internalised belief in its authority. See also HLA Hart *The Concept of Law* (Clarendon Legal Series, Oxford, 1961) at [5.2].



duly enacted, which developed no legal, conventional or moral sticking power<sup>2</sup> and hence with no ability to effectively direct or control exercises of State power. They are, or were, aspirational pieces of paper, nothing more. There is no particular inherent constitutional magic in the written form, it is the shared belief in the correctness and authority of the constitutional rules, written or not, which does the work.

People from successful written-constitution jurisdictions often do not pause to notice that or why their constitutions have “stickiness” (that legal, conventional or moral sticking power). It is taken as given that the document itself is its own source of authority. While there may be debates as to the meaning of the various terms of that constitution, its authority and effectiveness simply is not an issue; it is taken as a given. From that accepted starting point,<sup>3</sup> analysis focuses on the detail and internal substance of that constitution and not on why and how that constitution manages to maintain its accepted power to bind.

New Zealand’s “unwritten” and somewhat mysterious<sup>4</sup> constitution puts the issue of “stickiness”, or the importance of the Tinkerbell Principle, to the fore as there is no one primary document to point to as “it”; what “it” is, is an ongoing discussion.<sup>5</sup> Two of the more unique aspects of New Zealand’s operative constitutional culture are: 1) the phenomenon of concentrated near-absolute legal power lodging in its Westminster governments and unicameral Parliament; and 2) that constitutional rules and conventions around the use of the concentrated near-absolute legal power are politically rather than judicially enforced, either through political peer pressure or through adverse electoral outcomes. Neither of these traditions would seem to bode well for a transition to an effective written constitution, as written constitutions are generally judicially enforced instruments designed to limit the acceptable uses of democratically derived power, whereas the New Zealand system has seemingly elevated democratically derived power to absolute legal power. New Zealand does have its founding Treaty, the Treaty of Waitangi, which undertook

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2 That is, they were never accepted as authoritative from the internal perspective by those whom they would control or by those who would enforce them. Hart, above n 1, at [5.2]. France’s 1791 Constitution is an early example of this sort of “misfit”.

3 For example, see, generally, J Harvie Wilkinson III *Cosmic Constitutional Theory: Why Americans Are Losing Their Inalienable Right to Self-Governance* (Oxford University Press, Oxford, 2012) for a comprehensive discussion of the many scholarly and judicial constitutional theories at work in the United States, none of which question the authority of the text itself. While Bruce Ackerman’s *We the People* constitutional trilogy (*Foundations* (Harvard University Press, Cambridge, 1993), *Transformations* (Harvard University Press, Cambridge, 2000) and *The Civil Rights Revolution* (Harvard University Press, Cambridge, 2014)) does invite consideration of authority of extra-textual means of effecting constitutional amendment, his arguments essentially go to the fundamentally interpretative issues of what the United States Constitution means and how that meaning evolves, not to why the Constitution itself wields authority through time or why it means anything at all from one generation to the next. Most people outside the community of legal scholars, including politicians and other constitutional actors, have not read or heard of Hans Kelsen’s theory of the grundnorm, or HLA Hart’s analyses of obligation, and do not question the source of their constitution’s effective legitimacy or “stickiness”, either for the governors or the governed. M Knight (translator) H Kelsen *The Pure Theory of Law* (University of California Press, Berkeley, 1970) at 115–118; Hart, above n 1, at [5.2].

4 In 15 years of teaching a Public Law course, only rarely has a student had any knowledge as to the most basic of New Zealand’s constitutional arrangements.

5 See Matthew Palmer “New Zealand Constitutional Culture” (2007) 22 NZULR 565; A Sharp “‘This is my Body’: Constitutional Traditions in New Zealand” [2014] 12(1) NZJPIL 41; C James (ed) *Building the Constitution* (Brebner Print, Wellington, 2000) (a collection of papers arising from a project attempting to define and/or explain New Zealand’s constitution or constitutional arrangements).

limitations on how legal powers would be exercised.<sup>6</sup> However, those limitations have not been historically respected nor has that Treaty or its undertakings been enacted into any sort of legal limitation of Parliament's law-making authority.<sup>7</sup>

Does having no written constitution, while being a unitary state with a Westminster government drawn from a unicameral Parliament, with no tradition of judicial oversight<sup>8</sup> of parliamentary powers, make New Zealand what Bruce Ackerman would term "monist", a purely majoritarian jurisdiction?<sup>9</sup> Although New Zealand's streamlined parliamentary system coupled with its embrace of a strong form of the parliamentary sovereignty doctrine could be that way interpreted, and make it seem that New Zealanders are monist purists,<sup>10</sup> I will argue that New Zealand has a conventional "dualism" that is as effective, if not more so, as the attempted legalised "dualism" of the United States or other written-constitution jurisdictions.<sup>11</sup> Further, I argue that New Zealand would risk killing its own "Tinkerbell", which underpins the effectiveness of its constitutional norms, or at least maiming her in a tragic way, if it moved to the sort of judicially overseen dualism prevalent in many other common and civil law jurisdictions.

This is, in part, because one undesirable effect of those constitutions is a separation of the direct line of "ownership" between a body politic and its constitution, as the constitution shifts

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- 6 Jindra Tichy and Graham Oddie "Is The Treaty of Waitangi a Social Contract?" in Graham Oddie and Roy Perrett *Justice, Ethics, and New Zealand Society* (Oxford University Press, Auckland, 1992) 73.
- 7 See, generally, Claudia Orange *The Treaty of Waitangi* (Bridget Williams Books, Wellington, 1995); Matthew Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008).
- 8 *Taylor v Attorney-General of New Zealand* [2015] NZHC 1706, [2015] 3 NZLR 791 is a notable development in this area, as the Court issued, for the first time, a formal declaration that a parliamentary statute was inconsistent with the New Zealand Bill of Rights Act 1990. Section 4 of that Act forbids courts from invalidating any parliamentary Act on the grounds of inconsistency, but ss 5 and 6 also instruct the court to interpret Acts as consistent with the New Zealand Bill of Rights Act 1990, if possible, using the assessment of whether the statutory rights restriction is one which can be justified in a free and democratic society as a guiding standard. If a statute cannot be so justified or be interpreted to be consistent with the New Zealand Bill of Rights Act 1990, the s 4 savings clause applies. The *Taylor* Court could not find an interpretation rendering the rights restriction in question justifiable in a free and democratic society, and granted a declaration to that effect to the plaintiff, who nonetheless remains subject to the statute in question. That is the outer extent of any judicial supervision of legislative content in New Zealand, and was a first. Parliament is under no duty to re-examine the offending statute or to respond to the Court's declaration in any way.
- 9 Ackerman, above n 3. In Ackerman's terms, for those unfamiliar with his work, the United States has two sorts of law-making. The first sort occurs during "constitutional moments" and is when "We the People" are speaking in a constitutional manner or with their constitutional voice, *regardless* of whether "We the People" are going about that in the approved super-majoritarian manner set out in the 1789 Constitution or whether they are using other, unorthodox methods to speak constitutionally. The second sort occurs during "ordinary" times, when "We the People" are speaking in their ordinary voice, using the law-making structures and institutions to make ordinary law. Hence, Ackerman terms the United States a "dualist" or two-track system, where "the people" must manifest some sort of special evidence to trigger the authority of their "constitutional voice" and contrasts that with a "monist" majoritarian system, where ordinary majorities *always* speak with constitutional authority.
- 10 See Janet McLean "The Political, the Historical and the Universal in New Zealand's Unwritten Constitution" (2014) 12(2) NZJPIL 321 for a discussion of the role of monism in the New Zealand constitution. McLean argues that New Zealand has an operational monism that is in tension with the foundational limits of the Treaty and universal notions of fundamental universal rights. I agree, but want to argue that New Zealand is only legally monist, but is constitutionally dualist in at least some areas.
- 11 Ackerman's analysis of the irregular "monist" procedures of the United States Civil War Amendments and of the New Deal in the *We the People* series, above n 3, supports this.

from being politically to being judicially enforced, either in an *ex ante* manner (as in France)<sup>12</sup> or in an *ex post* manner (as in Germany and the United States).<sup>13</sup> Ensuring effective respect for constitutional norms and rules then becomes understood as primarily the responsibility of lawyers, selected law-makers and specified courts, rather than as the widely shared responsibility of all political actors (including, most importantly, the people). The basis for the above assertions will be briefly argued, then two suggestions put forward on navigating several possible constitutional mechanisms between the dilemma of: a) needing a clearly articulated constitution to maintain the conditions for constitutional democracy as New Zealand's population grows in numbers and cultural diversity; and b) avoiding a clearly articulated constitution from becoming an impediment to the legitimate democratic will.

The first suggestion is to clarify and separate the concepts of entrenched law and of higher law. These concepts are sometimes conflated in New Zealand commentary on written constitutionalism, but are distinct and separate concepts, which go to different issues and perform different functions. This conflation unduly complicates the imagining of a more concretised constitution that would fit with New Zealand's constitutional culture, and hence maintain its "stickiness". The second is to suggest a comparative consideration of other constitutional democracies with strong utilitarian and democratic traditions, namely the Scandinavian countries.<sup>14</sup> Some of the possible pathways used in those jurisdictions, which retain the primacy of those populations' "democratic will", while working to restrain excesses of that "democratic will", could be usefully imported to New Zealand. Such borrowing might enhance the palatability of a more formal constitutionalism for New Zealand, as those constitutional devices have developed in a context consistent with New Zealand's existing constitutional understandings.

## II. PROBLEMS INHERENT IN WRITTEN "LEGAL" CONSTITUTIONALISM

The deep problems arising in most written constitutions are two-fold. The first is that of "rule opacity".<sup>15</sup> The second is how written constitutions often operate to divorce the people from direct control and responsibility for their constitution. Both problems are fundamental and intrinsic to any mature legal system<sup>16</sup> and to the rule of law itself, whether that law be ordinary or constitutional.

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12 Vicki Jackson and Mark Tushnet *Comparative Constitutional Law* (2nd ed, Foundation Press, New York, 2006) at 480. In 2010, pursuant to a 2008 constitutional amendment, the French Constitutional Council may also exercise an "ex post" review: Conseil Constitutionnel <[www.conseil-constitutionnel.fr/conseil-constitutionnel/english/presentation/general-presentation/general-presentation.25739.html](http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/presentation/general-presentation/general-presentation.25739.html)>.

13 Jackson and Tushnet, above n 12, at 479–484, although the German Federal Constitutional Tribunal also has jurisdiction to consider whether a statute conflicts with the Basic Law before it goes into effect, upon a petition from the federal or a State government, or a third of the members of the Bundestag.

14 I am taking as a shared assumption that New Zealand has a strong utilitarian culture, from both sides of its cultural heritage. See Palmer, above n 5; Angela Ballara *Iwi: The dynamics of Māori tribal organisation from c. 1769 to c. 1945* (Victoria University Press, Wellington, 1998), especially pt IV.

15 This author's way of summing up the problem that Dan-Cohen addresses.

16 Mature legal system in the "Hartian" sense of consisting of primary "conduct rules" and secondary rules, where the secondary rules are the rules about how the primary rules are created, interpreted, applied and changed. See Hart, above n 1, at [5.3].

### A. Rule Opacity

Meir Dan-Cohen analyses “rule opacity” as a problem for rule of law in his seminal article “Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law”.<sup>17</sup> Briefly, Dan-Cohen accepts as given that a fundamental tenet of “rule of law” is that the people to whom the law applies must be able to know what that law is.<sup>18</sup> He then explores what justifications can be offered for a system postulating adherence to the doctrine of rule of law whilst at the same time having a system of adjudication that gives rise to “decision rules” (as applied) that not only diverge from the “conduct rules” (as commonly known and understood), but which actual “decision rules” are nearly inaccessible to anyone without specialised legal training.<sup>19</sup> This disconnect between the “conduct rules”, as commonly understood, and the relatively obscure “decision rules” as interpretations governed by precedent, means that the law, as it truly is, is not generally knowable by the legally untrained public. Rather, the legal system “selectively transmits” only certain parts of the law to that public.<sup>20</sup> This author argues that this disconnect persists even when common law jurisdictions, such as California or New Zealand, have highly codified laws, and exists as well as in civil law countries. Once there is a separate formal and professional adjudication process with its own rules of interpretation and application (that is, once there is “rule of law” itself, with an independent means of applying the law), the problem of legal “rule opacity” to the general public arises.

Dan-Cohen found and named this phenomenon to be one of “acoustic separation”.<sup>21</sup> He imagined that independent adjudication operates to create an “acoustic barrier” between the rules as publicly understood and the rules as judicially applied. Dan-Cohen found this to be troubling, particularly in the area of criminal law with its high liberty stakes, as it seems to violate two of the fundamental tenets of rule of law: a) that the law be publicly available; and b) that the law be able to be understood.<sup>22</sup> In the context of written and judicially enforced constitutionalism, the “acoustic separation” phenomenon is doubly troubling as it results in a constitution which is both unknown and unknowable to the general, lay populace, unless they undertake legal training. A people who can neither effectively access nor truly understand their constitution “as applied”, can hardly be said to be self-governing, much less maintain that authentic belief in the legitimacy of the actually applied constitution, which is necessary for its efficacy and authoritative “stickiness”. One sees evidence of this problem in the persistent unrest, discontent and disagreement in the United States around judicially settled constitutional questions.<sup>23</sup>

17 Meir Dan-Cohen “Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law” (1984) 97 Harvard Law Review 625.

18 Dan-Cohen, above n 17, at 665–677.

19 Dan-Cohen, above n 17, at 630–636.

20 Dan-Cohen, above n 17, at 630–636.

21 Dan-Cohen, above n 17, at 630.

22 Dan-Cohen, above n 17, at 670–673; see also Lon Fuller *The Morality of Law* (Yale University Press, New Haven, 1964) at 33–41 (the story of King Rex).

23 In the extreme, the disconnect between a judicially decided constitutional rule and the constitutional rule to which the public and other constitutional actors had come to a “conventional” agreement can lead to such a de-legitimation of constitutionalism that civil war ensues. An example is the decision in the United States *Dred Scott* case, which declared the nation’s “Missouri Compromise” to be unconstitutional. See *Dred Scott v Sandford* 60 US 393 (1857). The frustration and discontent elucidated by the decision in *Roe v Wade* 410 US 113 (1973), a raft of decisions overturning restrictions on what, where and how firearms may be carried, and the widespread frustration with *Citizens United v FEC* 558 US 310 (2010), overturning restrictions on corporate financing of political campaigns, provide further evidence.

Dan-Cohen resolved his unease about the criminal law, in effect, by embracing the sort of fictionalised consent used to justify forms of beneficial interference by the state or other authorities with an innocent person's liberty when that person is not fully rational.<sup>24</sup> This fictionalised consent permits coercion in situations where a person has violated no law but lacks the rationality to reasonably assess their own good.<sup>25</sup> The idea is that if and when the person achieved a rational state, they would consent to the state's interference.<sup>26</sup> Thus, his argument was that a rational public would consent to being unable to know the law which applied to them. This is because the "acoustic barrier" between the "conduct rules" of the criminal law (as publicly understood) and the "decision rules" (as applied by the courts) serves a beneficial purpose for the (non-criminal) public. The law-abiding, rational public would consent to being governed by rules which are opaque to it, as that very opacity works to prevent the ordinary law-abiding citizen from making "mistakes".<sup>27</sup> Dan-Cohen illustrates his argument by looking at the functioning of criminal law defences such as duress or self-defence.

For example, in many common-law jurisdictions, the law of culpable homicide incorporates numbers of exceptions, or interpretations of statutory exceptions, to the widely understood rule that one ought not to kill another. The "acoustic barrier" created by adjudication makes the exact detail of those justifications or excuses, and of when or how they are applied, generally unavailable to the law-abiding lay public. That sort of detail is generally developed in a body of case law or scholarly commentary about which many lawyers and judges disagree, leaving the public with no real notion of when any exceptions apply. Dan-Cohen argues that this very public ignorance of the detail of the criminal law's "decision rules" around culpable homicide protects the ordinary law-abiding person from making a mistake about when they may kill another without legal penalty.<sup>28</sup> Under his reasoning, the law-abiding person, who does not know the detail of those exceptions to the rule against killing, will act to kill only when they are in such a desperate situation that the homicide will necessarily fall into one of the exceptions. Thus, the very uncertainty as to the parameters of the exception operate to assure that law-abiding persons kill only with a valid justification or with a reasonable excuse.<sup>29</sup>

If they were to be educated about the detail of the exceptions, Dan-Cohen reasons that the law-abiding lay person would be prone to act precipitously, mistaking their circumstances for legally exceptional ones and so become criminals, not through any intent to perform a criminal act but through their mistaken interpretation of the legal rule that applies.<sup>30</sup> From this, he concludes that although a technical violation of several "rule of law" ideals, the disjuncture between the generally known "conduct rule" (do not kill another person) and actual opaque "decision rules" (homicide rules and exceptions as applied) is not only justifiable, but desirable.

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24 Dan-Cohen, above n 17, at 648–664; see also G Dworkin "Paternalism" in J Feinberg and H Gross *Philosophy of Law* (4th ed, Wadsworth Publishing, London, 1991) 258.

25 Civil commitment processes in the Mental Health (Compulsory Assessment and Treatment) Act 1992, based on people being a danger to themselves and others is an example.

26 This is analogous to the constructive consent of an incapacitated accident victim to necessary medical treatment. Dworkin, above n 24.

27 Dan-Cohen, above n 17, at 650–651.

28 Dan-Cohen, above n 17, at 640–641 and 643–648.

29 Dan-Cohen, above n 17, at 637–651.

30 Dan-Cohen, above n 17, at 641.

There are at least two problems with Dan-Cohen's solution to the "acoustic separation" phenomenon. First, while identifying "acoustic separation" and "selective transmission" as fundamentally problematic for rule of law, he restricts his analysis of both the problem and its solution to the criminal law. However, the phenomenon of acoustic separation is not restricted to the criminal law, it is present in all facets of mature legal systems.<sup>31</sup> Many areas of law may be able to be "rescued" from the problem by a thought exercise similar to Dan-Cohen's, but in the area of public law, or constitutionalism, Dan-Cohen's solution is problematic. This is because it is from public law, from its institutions, its workings, and its structures, that one would have to make an argument about any sort of constructive public consent. A constitutional governing system's very legitimacy is based on the supposed consent of, and accountability to, the governed.<sup>32</sup> Thus, in a public law context, "acoustic separation" or "selective transmission" requires that the public be deemed to consent to be governed by rules which they do not know that they do not know. In the case of a judicially enforced, higher law, written constitution, that argument would be circular in the extreme.

Dan-Cohen's analysis of the "selective transmission" of legal rules to the public, to whom those rules apply, has profound implications for legal constitutionalism. It crystallises the substantial disconnect between many written constitutions and the democratic self-determination and sovereignty of the people, which those constitutions purport to protect. Divorcing the articulation and enforcement of constitutional rules from the people on whom their continued legitimacy depends undermines the efficacy and "stickiness" of those constitutions.

Secondly, Dan-Cohen presumes that the lay public would agree that it is better for the law, as applied, to be opaque as the opacity prevents the law-abiding from making mistakes and from inadvertently becoming criminals. For the constructive consent argument to work, however, one needs to have situations where "rational" actors have indeed consented to what one is presuming it would be rational to consent. We accept the justification of paternalistic interference with the irrational for their (or our) own good, because we have a baseline of what rational people generally consider to be their own good.<sup>33</sup> If our governing and legal system is structured in such a way that the lay public never has a chance to confront or to consider, much less to agree to, the opacity of the rules and whether that opacity is justifiable, in essence that public is being reduced to a state of presumed and perpetual irrationality. We never get to know whether a rational public (assuming that is not an oxymoron) would consent to being so governed, because the public is acoustically outside of the actual decision and debating arena. This reduces the public or the populace from having the presumed ultimate authority over matters constitutional to the status of incompetents.

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31 See Dan-Cohen, above n 17, generally and at 652; see also of Hart's secondary rules, above n 1.

32 Consent of the governed has been deemed fundamental to the legitimacy of governance, both in ancient and modern times. See, for example, Anthony Arblaster *Democracy* (2nd ed, Open University Press, Buckingham, 1994) at ch 1. From the time of Thomas Hobbes's *Leviathan* (1651) (Gutenberg EBook, 2013) and John Locke's *Two Treatises of Government* (1689-90) (Cambridge University Press, Cambridge, 1988), that is, the advent of the "modern" "social contract" State, consent of the governed has grounded legitimacy at least in theory, if not in fact. See, generally, David Held (ed) *States and Societies* (New York University Press, New York, 1983) at 1-23. In the Western context, democratic accountability has been seen as essential to maintaining the legitimacy of that consent, at least since the time of Thomas Paine and JJ Rousseau. See, generally, David Held, above; Jacques Barzun *From Dawn to Decadence* (HarperCollins, London, 2000) at 361-365; Jean-Jacques Rousseau *The Social Contract* (1762) (Penguin, Harmondsworth, 1968); Thomas Paine *The Rights of Man* (1791) (Wordsworth ed, Hertfordshire, 1996).

33 Dworkin, above n 24.

The United States is the quintessential example of written higher-law constitutionalism. Since the *Madison v Marbury*<sup>34</sup> decision asserting and establishing the United States' Supreme Court's ultimate authority to decide the meaning of the text of that constitution, the detail of constitutional law and development thereof have been highly, but not uniquely, devolved to case law. Federal court adjudication of the meaning of that text, with its physical<sup>35</sup> and procedural layers of complexity, has resulted in moving the actual rules away from the public arena to behind that acoustic wall inherent in systems of common law adjudication and precedent. There is, however, still the text, to which the lay public has direct and easy access. That text is short and succinct, providing a sort of knowledge akin to Dan-Cohen's publicly known "conduct rules" in the acoustically separated criminal law arena, with the United States federal court jurisprudence providing the actual constitutional rules, akin to Dan-Cohen's "decision rules" behind the acoustic wall. There is also a significant divide between public perceptions of the rules of the constitution and the federal jurisprudence.<sup>36</sup> The divide between public understanding and access to the federal rules and institutions by which it is governed drops steeply as the "legal distance" of those rules and institutions from the constitutional text increases. This may be both inherently unavoidable, due to issues of complexity, and of less concern than a basic opacity as to the fundamental rules to which the public is deemed to be consenting as the basis for, and the basics of, the State's ability to exercise authority over them.

A written "higher-law" constitution, whose claim to authority or legitimacy is anchored in democratic adoption and which textually provides for its own ongoing democratic amendment to assure some level of arguable ongoing consent, has an in-built problem. The problem is that the effective text which might be amended becomes increasingly inaccessible to the polity over time. This flows from an accumulation of constitutional adjudication and elaborated conventional understandings. The resulting ignorance of the actual operative rules renders the "fail-safe" of democratic amendment a less effective mechanism for keeping the people as the ultimate arbiters of the fundamental rules by which they consent to be governed. This undoes the very ideal of democratic constitutionalism as enabling "safe" popular sovereignty or for peoples to be self-governing. Rather, it seems to put the community of legal interpreters in the position of philosopher kings, with popular sovereignty being relegated to that necessary "Noble Lie" taught to the rest to assure their cooperation and governability.<sup>37</sup>

If the public law arena is as acoustically divided between the lay public with limited legal knowledge and those legally trained, as is the criminal law arena, the people are completely disempowered from self-governance. In this arena, the logical implications of the law's intrinsic "acoustic barrier" are deeply troubling; the public are perhaps kept from making "mistakes", but "mistakes" as defined by those behind the "acoustic barrier", "mistakes" as defined by other than that public. Those who are "in the know" on the "legal actors" side of the acoustic barrier, where the rules (and their justifications) as factually applied are known, debated, and decided

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34 *Madison v Marbury* 5 US 137 (1803).

35 The public could hardly find the constitutional rules, as applied, anything but unintelligible with 94 separate judicial districts, 13 appellate courts and a Supreme Court, each with authority to decide federal constitutional questions; with many splits in authority at all but the Supreme level, many of which are never or not yet authoritatively settled; and with no one settled interpretative norm. See Joseph Goldstein *The Intelligible Constitution* (Oxford University Press, New York, 1992), focusing only on the problem of accessibility of the Supreme Court's jurisprudence.

36 Above n 23.

37 Above n 11.

upon, are seemingly in the role of those elite philosopher kings.<sup>38</sup> That the historical struggle for the development of democratic constitutionalism and accountability<sup>39</sup> has culminated in a written constitutionalism that is effectively a modern incarnation of Plato's highly anti-democratic *Republic* seems perverse.<sup>40</sup> However, those implications are difficult to refute.

### B. *An Unavoidable Problem?*

Given the nature of the law, qua law, being perhaps intrinsically subject to capture by judges due to the nature of language and interpretation,<sup>41</sup> as well as moving through layers of precedent behind the "acoustic barrier", the question arises of whether the ideas of rule of law and constitutionally-based effective popular sovereignty are incommensurable goods,<sup>42</sup> which can never both be achieved at the same time but which must be balanced instead. Such an incommensurability may be true in a system of legalised constitutionalism, where a constitution is not only the basis of the legal system but also formally integrated into the same law that it enables. Can the same be said to be true of a conventional constitutional system that holds the constitution, for the most part, as separate and apart from the law which gave it birth?<sup>43</sup>

### C. *Conventional Constitutions, Opacity and Constitutional "Ownership"*

The New Zealand system of an "unwritten" conventional constitution would seem at first to be the quintessential "owned by the people" constitution. While important constitutional cases do exist, for instance, *Fitzgerald v Muldoon*,<sup>44</sup> and there are statutes of a constitutional nature for courts to interpret, it is conventions that provide both the guts and the glue of the constitutional arrangements. Conventions bind through an internalised constitutional and political morality,<sup>45</sup> and are enforced through political consequences, either from within the "arena" of fellow constitutional actors, or, ultimately, from the polity at election time.<sup>46</sup> This would seem to be the ideal, from the perspective of avoiding the serious problem created by legally constructed walls of precedent and judicial interpretation separating a people from their constitution.

There are problems with this initially optimistic view. The first is that most of the conventions of the New Zealand constitution, much less their purpose, appear to be a functional mystery to much of the polity. Even the most mature students in Constitutional "Law" or Public Law classes have no familiarity with the basic constitutional conventions,<sup>47</sup> save one, that the government must

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38 Plato *The Republic* (2nd ed, Penguin, New York, 1986) at 180–182.

39 Held, above n 32, at 1–52.

40 See Jon Hesk *Deception and Democracy in Classical Athens* (Cambridge University Press, Cambridge, 2000), especially ch 3 "Athens and the Noble Lie" at 143–162.

41 William Twining *Karl Llewellyn and the Realist Movement* (Cambridge University Press, Cambridge, 1973) at 206–215; Jerome Frank *Law and the Modern Mind* (Coward-McCann, New York, 1949) at 732–735.

42 Isaiah Berlin *The Crooked Timber of Humanity* (Princeton University Press, Princeton, 1998).

43 See AV Dicey *Introduction to the Study of the Law of the Constitution* (10th ed, Macmillan & Co, London, 1959).

44 *Fitzgerald v Muldoon* [1976] 2 NZLR 615 (SC).

45 Hart, above n 1, at 79–88.

46 G Marshall *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford University Press, Oxford, 1986) at 3–18 and 210 – 211, reproduced in Mai Chen and Geoffrey Palmer *Public Law in New Zealand* (Oxford University Press, Auckland, 1993) at 200–206.

47 Above n 4.



maintain its majority or must maintain the “confidence of the House”. Civics is not a required part of the public education curriculum in New Zealand. There is no concise written document to which the polity may refer. How can the New Zealand polity be said to legitimate that of which they are formally ignorant? The same problems of constitutional inaccessibility arise in New Zealand, but in a different, more egalitarian, way.

The situation in New Zealand is not due to legal impenetrability, but is due to the nature of the evolved constitutional arrangements themselves. The “meaning” of New Zealand’s “constitution” cannot become textually accessible because the “thing” does not exist in a definitive manner.<sup>48</sup> It is continually renegotiated, by *feel*, while no one person or document has the authority to say exactly what it is, even those very close to the core.<sup>49</sup> That very indeterminacy both undermines and preserves its legitimacy, as opposed to a purportedly “accessible” text.<sup>50</sup> The inability of the polity to ever *know* what their constitution is purported to be (not in the sense of the polity in a jurisdiction with a written constitution who can at least read the text of the document<sup>51</sup>) cannot be said to be legitimacy-enhancing or to enhance a people’s ability to effectively self-govern. A written text does at least provide something akin to Dan-Cohen’s publicly understood “conduct rules”, even if the “decision rules” as to the application of that text are opaque to the public. In the New Zealand situation, the fundamental “conduct rules” themselves, as well as how they may be applied, are opaque to the public. However, due to its very indeterminacy, often New Zealand’s conventional rules also have a significant level of opacity to constitutional actors who would be considered to be “inside the acoustic barrier”.<sup>52</sup>

That very indeterminacy and doing things by “feel” acts to keep the fundamentals of the constitution with the people in a much stronger way than a legalised text could achieve.<sup>53</sup> This is because any constitution, written or unwritten, can only be authoritative if there is a broadly shared consensus, by the governed and the governing, around its authority and legitimacy. In order for that constitution to function, a culture of constitutionalism must be maintained and enforced at least within the arena of constitutional actors.<sup>54</sup> In jurisdictions with legal constitutions, the responsibility of a polity for and to their constitution, and the requisite constitutional culture, is diluted both in perception and in fact. In those jurisdictions, that responsibility is seen to lie primarily with the courts and those other special institutions charged with both the interpretation and the enforcement of that constitution’s rules (either *ex ante* or *ex post*). The people’s role is to appeal to the courts in *ex post* systems and not much at all in *ex ante* systems (where specialised constitutional institutions

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48 Above n 5.

49 See Geoffrey Palmer “The Hazards of Making Constitutions: Some Reflections on Comparative Constitutional Law” (2002) 33 VUWLR 631 at 642: “while New Zealand does have a constitution, it is quite incapable of any simple authoritative description”.

50 See JM Balkin “Deconstructive Practice and Legal Theory” (1987) 96 Yale Law Journal 743; Scott Brewer “Figuring the Law: Holism and Tropological Inference in Legal Interpretation” (1988) 97 Yale Law Journal 823; S Banner “Please Don’t Read the Title” (1989) 50 Ohio State Law Journal 243 regarding the accessibility of the meaning of texts.

51 Even if they cannot, without much training and effort, know exactly what that text means.

52 Above n 5 and 10; Marshall, above n 46; Chen and Palmer, above n 46.

53 See Brian Leiter “Heidegger and the Theory of Adjudication” (1996) 106 Yale Law Journal 253 at 262–271 for a discussion of Heidegger’s ideas about the deep internalisation of culturally transmitted tacit “background” knowledge, for insights about the effective and successful learning of ways of doing and being that seem not to be formally transmittable.

54 Palmer, above n 5.

determine the constitutionality of proposed law before its enactment), or both in a mixed system. In all three situations, constitutionality and the maintenance of constitutionalism is seen to be a legal problem to be decided by the appropriate authorities, and not a problem for the people themselves to resolve or decide.

Even to amend textual constitutions, complex legal processes must be negotiated. Should a judicial interpretation of a constitutional text unacceptable to the polity sufficiently penetrate the acoustic barrier and re-enter the public realm, tremendous political transaction costs must be overcome to enact any reparative amendment. Long and costly court processes arise as well, even if the “democratic amendment” route rather than the “constitutional adjudication” route is followed. This is because issues will arise as to whether the formal amendment process is being correctly followed, and that too will be decided by the judiciary. Judicial interpretations of the legal requirements to be met for the amendment process to proceed or to be successful, and legal interpretations of any amending text, are unavoidable.

In New Zealand’s constitutional situation, however, the connection between the polity and its elusive constitution is direct, with no requirement for mediation by the legal community of philosopher kings. This may lead to sloppy public enforcement of constitutional norms (either *ex ante* or *ex post*), particularly those such as rule of law, which are understood to be important by those schooled in constitutionalism; that is, those on the “knowing” side of the legal system’s acoustic barrier, and not so much by those outside that system.<sup>55</sup> But the indeterminacy of the New Zealand constitution, and its inability to be precisely and legally defined, also assures that its cultural core remains firmly the property and responsibility of the polity, and that it does not become the rarefied preserve of those who would know better. Both the people and the legal actors are on a more levelled playing field of uncertainty. This uncertainty enables constitutional excesses, but it also enables the people to define directly what their core constitutional limits are. This is done through the traditional remedy of “voting them out” combined with inability of any Parliament to bind a subsequent Parliament.<sup>56</sup> The new Parliament, as the people’s representatives, are intended to remedy the constitutional transgression. Any statute may be repealed or any prerogative power of the executive may be suppressed by a new Parliament, but constitutional grounds alone do not suffice for the objectionable law to be deemed legally null and void *ab initio*. Due to the inability to deem a constitutionally objectionable, but legally proper,<sup>57</sup> exercise of the prerogative or legislative powers a legal nullity, this “people’s enforcement” can be too late to prevent a constitutionally objectionable harm. This is particularly so in a globalising context where the next Parliament or government may not practically be able to undo that which the people have deemed outside their constitutional consent. This state of affairs is problematic and gives rise to a concern that as New Zealand becomes more diverse and globalised itself, the people risk losing their “feel” for their constitution on which its ongoing effective enforcement rests, and consequently they risk losing their sovereignty over their destiny. That concern gives rise to the issue of whether it is time for the New Zealand polity to adopt a more formalised written constitution. The question becomes whether New Zealand can solidify its constitution without losing the people’s ownership

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55 See Palmer, above n 5.

56 See Philip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at [15.4.5].

57 Although counterintuitive for those from jurisdictions with written, higher-law constitutions, under New Zealand’s highly conventional constitution, legality and constitutionality are separate issues.

of the same. In order to make some suggestions as to how that might be done, it is first important to ascertain the essential core of New Zealand's flexible constitutionalism.

### III. NEW ZEALAND'S FUNDAMENTAL CONSTITUTIONAL TRADITIONS: THE EVIDENCE?

A certain indeterminacy as to New Zealand's constitutionalism arises from the inherent tensions within its constitutional fundamentals.<sup>58</sup> Those tensions and that indeterminacy also raise challenges for any constitutional solidification project. In considering whether and how to reform a constitutional system, understanding the current core norms and what makes them efficacious is important. This section will focus on New Zealand's internal constitutional story, in an attempt to illustrate core themes. Those themes will inform the proposal of relatively novel "constitutional strengtheners" which appear most compatible with New Zealand's constitutional culture.

One source of New Zealand's constitutional uncertainty is the founding 1840 Treaty of Waitangi. It is a rights-based document, legally respected very early on,<sup>59</sup> but legally devalued during and after the major Land Wars.<sup>60</sup> That founding Treaty is in deep tension with the idea of legally unlimited parliamentary sovereignty, which doctrine was still being formally articulated in Britain<sup>61</sup> as New Zealand was being colonised. Thus, from a constitutional perspective, during the initial period of colonisation, it was uncertain and unsettled whether the New Zealand constitution would develop as one with fundamental rights-based restrictions on the State's governing authority or whether it would follow the path of legally unfettered legislative supremacy. The outcome was that New Zealand adopted the parliamentary sovereignty doctrine, which is now deeply embraced.<sup>62</sup> Yet, that does not mean that New Zealand is a utilitarian, rights-hostile,<sup>63</sup> unfettered, monist, parliamentary democracy.<sup>64</sup> Rather, Parliament's legal powers are conventionally restrained from abusive exercises,<sup>65</sup> but conventions are by nature uncertain things, some being deemed more powerful and constitutionally important than others.<sup>66</sup> This reflects the underlying uncertainty discussed above as to the exact parameters of New Zealand's effective constitution. One solution is to consider the available evidence on which conventions have been the most powerfully internalised and respected through time. These would be the "grundnorm" (basic norm) conventions, with

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58 See McLean, above n 10; Palmer, above n 7, at ch 5.

59 See *R v Symonds* (1847) NZPCC 387 (SC); Palmer, above n 7, at ch 1.

60 *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 (SC); see, generally, Orange, above n 7; Palmer, above n 7, at chs 1–4. The Land Wars themselves centred around differing "constitutional" conceptions of the legitimacy and extent of authority of the nascent State.

61 This was through Bentham's critique of the common law and provision of utilitarian doctrine as the proper guide to legislative content (J Bentham *A Fragment on Government* (London, 1776) and *The Principles of Morals and Legislation* (Prometheus Books, New York, 1988)); Austin's development of legal positivism (J Austin *The Province of Jurisprudence Determined* (Cambridge University Press, Cambridge, 1995) at lecture 1); and Dicey's public law scholarship (Dicey, above n 43).

62 Joseph, above n 56, at [15.4] and [15.5.1]–[15.5.3].

63 See J Waldron "Historic Injustice: Its Remembrance and Suppression" in Graham Oddie and Roy Perrett (eds) *Justice, Ethics, and New Zealand Society* (Oxford University Press, Auckland, 1992) 139 at 139–146 and 158–167.

64 See McLean, above n 10.

65 Marshall, above n 46, at 3–18 and 210–211, reproduced in Chen and Palmer, above n 46, at 200–206; Joseph, above n 56, at [9.5].

66 Joseph, above n 56, at [9.2.3] on the uncertainty surrounding the content and depth of many conventions; see also Chen and Palmer, above n 46, at 206.

which any solidifying reforms ought to be consistent in order to attain the necessary “stickiness” to be constitutionally effective. To argue what might be New Zealand’s deepest constitutional norms (and not pretending to be an historian), a very brief summary of some major moments of New Zealand’s constitutional evolution and history follows.

Parliamentary sovereignty did not take much time to be tied to the idea of representative legitimacy in New Zealand. Soon after the signing of the Treaty and prior to 1852, New Zealand was governed by an unelected six-person Legislative Council, appointed by and including the Governor-in-Chief. The serving colonial Governor resisted the development of an elected council<sup>67</sup> (fearing for the consequences of such for Māori), but events overtook him when the British Parliament enacted the 1852 Constitution Act. That Act both established a representative legislature and contained entrenched provisions limiting local legislative competency. The existent Legislative Council, appointed by the Governor, then became the Upper House of the General Assembly (with life appointments evolving through both convention and legislation to seven year terms), with the Lower House elected on the basis of a male property-owning restricted franchise. Five years later, the British Parliament enacted an amendment lifting many of the 1852 Act’s restrictions on the General Assembly’s legislative competence.<sup>68</sup> The British Parliament’s subsequent 1865 enactment of Colonial Laws Validity Act restricted any authority of the courts to invalidate locally enacted legislation on the grounds of improper content.<sup>69</sup> Before the 1890s, when it became a chamber of political “packing” for the convenience of the government of the day, the Legislative Council appears to have been an authority of constitutional importance, serving the moderating function typical of a second chamber, despite its indirect representational legitimacy.<sup>70</sup> With the withering of that function, legitimate law-making authority lodged in the elected Lower House of the General Assembly.<sup>71</sup> By that time the franchise had become universal for all adults of either gender, so effective legal power and representational legitimacy have had a strong link in New Zealand for well over 100 years.

Further evidence of the importance of representation to the legitimacy of legal power in New Zealand is reflected by the history of the development of the franchise. A relatively liberalised voting franchise was in evidence early on (at least comparatively speaking). From 1852 the franchise extended to men owning 50 pounds worth of land in fee simple,<sup>72</sup> or renting rural land or a rural house (the practice of plural voting allowed property owners to vote in each district in which they held property). From that point, the franchise was progressively extended to: males over 21 holding a gold mining licence (1860); to Māori males over 21, regardless of property ownership (1867); to all un-propertied males over 21 (1879); and finally to all women over 21 (1893). Also

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67 Philip Joseph *Constitutional and Administrative Law in New Zealand* (1st ed, The Law Book Co, 1993) at 81 (for some issues, Joseph’s first edition is most useful).

68 KJ Scott *The New Zealand Constitution* (Clarendon Press, Oxford, 1962) at 5.

69 Whether New Zealand’s Parliament gained actual legal autonomy in 1865 with the Colonial Laws Validity Act 1865, or not until the eventual adoption of the Westminster Act in 1947, can be a matter of technical debate. Joseph, above n 67, at 92–93.

70 G Morris “James Prendergast and the New Zealand Parliament: Issues in the Legislative Council during the 1860s” (2005) 3 NZJPIL 177.

71 Morris, above n 70.

72 Which very intentionally excluded the Māori majority from the franchise as they held title differently. Andrew Geddis *Electoral Law in New Zealand: Practice and Policy* (LexisNexis, Wellington, 2007) at ch 5. That exclusion could be seen as almost inevitably leading to the subsequent Land Wars.

interesting is that when an elected representational body was established by the Constitution Act 1852, the term of the General Assembly started at five years.<sup>73</sup> The term was reset to three years in 1879, due to unease with the strength and power of central government. The three-year term has stayed intact till the present, except during times of crisis when it was deemed apposite by that same General Assembly to extend its own life by postponing elections through cross-party consensus; for instance, World War I, the Great Depression and then again in World War II.<sup>74</sup> These extensions of the legislature's term without accountability to the voters, and particularly that during the Great Depression, were seen by many as constitutionally troublesome.<sup>75</sup>

There have been instances, both of long and short duration, of what one would term as challenges to representational legitimacy or to its efficacy in maintaining the civil rights on which that legitimacy necessarily depends. Historically, the franchise was originally tied to and weighted by property ownership. Also full-blooded Māori were restricted to a disproportionately small franchise until 1975, when their right to choose rolls was recognised.<sup>76</sup> Those on the Māori roll were not guaranteed the secret ballot until 1935. During the 1951 Waterfront strikes, the civil liberties of association and speech underpinning democratic legitimacy were severely curtailed.<sup>77</sup> Within three years of New Zealand's 1947 adoption of the British Parliament's Westminster Act 1935, marking New Zealand's full constitutional autonomy, the Legislative Council, or Upper House, was abolished with no special process by an appointed suicide squad. This, in conjunction with the previous self-granted extensions of the terms of serving parliaments gave rise to the first truly autochthonous "solidification" of New Zealand's constitutional norms, the Electoral Act 1956.<sup>78</sup> That Act set out the fundamentals of the electoral system and restricted Parliament's authority to undo those fundamentals or to extend its term beyond three years, without either gaining the authority to do so through a successful public referendum or through an internal vote of 75 per cent. That the entrenching section, s 189, was not itself entrenched was at first considered to be a drafting error, but its retention over time has been considered to be successive Westminster governments' deliberate retention of Parliament's legal power to undo the entrenchment without special procedures.<sup>79</sup> That the "solidification" was focused solely on protecting democratic accountability, and the unwillingness to unequivocally bind future majorities to special procedures (which has persisted till the present)<sup>80</sup> is further evidence of the importance that New Zealand's constitutional culture gives to democratic authority.<sup>81</sup>

Since the Electoral Act 1956, there have been many instances reflecting inefficacy of a number of core principles which would seem to be fundamental to an efficacious constitutionalism. There is the relatively casual respect for the rule of law reflected by, for example, the legislative

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73 John Wallace and others *Report of the Royal Commission on the Electoral System* (December 1986) at [6.3].

74 At [6.3].

75 Scott, above n 68, at 1–31.

76 Geddis, above n 72, at [6.2].

77 M Bassett *Confrontation '51: the 1951 Waterfront Dispute* (Reed, Wellington, 1972).

78 See Scott, above n 68.

79 Scott, above n 68.

80 The Electoral Act 1993, which came into being following the special procedures set out in the 1956 Act, includes an identical degree of entrenching and extent of protection. See s 268 of the Electoral Act 1993.

81 *Royal Commission on the Electoral System*, above n 73, at ch 5 and ch 1, [1.14].

“judgment” emerging from the Clyde Dam saga,<sup>82</sup> the unlawful conduct leading to *Fitzgerald v Muldoon*,<sup>83</sup> through to more recent instances of legislative retrospectivity<sup>84</sup> and complete ousters of the judicial function<sup>85</sup> from certain areas of law. The history of acknowledged breaches of the Treaty of Waitangi is evidence of its contingent position as a founding, rights-based covenant, important to New Zealand’s self-image as “fair” but seemingly only when convenient and not so much when not convenient. The 1984 devaluation crisis and the series of unruly governments using their strong House majorities, despite not winning even close to a majority of the national vote, to push through radical change without a true majoritarian mandate,<sup>86</sup> did not reflect well on the efficacy of even the fundamental representational norm.

These sorts of events and their resolutions, as will be discussed, help illustrate the evolution of New Zealand’s “sticky” constitutional fundamentals, or rather the seeming “unstickiness” of every fundamental except representative democracy. I want to argue that it is New Zealand’s responses to constitutional crises, rather than the crises themselves, that are more instructive. Every constitution is going to have moments of crisis, otherwise they would not be needed. Every norm is going to come under stress. What happens *as a result* of the crisis is arguably more reflective of the position and status of the conventions involved, than the triggering crisis itself.

In response to constitutional challenges or threats to legitimacy, New Zealand has made moves to strengthen its constitutional conventions and arrangements, to corral them into more concrete and reliable creatures through written clarification, either in authoritative conventional documents such as the Cabinet Manual, through ordinary statutes such as the Constitution Act 1986 and the New Zealand Bill of Rights Act 1990, or through electoral reform, such as the Electoral Act 1993. To date it has resisted putting any strict “hands off” legal fence around them, which would constrain them to the tamer life of higher (dualist) law, properly so called.

#### A. *Considering Identifiable Responses to Actual or Potential Constitutional Challenges in New Zealand*

A brief review reveals a few notable moments of “constitutional” strengthening or repair. The 1867 extension of the franchise to “unpropertied” Māori males can be seen as an attempt to mend the deep damage to legitimacy caused by the Land Wars.<sup>87</sup> The 1860 extension of the franchise to gold miners and the later 1879 extension of the same to un-propertied males in general, can also be interpreted as efforts, in times of social realignment or economic uncertainty,<sup>88</sup> to enhance the representational legitimacy of the government’s authority. The later unprecedented extension of the national franchise to women in 1893 follows the same pattern.<sup>89</sup> These early events and responses

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82 See MJC Viles *Constitutionalism and the Separation of Power* (reproduced in Chen and Palmer, above n 46, at 52–62).

83 *Fitzgerald v Muldoon* [1976] 2 NZLR 615 (SC). This case arose from Prime Minister Muldoon’s purported unilateral repeal of the effectiveness of an Act of Parliament through the device of a press release. Relying on the Bill of Rights 1688, s 1, the Court held that only Parliament had the authority to enact or to repeal statutory law.

84 See Philip Joseph “When Parliament ‘Misfires’: Retrospective Criminal Penalties” (2001) 4 NZ Law Review 451 (remedied by creative judicial interpretation).

85 Public Health Amendment Act 2013, s 70E.

86 See Jane Kelsey *The New Zealand Experiment: A World Model for Structural Adjustment* (Auckland University Press, Auckland, 1995).

87 Morris, above n 70, at 183 and 185–186.

88 Michael King *The Penguin History of New Zealand* (Penguin, Auckland, 2003) at 234–235.

point to an evolving reliance on some conception of fair representation as becoming understood as fundamental to developing and maintaining the legitimacy or “stickiness” of New Zealand’s emerging constitutional culture.

As mentioned, more recently, after experiencing the General Assembly extend its term through ordinary legislation three times in the first half of the 20th century;<sup>90</sup> after the lack of special process for the organised suicide of the Legislative Council (or appointed Upper House); and after the draconian curtailments of civil liberties during the 1951 Waterfront strike;<sup>91</sup> New Zealand unanimously<sup>92</sup> passed the Electoral Act 1956 with its “quasi” entrenching s 189. That section was the ancestral un-entrenched entrencher of the broad franchise, of the even weighting of voting districts; that is, one person, one equal vote (until 1945, rural districts got a member of Parliament for two-thirds of the population required for an urban district to get a member of Parliament)<sup>93</sup> and for the three-year term of Parliament.

Everything about that historic 1956 Act points to a concern around protecting the voting rights essential to democratic process and preserving electoral control over the House, and nothing points to directly restricting either the content or the substance of draconian laws, even though such laws had been recently experienced. Nor has there been any success in establishing a replacement upper legislative body as a constitutional check, even though such a body was lost. The deepest norm appearing is the importance of proper democratic processes establishing the legitimate democratic authority of Parliament rather than any rights-based restrictions on the possible outcomes of those processes. This reflects New Zealand’s very pragmatic approach,<sup>94</sup> leaving the options open for subsequent Parliaments.

In keeping with the representation “grundnorm”, as per the requirements of s 189 of the Electoral Act 1956, a referendum was held in 1967 on extending the term of the General Assembly from the “entrenched” three years to four. It was soundly defeated, with 68.1 per cent against.<sup>95</sup> The same proposal was likewise defeated in 1990 by a similar margin (69.1 per cent), and with a turn-out of over 80 per cent of the voters. New Zealanders apparently wanted, and still want, to use democratic process and frequency of elections to keep a rein on the now unicameral legally all-powerful legislature.

Although the Muldoon years brought with them the aforementioned crises of legitimacy around rule of law, the bigger problem brewing was the continual parade of absolutely powerful governments, with strong majorities in the House obtained without majoritarian backing from the

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89 Women were not allowed to stand for Parliament, however, until the passing of the Women’s Parliamentary Rights Act 1919. This disparity may reflect that extension was not so much motivated by genuine concerns for women’s inclusion in the voting polity but more by ordinary political (mis)calculation, or perhaps by a bit of both.

90 *Royal Commission on the Electoral System*, above n 73, at [6.3].

91 See, generally, Bassett, above n 77.

92 AH McLintock (ed) “The Legislative Authority of the New Zealand Parliament” (1966) Te Ara <[www.teara.govt.nz/en/1966/history-constitutional/page-7](http://www.teara.govt.nz/en/1966/history-constitutional/page-7)>.

93 New Zealand Official Yearbook 1945 at s 2 “House of Representatives”. This weighting of rural votes appears to have arisen as the practice of land-owning-based plural voting was being abolished.

94 See Palmer, above n 5.

95 *Royal Commission on the Electoral System*, above n 73, at [6.4].

polls.<sup>96</sup> In response to the deepening crises around the legitimacy of the authority of the resultant governments, New Zealanders (as seems to have been an historical pattern or habit) resorted to amending the law dealing with the system of representation and the House of Representative as their ultimate fix. The mixed member proportional (MMP) system set out in the Electoral Act 1993 was the result. Once again, New Zealand had declined to produce higher law or an entrenched constitution in response to seemingly illegitimate procedures or outcomes and the resultant constitutional discontent.

During the same period, other reforming responses to a perceived need to adjust and legally clarify a number of constitutional issues were to produce ordinary law, leaving convention, and not the law itself, to do the work of assuring their constitutional status. The Constitution Act 1986,<sup>97</sup> which set out some fundamental understandings and which completed the repeal of the Constitution Act 1852, is an ordinary declaratory statute; the New Zealand Bill of Rights Act 1990 is an ordinary statute, neither entrenched nor superior law; the Human Rights Act 1993 (as amended in 2001) is also ordinary law. These had been preceded by the ordinary Official Information Act 1982 to ensure a healthy measure of transparency, the ordinary Treaty of Waitangi Act 1975 (as amended in 1986) establishing (except in very, very narrow circumstances) an advisory-only tribunal to deal with fundamental and founding rights-based issues, and a raft of other ordinary statutes<sup>98</sup> that reflect important constitutional norms and set out rules found either as entrenched or superior law in other jurisdictions. All of the statutes mentioned are deeply constitutional in nature and purpose (fundamental institutional structures, fundamental civil, political and human rights, and transparent access to the sort of information required for meaningful elections and for effective democratic control, etc), but none was given any protected status which might extend the management of the substance of the democratic law-making to the judicial system and away from the representative body accountable to the electorate. Finally, when New Zealand established its Supreme Court in 2003, s 3(2) of that Act was careful to reaffirm the sovereignty of the elected Parliament.

### *B. Extracting the Most Basic Constitutional Norm from the Evidence*

From the recent period of constitutional concern, only the reform of the representational system and electoral process was enacted through special procedures and carried any attempt at entrenchment. That reform respected and scrupulously followed the proscribed special electoral procedures set out for significant electoral reform set out by s 189 of the Electoral Act 1956 (as well as reproducing the same special procedural requirements for “next time”). That the constitutional actors participating in the reform felt the need to follow that special procedure set out in s 189, rather than resort to its available simple repeal, reflects two things. The first is that, despite the

96 The last government to have won an actual majority of the electorate vote was in 1951, and the last pre-mixed member proportional (MMP) government won its absolute majority in the House with a mere 35 per cent of the electorate vote. Geddis, above n 72, at 28; also see, generally, Geoffrey Palmer *Unbridled Power* (Oxford University Press, Auckland, 1987); Kelsey, above n 86, at ch 1 and 2.

97 Recall the casual process and lack of public interest or discussion around the 2005 repeal of s 21 of this Act and its legal requirement that the Crown must recommend Bills with monetary implications before Parliament may consider them. Rather, the Government retains a conventional “veto” over Bills deemed too expensive through Parliament’s Standing Orders (see New Zealand Cabinet Manual 2008 at [7.123], where Standing Orders are quintessentially anchored in representation legitimacy).

98 These would include the Race Relations Act 1971, the Ombudsman Act 1975, the Human Rights Commission Act 1977, the State Sector Act 1988, the Imperial Laws Application Act 1988, the Public Finance Act 1989 and parts of the Broadcasting Act 1989.



expense involved and despite Kiwi constitutional pragmatism, following the special process for reform was deemed necessary for any reform to successfully strengthen and repair the democratic legitimacy of the House. This is more evidence that democratic process and representation have a special status as more fundamental and less contingent than New Zealand's other constitutional norms.<sup>99</sup> Because of this, any "solidifying" reforms should not be in fundamental tension with purely democratic norms. The second thing to note is that an evolved "conventional" dualism in New Zealand constitutionalism is alive, healthy, effective and well-supported by the evidential record,<sup>100</sup> but that this dualism is a circumscribed and limited dualism. It is a conventional, not a legal, dualism. It is a dualism limited to things representational and electoral, which goes to democratic processes but not to the substance of those processes.

Nothing in the past 10, 20, 30, 50, 100 years points to any evidence of a New Zealand constitutional appetite for any sort of judicial management or extra-political management of the constitutional conduct of the legislative branch. Of the entire series of statutes of a constitutional nature enacted during the recent period of constitutional clarification and reform, it was for the reform of the electoral process and the makeup of Parliament, and for those things alone, that a special process was used. The failure to find it necessary, conventionally or otherwise, to follow special procedures to enact or to change any of New Zealand's other "constitutionally weighty" statutes, speaks as much to New Zealand's fundamental way of doing constitutionalism as does the failure to make any of those statutes, however fundamental, into higher law.

Nearly everything in New Zealand's constitutional history points to New Zealand having evolved a constitutional system that relies on and privileges things representational and electoral, above all else, to ensure constitutional legitimacy or "stickiness". This can be observed from the early progressive liberalisation of the franchise through to the development of the three-year term of the General Assembly (finally entrenched in 1956), to the use of the 1993 reform of electoral and representational system rather than any legal restriction of Parliament's competency to "fix" the constitutional and legitimacy crises of the 1970s, 1980s, and early 1990s through to the special processes "entrenched" by s 189 of the Electoral Act 1956. The early history shows a growing reliance on things electoral to enhance and to repair legitimacy, and the last 60 years of statutory law shows its privileging as uniquely requiring a special process for reform. The conventional respect shown for the entrenching ss 189 of the Electoral Act 1956 and 268 of the Electoral Act 1993 reflect that privileging and its limitation to the core aspects of the democratic representation.

The requirements of s 189 of the Electoral Act 1956 were carefully respected during the electoral reforms of the 1990s. This was so, even though Parliament could have simply repealed s 189, as it could repeal s 268 of the Electoral Act 1993. But because of New Zealand's evolved conventional

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99 Matthew Palmer identifies the basic norms of our constitution as representative democracy, parliamentary sovereignty and rule of law supported by an independent judiciary, which norms are embedded in a culture of authoritarian, egalitarian pragmatism. If looking from the perspective of the ultimate "owners" of the constitution, or the "outside" perspective, and not from the perspective of legally and constitutionally tutored (the inside perspective), the first two norms reflect facets of the same "outside", most fundamental norm of the constitution. The latter norm seems more of an "insider" constitutional norm that is supported by and widely reflects "outsider" pragmatic egalitarian or utilitarian notions around fair play. It is doubtful that "outsiders" would die in a ditch for the latter norm, while there is no doubt that they would so do for their representational authority. That is why constitutional actors concerned with maintaining constitutional legitimacy or "stickiness" need to keep their eyes firmly on that norm when contemplating reform. M Palmer, above n 5.

100 This is in contrast to the record for a number of other constitutional conventions, such as the rule of law. See the Clyde Dam saga or the Public Health Amendment Act 2013's judicial privation clauses.

dualism around things electoral, Parliament did not, and will not, do that. Section 268's form of entrenchment makes clear that such entrenchment is fundamental but not higher law. The structure of the entrenching, leaving Parliament the unimpeded legal right to repeal the entrenching section itself, makes clear that the dualism around things electoral is intended to be enforced through conventional means only, and not through legal means. New Zealand's constitutionalism has evolved into an effective constitutional "dualism" around the fundamental structure and conception of representational legitimacy, giving it a procedurally and a representationally anchored constitution. Both the existence and the circumscription of that conventional dualism is a crucial consideration for the development and ongoing protection of New Zealand's constitutionalism.

New Zealand's commonly perceived constitutional and legal monism may have been circumscribed by an effective conventional dualism around things representational and there is no evidence of any successful evolution toward adopting or accepting any form of "higher" law, but that does not mean all is well or that there are no problems that may need to be addressed. While violating the conventional processes around electoral and representational reform may be "unthinkable", overlooking other conventions has been all too thinkable. Conventional constraints have not prevented constitutional transgression in the past.<sup>101</sup>

Suppose that the conventional dualism around the maintenance of representational democracy reflects "monist" democratic power as the fundamental principle responsible for the legitimacy or "stickiness" of New Zealand's constitutional arrangements. Suppose also that continuing to rely on convention alone to restrain the democratic leviathan is not entirely comfortable. What sort of options might then better protect those "at-risk" elements of constitutionalism that are in tension with "democratic monism", but not risk undoing the very "democratic monist" legitimating glue that seems to hold New Zealand's constitution together?

#### IV. RECONCILING "REAL-TIME" REPRESENTATIONAL LEGITIMACY AND LEGALISED CONSTITUTIONAL DUALISM

This section considers what, if any, sorts of legalised dualist reforms would likely "fit" or "be sticky" in the New Zealand constitutional context, and the ways in which they could be structured to most likely be compatible with continued healthy flourishing of New Zealand's constitutional "Tinkerbell". It further examines whether any such dualism could be introduced while keeping direct "ownership" of the constitution with the people, and avoiding losing that control to a quasi-philosopher king class of legal actors behind a legalised acoustic barrier. New Zealand's history of public ownership and public enforcement of its constitutional norms must inform which options best fit this constitutional culture and thus are most likely to be effective, to function as hoped and to be durable.

The typical options for constitutional strengthening and formalisation fit much more comfortably with higher-law, entrenched constitutionalism than with the unwritten constitutional tradition. But there are potentially effective strengthening options which could fit New Zealand's constitutional traditions much more comfortably than would any move towards an entrenched, judicially

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101 The excesses of the State's response to the 1951 Waterfront Strike and the constitutional transgressions of the Muldoon era previously discussed are examples. Effective written, higher-law constitutions have not prevented constitutional transgressions either. Transgressions are perhaps inevitable, the question is how and by whom they are dealt with and remedied, and whether those responses are empowering or disempowering of the authority of the "people" whose consent legitimises that constitution.

enforced, higher-law constitution. These options could solidify our constitutional fundamentals without removing the direct enforcement and management of the constitution from the public and handing it over to the experts. Such options would flow from and stick with the deep importance of democratic authority to this constitution's legitimacy.

*A. Idea A: Clarifying Conceptions around Dualism – Entrenchment versus Higher Law*

One option for constitution strengthening is extending single entrenchment, as with the Electoral Act 1993, beyond that Act. Although the concepts of entrenchment and higher law are often conflated in New Zealand, even double entrenchment can strongly anchor fundamental law without inviting higher-law adjudication by the judiciary. For example, the current New Zealand Bill of Rights Act 1990 (BORA), with s 4 of the Act's reservation of Parliament's right to legislate contrary to BORA intact and fully operational, could nonetheless be doubly (or even just singly) entrenched. Many of the rights in BORA are fundamental to the functional integrity of a democracy, and the long history behind the Electoral Act 1993's entrenching s 268 tells us that "the functional integrity of our democracy" is one thing that is undeniably sticky about New Zealand's arrangements. Things such as electoral right and freedom of speech, assembly, association and conscience might be especially selected for a BORA-entrenching section,<sup>102</sup> as those are consistent with the evidence behind s 189 of the Electoral Act 1956 and s 268 of the Electoral Act 1993 that it is the democratic process in which New Zealand deeply believes. If BORA was to be entrenched, while retaining s 4, it would have its status as fundamental law strengthened, but it nonetheless still would not be that sort of higher law enabling the judiciary to police the substantive content of either BORA or other substantive statutory law. To further illustrate, another option could be to leave BORA otherwise as it is, but to repeal s 4. The New Zealand Bill of Rights Act 1990 would then be arguably available to the judiciary as a higher-law trump, but it would be an un-entrenched trump which Parliament could legally amend or repeal at will. This might also be palatable for New Zealand, as retaining a ready pathway of ordinary substantive democratic control could both satisfy the normative superiority of the democratic will and still create space for more robust protection against statutory violations of fundamental rights. Un-entrenched but superior law would also encourage a level judicial deference and restraint in wielding any review power to a level that would be appropriate to a jurisdiction with a robust tradition of legislative supremacy. But making BORA *both* entrenched and judicially enforceable higher law would not be consistent with the evidence around New Zealand's constitutional morality (despite Cooke J's dicta in *Taylor v New Zealand Poultry Board*<sup>103</sup>). These two proposals illustrate the difference between the constitutional devices of entrenchment and higher law, and the options that arise when the two concepts are clearly differentiated; neither is to be preferred over the other, as either would be feasible and would "fit".

One could also legislatively entrench the Treaty of Waitangi, in both languages, as New Zealand's founding documents, while using some language similar to s 4 in the New Zealand Bill of Rights Act 1990 to explicitly deny the judiciary any authority to limit statutory law or to restrict subsequently developing understandings of the Treaty's meaning based on such entrenchment. To do so would protect the Treaty as a living document between Iwi and the Crown and also as a fundamental norm of our constitutional understandings, but it would not run the risk of the Treaty becoming "liberated" from its parties and transformed into something whose meaning is "owned"

<sup>102</sup> New Zealand Bill of Rights Act 1990, ss 12, 13, 14, 16 and 17.

<sup>103</sup> *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 (CA) at 398.

by legal experts behind an acoustic barrier. Entrenchment without higher-law status firmly grounds the constitutional status of the Treaty, while avoiding the risk that any evolved working consensus accepted between the Treaty parties, either through convention or legislation, be declared illegal or unconstitutional.<sup>104</sup>

The Treaty is suggested as a candidate for entrenchment as fundamental (but not superior) law not only because of its founding status, but also because it has been incorporated into New Zealand's representational norms. The Electoral Act 1993 retained separate Māori representation, and also assured that that separate voice would become proportionate. While New Zealanders tend not to find that remarkable, proportionate representation for a politically significant indigenous people is remarkable. There is no evidence of majority unrest around transitioning the Māori role from four seats to proportionality, when Māori made up about 15 per cent or so of the population.<sup>105</sup> That is an assurance of an important, and not merely a token, voice. It is one thing to grant guaranteed token representation to an indigenous population, it is another for a jurisdiction to calmly and seamlessly integrate the sharing of separate and true political power through representational means. To outsiders, both the existence and the (generally<sup>106</sup>) unremarkable status of separate and proportionate Māori electoral representation is evidence of the extent to which the "Treaty Partnership" paradigm is integrated into New Zealand's constitutional norms. People born in New Zealand seem not to take too much notice of the uniqueness of this arrangement, which is also indicative of its integration into New Zealand's fundamental representational norm. It seems "norm-al", and so is a good candidate for formalisation.

### *B. Idea B: Written Constitutions in Deeply Democratic (and Egalitarian) Jurisdictions*

Other interesting options for constitutional "solidification" in ways that are consistent with New Zealand's fundamental democratic norm have been developed in like-minded jurisdictions. The Scandinavian jurisdictions<sup>107</sup> have navigated this tightrope between the entrenched written articulations of their "Basic Law" and the very democratically weighted and centred constitutions. These countries and their systems are interesting to New Zealand for a number of reasons. They are of similar population size; that is, they are small democracies. Their smallness is relevant because it very well may be that the constitutional rules which suit small democracies are unsuited for democracies that are several orders of magnitude larger and vice versa.<sup>108</sup> They are essentially

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104 See the discussion of the Court's decision in *Dred Scott*, above n 23, to invalidate the Missouri Compromise, an arrangement designed to contain and gradually eliminate slavery in the United States. Once the possibility of a negotiated solution was removed by judicial decision, war to settle the same question became nearly inevitable as neither side had the super-majorities to prevail through the amendment process.

105 Te Puni Kōkiri, Ministry of Māori Development *Te Māori i Ngā Rohe (Māori Regional Diversity)* (2001) at 12.

106 Objections to the place of the Treaty in New Zealand's constitutional norms are voiced in political debate, but the Treaty maintains its status as a fundamental document, reflecting the agreement by which the Crown's sovereignty was legitimated. For example, Treaty concerns and articulated Māori preference assured the Electoral Act 1993's retention of separate (and proportionally allocated) Māori seats. On the other hand, those seats and the provisions directly relating to them are not included in the entrenching provision, s 268, of that Act.

107 Namely, Norway, Sweden, Finland and Denmark. Although Finland would appear to be the best fit, each jurisdiction employs devices that could be useful to New Zealand in finding a way between complete reliance on convention and a judicially enforced higher-law constitution.

108 There is work in democratic and other organisational theory that seems to bear this notion out.

unitary countries like New Zealand, not federations of variously populated states<sup>109</sup> (which may, without a doubt, need an internal apolitical umpire situated outside of majoritarian representational processes in order to keep the federation from falling apart).<sup>110</sup> Like New Zealand, they have strong egalitarian norms with a robust social welfare history and tradition; that is, they are social democrats<sup>111</sup> as even John Key once described New Zealand.<sup>112</sup> While not purely “common law” countries, neither are they purely “civil law” countries; that is, their legal systems are not completely codified in the manner of the “civil law” countries and judicial decisions can be sources of law.<sup>113</sup> They are somewhere in between (which, some might argue, is where New Zealand’s enthusiasm for statutory law<sup>114</sup> might position it). They also embrace judicial independence, and the importance that the executive, the legislative and the judicial function be exercised separately.<sup>115</sup> Like New Zealand, they have a strong utilitarian tradition.<sup>116</sup> Their systems privilege the position and role of unicameral<sup>117</sup> Parliaments as the fundamentally legitimating body,<sup>118</sup> and because of their strong democratic traditions, they are similarly leery of judicial review of democratically enacted statutory law.<sup>119</sup>

These similarities to New Zealand and its constitutional culture are relevant to the issue of a good “fit”, which is necessary for a successful “legal transplant”. The more similarity between the “donor” and the “recipient”, and the more similar the problem under consideration, the better the odds for a successful result. Here, the shared problem is how to maintain and enforce constitutional limitations without undermining the legitimacy of democratic governance.

The approach of these jurisdictions to that problem range from Norway, which has an ex post judicial constitutional monitoring system for the constitutionality of the application of statutory law,<sup>120</sup> and which is the system that is closest to that of the United States (but which is still without the United States court-centric approach) through to Finland, which has a system of a priori management of unconstitutionality through a special parliamentary committee tasked to identify when Parliament is acting unconstitutionally before it actually does so. If that committee declares that a proposed Bill would be unconstitutional, the Parliament must take notice. It may

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109 Andreas Follesdal and Marlene Wind “Nordic Reluctance towards Judicial Review under Siege” (2009) 27 *Nordisk Tidsskrift for Menneskerettigheter* 131 at 137.

110 Although Sweden, Finland and Denmark are now members of the European Union, which has limited their sovereignty to a certain degree vis-a-vis other European Union members, their internal systems remain intact.

111 Follesdal and Wind, above n 109, at 138.

112 Kate Chapman “‘Socialist streak’ just means we have a heart, says Key” *The Dominion Post* (online ed, Wellington, 27 August 2011).

113 Jaakko Husa “Guarding the Constitutionality of Laws in the Nordic Countries: A Comparative Perspective” (2000) 48 *Am J Comp L* 345 at 353; Stan Schaumburg-Muller “Parliamentary Precedence in Denmark – A Jurisprudential Assessment” (2009) 27 *Nordisk Tidsskrift for Menneskerettigheter* 170 at 174.

114 Geoffrey Palmer “Law-Making in New Zealand: Is There a Better Way?” [2014] 22 *Waikato LR* 1 (concerning hundreds of thousands of pages of statutory and other law in New Zealand).

115 Husa, above n 113, at 357, 360, 363 and 369.

116 Follesdal and Wind, above n 109, at 138.

117 Jackson and Tushnet, above n 12, at 477.

118 At 139; Husa, above n 113, at 370, 371 and 377; Joakim Nergelius “Judicial Review in Swedish Law – A Critical Analysis” (2009) 27 *Nordisk Tidsskrift for Menneskerettigheter* 142.

119 Follesdal and Wind, above n 109; Husa, above n 113.

120 Jackson and Tushnet, above n 12, at 476.

then proceed, but to do so it must explain why it is so acting and it then must use the same special processes that are used to change the Basic Law itself.<sup>121</sup>

These other approaches to formalising constitutionalism into law, while privileging democratic authority, are presented as potential options for New Zealand to consider. No claim to expertise is made. Rather, these approaches are raised as possibilities to explore which diverge from either the status quo or the devices of higher law entrenchment. Both the status quo and a written higher law constitution have worrying pathologies that need not to be accepted.<sup>122</sup> There are other successful options already in place in compatible jurisdictions.

### *1. Considering possibilities from Norway*

In Norway about 4.5 million people govern themselves through a multiparty, unicameral, constitutional monarchy. Norway has evolved into a parliamentary form of government without formally amending its Basic Law, through the gradual development of “customary” constitutional law.<sup>123</sup> Disputes about those functional understandings are not seen as legal disputes to be settled by the court system.<sup>124</sup> This shows that Norway’s is a system, like New Zealand’s, that is comfortable with evolution as a method of constitutional change and comfortable with relying on informally developed “conventional” rules as the means of enforcing their understanding of how the parliamentary system should work.

To ensure the constitutionality of the laws emanating from Parliament, Norway uses ex post, “laws-based”<sup>125</sup> controls. Ex post because the constitutional control occurs after, not before or during, the law-making process. “Laws-based” because the control is performed through ordinary legal processes in the court system. Norway does not have a specialised constitutional court, so all courts may review for constitutionalism, but there is a final Supreme Court which is superior to other courts. That Court’s decision would supersede the decisions of other courts. Norway also has a conception of the role of courts that is consistent with the common law in that it is considered appropriate for courts to “make” law and declare constitutional norms,<sup>126</sup> as well as to (deferentially) apply statutory law.

Norway’s development of a judicial ability to review statutes has been court-driven and has happened over a period of nearly one hundred years, such authority being by turns embraced and rejected.<sup>127</sup> This, like the development of their Basic Law itself, fits with an evolutionary paradigm. It was not until the 1970s that this “reviewing” power became firmly (re-)established, through a decision by the Supreme Court relying on “customary” constitutional law. That decision has been accepted by the other constitutional actors as legitimate, and perhaps the Court has used that authority sparingly in order to keep it so.

121 Husa, above n 113, at 356–360 and 364–369.

122 The text has outlined some of the problems with judicial enforcement of constitutionalism in detail, but the author is also well aware of New Zealand’s conventional system’s problems. Those problems particularly include weak protection of rights and the precarious position of rule of law as evidenced, respectively, by the laws enacted and enforced during the 1951 Waterfront Strike and by the Clyde Dam saga. The article is not trying to suggest that there is no room for improvement, or, for that matter, that there is no need for improvement.

123 Husa, above n 113, at 357.

124 At 358.

125 At 358.

126 At 358.

127 Inger Johanne Sand “Judicial Review in Norway under Recent Conditions of European Law and International Human Rights Law” (2009) 27 *Nordisk Tidsskrift for Menneskerettigheter* 160 at 161–162; Husa, above n 113, at 357.

Unlike the United States and other written higher-law jurisdictions with a “common law-like” background, the reviewing courts in Norway do not approach the problem of whether a statute passes constitutional muster as one of simple legal interpretation, to be guided by ordinary interpretive rules and confined by their doctrine of judicial precedent. Instead, the Basic Law is considered to be as interpretive medium itself, which is embedded in broader constitutional norms.<sup>128</sup> Due to the evolutionary nature of much change in the Basic Law and the changed (and changing?) understandings of the constitutional norms in that law, the Basic Law itself is (reasonably) considered inherently ambiguous with gaps.<sup>129</sup> As strict textual interpretation is no longer relevant, courts are also informed by the scholarship, general consensus, customary constitutional law, and wider-accepted constitutional norms. The court is very deferential not only to the statute, but to any legislative history around the legislators’ and Parliament’s views about the constitutionality of the statute. Any reasonable constitutional interpretation is considered sufficient and decisive.<sup>130</sup> If the court’s strong presumption of constitutionality cannot be successful, the court may leave the statute itself intact, but not apply it to the particular cases where its application would produce un-constitutionality.<sup>131</sup> If any form of judicial review of statute law were to be acceptable to New Zealand, this very deferential standard, combined with a limitation of any disallowance to refraining from applying a statute to the case before it, would probably represent the outer limits.

## 2. *Considering possibilities from Sweden*

With about twice New Zealand’s population, Sweden is still an appropriately “small” jurisdiction. Sweden is also a unicameral, parliamentary, constitutional monarchy with a multiparty system. One interesting feature of the Swedish system is that there are multiple Basic Laws, or higher-order laws, one of which is the first among equals, but all of which are deemed superior to ordinary law.<sup>132</sup> This is somewhat analogous to New Zealand’s own system of multiple, arguably constitutional fundamentals differentially located in law, Treaty and convention. If other successful constitutional systems seem to be able to function without the “one Ring” to bind them, but with multiple-sourced basics, perhaps the idea that there needs to be a formalised constitution is based more on unexamined perceptions about what is out there and working than on operational reality. In Sweden this pluralist bent is extended beyond the sort of pluralism of fundamental sources with which New Zealand is familiar, as Sweden provides plural sites where the constitutionality of a statute might be legitimately brought into question.

Numbers of public institutions are enabled to consider the constitutionality of statutes *as applied* to a particular situation or case, and to act accordingly.<sup>133</sup> This produces a wide spread of responsibility for maintaining and interpreting the Basic Law, and prevents one court institution from developing into the constitutional oracle. That Sweden does not have one definitive “Supreme” Court (but rather has several in different areas of law) is no doubt also a factor.<sup>134</sup> This spread of

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128 Husa, above n 113, at 359; Sand, above n 127, at 162.

129 Husa, above n 113.

130 The idea of the courts accepting that there may be numerous “correct” interpretations of a constitution is appealing and refreshingly honest. The court seems to be there to prevent “wrong” interpretations, and not to insist on any one “right” one.

131 Husa, above n 113, at 379.

132 At 360.

133 At 360–361; Nergelius, above n 118 at 146.

134 Husa, above n 113, at 368.

responsibility for constitutional oversight could resonate with New Zealand's reluctance to hand its constitution over to the judiciary.

Sweden also has a parallel *ex ante* system of reviewing Bills for constitutionalism before they are passed. The reviewing body is a special council on legislation, also known as the Law Council, which is made up of justices or former justices of the Supreme Courts. Its powers and role towards both the government and parliaments are advisory in nature, and its opinions are not binding.<sup>135</sup> In a way, it is not dissimilar to the advisory role of the Waitangi Tribunal, cautioning about action deemed to violate the Basic Laws, and the Swedish Parliament is free to disagree with its recommendations. However, should Parliament proceed, the contrary opinion of the Law Council might influence a later decision by a public authority that the statute in question could be constitutionally applied to the case in front of it.<sup>136</sup>

The superiority of Basic Law in Sweden is established by the text of the Basic Laws themselves, and if inferior law or regulations conflict with the superior laws or norms, the inferior law is not applied in the case at hand, but is also not invalidated (unless it is a law which has been enacted outside of a law-making authority's jurisdiction or competency; for instance, is *ultra vires*). The Basic Law also provides for and explicitly sets out the standard of review to be applied when considering the constitutionality of a law. Consistently with the privileged position of democratic legitimacy, Parliament is allowed "a larger margin of error"<sup>137</sup> than other bodies. If the law in question is a parliamentary statute, the standard of review is extremely high and application of the statute must obviously, indisputably, manifestly and unquestionably conflict with the Basic Law for a public body to refrain from following it.<sup>138</sup> The standard of review set out for lesser sorts of law is significantly less deferential. The device of including the appropriate standard of review for questions of constitutionality is quite similar to the standards for the judiciary set out in ss 5 and 6 of the New Zealand Bill of Rights Act 1990, and might point to a way through which New Zealand could experiment with allowing some limited judicial review of statutory law.

Despite being formally available in the Basic Law, the practice of constitutional review is not seen or accepted as ordinary practice and is avoided if possible through "interpretive harmonisation".<sup>139</sup>

### 3. *Considering possibilities from Finland*

About 5.3 million people govern themselves in Finland through a multiparty, unicameral, parliamentary, presidential Republic. Until recently, Finland also had multiple co-existing Basic Laws, with one of those being the first among equals. In 2000, Finland consolidated their system into one Basic Law. That Basic Law weakened the presidency substantially while strengthening the already parliamentary-based governing system and the Prime Minister's role. It also introduced an extremely circumscribed form of statutory judicial review.<sup>140</sup> Like Sweden, Finland does not have one Supreme Court, but separate hierarchies of courts in different areas of law.

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135 Nergelius, above n 118, at 142–146.

136 At 146.

137 At 145–146.

138 Husa, above n 113, at 363; Nergelius, above n 118, at 147. Some judges have taken this standard of review to mean that if even one judge believes that a statute is constitutional, regardless of the contrary opinion of the other judges, that must mean that there is not manifest and indisputable unconstitutionality.

139 Husa, above n 113, at 363. Again, this is reminiscent of s 6 of the New Zealand Bill of Rights Act 1990.

140 Husa, above n 113.



The Finnish system of maintaining the constitutionality of laws has been almost exclusively *ex ante* and remains so.<sup>141</sup> Finland has a particular special parliamentary standing committee (the Committee) – but not a separate Constitutional Court lodged in the Legislative Branch as in France<sup>142</sup> – charged with overseeing the constitutionalism of statutes. Theoretically, the President (whose role is similar to that of New Zealand’s Governor-General), the Speaker and the Chancellor of Justice also have authority to rule on the constitutionality of a Bill. In practice the Committee, as the democratic institution, has the effective and accepted authority to do so.<sup>143</sup>

The Committee is made up of parliamentarians<sup>144</sup> and considers the constitutionality of proposed Bills. There is no expectation that every Bill be reviewed, nor is there a system for referring or choosing particular Bills for review; rather Bills deemed to be ambiguous or suspicious are reviewed.<sup>145</sup> The Committee has formal procedures and interpretive rules, and its opinions are considered legally authoritative and binding. Decisions are guided by the Basic Law, conventional understandings such as constitutional “customary” law and public law scholarship about what those things mean, as well as by its own prior deliberations.<sup>146</sup> The Committee has the prestige and respect accorded to constitutional courts in other systems, which it could not have gained if its members did not consistently and scrupulously set party politics aside.<sup>147</sup>

Under the Finnish doctrine of exceptionalism, if a Bill is deemed to violate the constitution by the Committee but nonetheless deemed to be necessary by Parliament, the statute may be debated and passed as such, but this must be done through the special processes used to make “Basic” law itself.<sup>148</sup> Such a statute is explicitly admitted to be of an unconstitutional nature and is also explicitly intended to last only for as long as the situation making it necessary lasts (the post-World War II Finnish/Soviet refugee situation triggered some exceptional statutes in Finland). Such statutes are not, despite their manner of enactment, considered to have the hierarchal precedence accorded to the Basic Law, but have the same status as other ordinary law and are applied as such.<sup>149</sup> The 2000 reforms do not permit any court-based challenge of the constitutionality of “exceptional laws”, but do put some limits on their substantive content.<sup>150</sup>

If the Committee formally finds that a Bill is constitutional, that decision is determinative of the constitutionality of the resultant statute (once debated, passed and ratified by the President), and

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141 Toumas Ojanen “From Constitutional Periphery toward the Center – Transformation of Judicial Review in Finland” (2009) 27 *Nordisk Tidsskrift for Menneskerettigheter* 194 at 195–196. Textually, before the 2000 consolidation, judicial review of statutes was explicitly forbidden by the 1919 Basic Law.

142 Jackson and Tushnet, above n 12, at 480.

143 Husa, above n 113, at 365.

144 Ojanen, above n 141, at 196.

145 Husa, above n 113, at 366.

146 Ojanen, above n 141, at 196; Husa, above n 113, at 366.

147 One wonders if a committee with such an ethos could develop in New Zealand, but there is long-established example of that in the role of New Zealand’s Attorney-General; also a member of Parliament from the governing party, conventionally, sets party politics aside and acts impartially when acting in their role as the legal advisor to the House under section 7 of BORA 1990, when exercises their powers to declare “*nulle prosqui*” and so forth. The role of the Speaker might be another example.

148 Husa, above n 113, at 367.

149 Husa, above n 113.

150 Husa, above n 113.

it may not be otherwise challenged.<sup>151</sup> If the Committee either does not consider a Bill or decides not to issue an opinion on a Bill it has considered, the constitutionality of the subsequent statute resulting from that Bill is, since 2000, open to limited constitutional challenge in the courts. The experimental authority, extended to the courts in 2000, is a power to review for constitutionality in very narrowly defined areas and only in cases involving the application of a statute where the Committee did not make a determination. The opinions and findings of the Committee form a body of authority that is considered an important legal source for any court's constitutional interpretations.<sup>152</sup> The remedy available to the courts in the narrow range of permissible review is "non-application" to the case and situation at hand.<sup>153</sup>

#### 4. *Considering the possibilities from Denmark*

Approximately 5.4 million people govern themselves in Denmark, through a Basic Law which formally establishes a unicameral, parliamentary, constitutional monarchy. That Basic Law formally limits the Monarch's powers and vests the executive power with the Prime Minister and the government. As in the other Scandinavian jurisdictions considered, Parliament is seen as the premiere or dominant institution of public power.<sup>154</sup> In Denmark, courts play an important, self-constructed, role.

While the authority for judicial review of the constitutionality and propriety of executive actions and regulations is anchored in a specific section of a text of that Basic Law, when a motion was put to Parliament to formalise judicial review of statutory law for consistency with the Basic Law in 1959, it was outvoted 114 to 1.<sup>155</sup> Nonetheless, there is a court-created and norm-based doctrine of functional Basic Law review based on a separation of powers theory,<sup>156</sup> and the Danish Supreme Court is the practical authority for determining the meaning of the Basic Law. At the same time, there are no clearly developed rules about sources of law or the hierarchy of those sources of law (apart from the superiority of Basic Law), with much Danish law being judge-made (as evolved from customary practice), either directly (as in tort) or indirectly from clarifying the meaning of statutes, sometimes deliberately left ambiguous. Further, one author has suggested that it is de facto practice in Denmark for ministries to seek ex officio judicial opinion on constitutional matters when drafting Bills,<sup>157</sup> but that the practice is not well documented. The court is extremely deferential to Parliament and uses a doctrine of "flexibility of interpretation" to avoid finding statute conflicts with the Basic Law. However, the court has once applied Basic Law directly to find that Parliament had legislated completely outside of its competency, in essence finding a statute ultra vires.<sup>158</sup> Courts in Denmark are avoidant of constitutional review in cases that are perceived to be more political than constitutional in nature,<sup>159</sup> but do occasionally decline to apply statutory law to the case in front of them for norm-based reasons.

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151 At 367.

152 At 367.

153 Ojanen, above n 141, at 196; Husa, above n 113, at 365.

154 Schaumburg-Muller, above n 113, at 172.

155 At 171.

156 Husa, above n 113, at 370.

157 Husa, above n 113, at 370. This would be somewhat similar to the consultation practice in Sweden, see within the text above n 135.

158 Husa, above n 113, at 372.

159 Schaumburg-Muller, above n 113, at 175.

A striking thing about the Danish system is the seeming level of comfort with uncertainty about hierarchies and sources of law and with creative statutory interpretation to achieve acceptable results; as well as a seemingly innate confidence that the relevant constitutional actors will discern and do the appropriate thing in the circumstances at hand. While this is heartening for a country such as New Zealand, with a “hard to nail down” constitution, it could only ever be appropriate in small democracies with high civic virtue and broadly shared norms.

##### 5. *Scandinavian options reviewed*

The above brief survey reveals a number of approaches to constitutionalism with which many may not be familiar. Norway’s experience shows that textual constitutionalism and changing that text through democratically driven evolutionary understandings of “customary” constitutional law (the limitation of the monarchy) can be compatible. The compatibility is made possible by courts not insisting on one “right” interpretation of the constitution, by everyone’s acceptance of some inherent ambiguity and by the courts’ institutional deference to Parliament’s reasonable interpretations. Likewise, judicial review of statutes for constitutionality can be limited to whether the statute ought to be applied to the case at hand, rather than being extended to invalidation of the statute itself. These things resonate with New Zealand’s evolutionary, somewhat amorphous and democratically weighted arrangements.

The Swedish system shows that written constitutionalism does not necessarily mean a written constitution that is confined to one text, but can mean endowing a number of texts with “Basic Law” status. The Swedish system also challenges the notion that review of ordinary law for consistency with constitutional texts could occur only in one sort of institutional setting, bringing to the fore the possibility of numerous public actors having both the responsibility and the authority to make sure the law they apply complies with constitutional norms. The idea that in a unitary system where court decisions are accepted as sources of law, there needs to be one final superior court to oversee and settle all legal questions is also brought into question by the Swedish system. Sweden also demonstrates that a written constitution might explicitly impose the appropriate level of deference to Parliament’s interpretations by textually setting out the applicable standard for any constitutional review of Parliamentary Acts, for example, being in obvious, indisputable, unquestionable conflict with the relevant text.

The Finnish system of *ex ante* review through a special standing committee of Parliament, which has operated with such integrity and gravitas that it has obtained the respect and authority of a Constitutional Court, reveals another option for protecting textual constitutionalism without ceding direct democratic control. The careful processes and jurisprudence developed to ensure the Committee acts as intended and remains effective, *might* be able to be developed here. New Zealand already has two members of Parliament who are absolutely expected to rise above the politics of the day and to be neutral constitutionalists, the Attorney-General and the Speaker of the House. It is not unthinkable that New Zealand could expect more members of Parliament to so behave, given the appropriate institutional setting. Finland’s experience also shows that a system can experiment at the margins, extending to courts a very narrowly circumscribed authority to review statutes for constitutionality, available only for certain statutes in certain areas and with limited consequences, and see how it goes. That is a possibility that New Zealand might consider.

In the Danish system, apart from the precedence of the Basic Law, there is no agreed hierarchy of legal sources analogous to the New Zealand understanding that statutory law is superior to case law. At the same time there is broad acceptance that, while Basic Law is the highest law, Parliament is the most legitimate and most important institution to wield public power and other institutions

should defer to its expressed opinions on Basic Law matters. It is in that context, despite a history of extreme parliamentary hostility to the idea, that Denmark's courts have created, based on a separation of powers theory, an overall constitutional authority and a limited and deferential statutory review for consistency with Basic Law. But the court in Denmark also had a text to which it could apply the separation of powers theory. Whether New Zealand courts might successfully develop such authority autonomously might be something worth considering, perhaps through embracing both interpretative heroics to save a statute and limiting themselves to the remedy of simple non-application of a statute to the case at hand if such heroics do not avail. That might be a navigable path to developing the sort of "safety valve" envisioned in *Taylor v New Zealand Poultry Board*,<sup>160</sup> but in a circumscribed manner that does not pretend to strike the statute down or challenge Parliament's sovereignty.

A perhaps instructive aside is the discontent that the European Union Scandinavian jurisdictions have experienced around the arrival of that judicial review exercised by the European Court of Justice and the European Court of Human Rights. It has been considered concerning, not only because those courts are not locally situated, but because they are not "of" those constitutional cultures, so lack the intrinsic background knowledge of the proper role for courts.<sup>161</sup> The European Union courts have been perceived as not giving adequate deference to the substance of democratic decisions taken within the local constitutional and normative understandings, thus infringing on those norms and changing them in unforeseen ways.<sup>162</sup> That issue might have been of concern when the Privy Council was New Zealand's final court, but since the formation of the Supreme Court,<sup>163</sup> if New Zealand did develop some form of constitutional judicial review of statutory law, that review, however limited, would be performed by judges immersed in New Zealand's constitutional culture of democratic deference, which would be essential to the palatability of any such project. Without that repatriation of the highest court to New Zealand's shores, such a project would be unthinkable.

## V. CONCLUSION

Any constitution, like Tinkerbell, lives and is effective only if enough people believe in its authority. Both written and unwritten constitutions need legitimacy to work, and many written "constitutions" are simply pieces of paper. While New Zealand's unwritten constitution has its challenges and shortcomings, especially around "rule of law", formalising it into written higher law might not help and could be harmful. New Zealand's unwritten constitution is also one of the few constitutions in the world genuinely "owned" by the people from which it theoretically derives its legitimacy. This is in no small measure because written constitutions, while providing a concrete text for a populace, unless properly managed, often lead to that constitution becoming judicial-ised and divorced from the people. Layers of judicial, textual interpretation and precedent can make the written constitutions, as applied, unknowable to any but the legally trained and transfer its effective "ownership" to courts and lawyers. Nonetheless, a drawback to New Zealand's unwritten

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160 *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 (CA).

161 See Leiter and commentary, above n 53.

162 Nergelius, above n 118, at 149; Follesdal and Wind, above n 109, at 131–134; Marlene Wind "When Parliament Comes First – The Danish Concept of Democracy Meets the European Union" (2009) 27 *Nordisk Tidsskrift for Menneskerettigheter* 272.

163 Supreme Court Act 2003.

constitution is that although very broadly effective, it is frustratingly indeterminate in content and application. There is unease that its indeterminacy may yet impede its effective internalisation by the necessary critical mass of constitutional actors (which includes the ever diversifying public).

Surveying constitutional developments in New Zealand, over time, provides evidence that the most fundamental norm underlying the legitimacy of the constitution is egalitarian, representative democracy with frequent elections. That is the only aspect of the constitutional arrangements around which an unarguably conventional, constitutional dualism has developed, and that is the aspect of the constitution to which New Zealand has looked to strengthen the legitimacy of public authority. Having such a strong norm around representational and democratic legitimacy makes New Zealand a weak candidate for a written, entrenched, higher-law constitution, even if that would provide some clarification and a text. However, there are other “solidifying” and “strengthening” options available which would be consistent with the deep fundamentals of New Zealand’s constitutional culture.

If New Zealand considers writing its constitution, it needs to clearly separate the concepts of entrenchment and higher law. If the concepts are separated, either one might be compatible with a system dependent on strong democratic legitimacy. New Zealand could either entrench certain other aspects of the constitution closely tied to electoral or representational legitimacy, such as parts of the New Zealand Bill of Rights Act 1990, or make those things higher law, but not do both in the same statute. New Zealand might consider entrenching the Treaty but explicitly deny the judiciary a role in its interpretation, in order to keep the Treaty “owned” by its parties. Separating the concepts assures the continued precedence of the democratic will, while enabling some things to be clarified as absolutely fundamental.

The Scandinavian jurisdictions resemble New Zealand in size and fundamental norms. They have successfully navigated a path between the constitutional precedence of their unicameral Parliaments and effective written constitutionalism. Through various devices, those jurisdictions have maintained strong democratic legitimacy and the constitutionality of their system and laws, without developing the judicial centrism typical of the many written constitutions. Those systems also have had a strong element of constitutional evolution, as does New Zealand’s, and their legal systems are consistent with common law understandings. If New Zealand were to pursue constitutional reform, either of an evolutionary or of a comprehensive manner, the “middle way” methods of those jurisdictions rather than the more familiar ones might prove to be fertile ground to explore for suitable options and alternatives.

New Zealand has a treasure in its uniquely publicly owned constitution. It must strengthen and develop that treasure so that it is adequately robust to meet the future challenges of a rapidly diversifying population and a globalising world. But it must do so in ways that are suited to its unique nature, and not in ways which would ultimately undermine its life and legitimacy. After analysing that unique nature, this article has attempted to show some possible ways to successfully do both.

# THE MAKING OF LAWYERS: EXPECTATIONS AND EXPERIENCES OF FIRST-YEAR NEW ZEALAND LAW STUDENTS

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AND DEBRA WILSON\*

## I. INTRODUCTION

This paper reports on the first, baseline, collection of data in a longitudinal study of law students at the University of Auckland, the University of Canterbury and the University of Waikato.<sup>1</sup> The expectations and experiences of New Zealand law students have been little studied and this project aims to present those involved in the teaching and learning of law students with a comprehensive pool of data to inform both their individual teaching practices and the potential enhancement of the general law-school experience in New Zealand. It is intended that, over time, a complete law-student profile will be developed, which will detail the expectations, views and experiences of law students during each year of their law studies and in their first years in the workforce after completing their law degrees.

In this first phase of the study, two online surveys of the cohort of first-year students enrolled in first-year law papers at the participating law schools in 2014 were undertaken, the first survey taking place at the beginning of the academic year, the second towards the end. Given that this is the first and baseline report, an extensive range of data was collected from core demographic information through to relationships with teaching staff and other students, family background, future intentions and general well-being. The methodology employed is detailed in Part II of the paper with results and accompanying commentary being detailed in Parts III and IV. Results were analysed globally, as well as by specific law school, gender and ethnicity. A key finding is that although the majority of student expectations and experiences were positive, a more detailed analysis by gender and ethnicity revealed groups within the larger cohort with experiences that were either more positive or negative than the cohort norm.

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1 We have a number of acknowledgements to make. First, our thanks go to the staff at the Universities of Auckland, Canterbury and Waikato who gave their support and assistance to this study, particularly the Deans of the Law Schools (Andrew Stockley, Chris Gallavin, Bradford Morse and Wayne Rumbles). We acknowledge, with thanks, the funding we have received from Ako Aotearoa Southern Hub for this first stage of the study. We also thank our independent consultant, Dr Liz Gordon, for her assistance with administering the student surveys and production of data and for her general support and assistance. Finally we thank Neil Boister and Rachel Spronken-Smith for their comments on an earlier draft of this paper.

## II. METHODOLOGY

The project design is mixed method sequential research involving both quantitative and qualitative strategies, mainly using surveys, as well as interviews and focus groups where appropriate. Our approach to data collection is based on an “is/ought model” – surveying is carried out to determine what the current situation is, followed by soliciting views about what should subsist, and analysis of all data collected. The project is broken down into a number of substantive stages.

The first phase, which is the subject of this paper, comprised a number of steps carried out in 2014. Initially, a literature review of empirical studies and analytical commentary on student profiles and/or the development of student profiles was carried out. Second (the heart of the study), an online longitudinal survey of the 2014 first-year law class was developed. This class is to be surveyed in each year of their studies. Two surveys were carried out in the first phase of the project. An initial survey conducted in the first half of 2014 included background, expectations as to the purpose and skills delivered by the degree and well-being questions.<sup>2</sup> A second survey was administered at the beginning of the final term to see what had changed, what had actually been delivered to students and whether the students’ future plans had altered. The longitudinal study was administered to students at three law schools – Canterbury, Auckland and Waikato.<sup>3</sup> The latter two law schools agreed to take part in the longitudinal study after it was developed for the Canterbury cohort.<sup>4</sup> Surveys were then adapted for the separate law schools and administered online by the Canterbury research team.

The survey was promoted beforehand to the relevant classes in each law school. The student subjects were then contacted by email and invited to take part in a 15 minute online survey. Students responding to the first survey were assigned a digital identifier, which was only used to contact individuals for the following survey. Students completing the surveys were eligible to be entered in a prize draw to win a \$150 book voucher. To enter, students were asked to supply an email address and these were used only for entry in the prize draw. Canterbury Law staff researchers do not have access to any identifying information and cannot identify any student responses, to ensure there is no possibility that participation can affect student academic progress. However, if survey responses showed a student was at risk in terms of well-being, provision was made for that student to be identified by an independent consultant and offered assistance if necessary.

Participation in the study is voluntary. Students have the right to withdraw at any stage with no penalty, in which case relevant information is removed from the data if requested, provided this is practically achievable. Only members of the Canterbury research team and their assistants working on the project have access to the raw data, which is dealt with in confidence and securely stored at the Law School at Canterbury University. The data will be destroyed five years after the project has been completed.

The first online survey contained basic demographic questions covering ethnicity, age, gender, disability, prior experience and location, educational and family background. This was followed by questions investigating the reasons for studying law and for studying at the chosen law school,

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2 The survey was administered in March/April at Canterbury and in May/June at Waikato and Auckland law schools.

3 All of the New Zealand law schools were invited to participate in the project and Auckland and Waikato law schools accepted the invitation.

4 The study is therefore, strictly speaking, not collaborative but cooperative – it is being carried out by Canterbury researchers with the cooperation of the other law schools which provided contact data for their first-year law classes to allow the survey to be administered to those students.

future plans and intentions, and expectations around the law degree and the planned study of law. A final set of questions dealt with well-being and confidence at the start of the study year. The second survey was adapted to remove the demographic questions and to allow comparison of the actual experience with the initial expectations captured in the first survey. Questions focused on whether students expected, at this later stage of their first-year studies, to continue studying law in 2015, on the skills they had gained, the support they had received and the contact they had had with their law teachers and other students. Questions were also directed at the students' actual study experiences and feelings of general well-being. One final subset of questions was directed at how the students' first-year experience could have been improved.

A total of 1,740 students, enrolled in first-year law courses across the three participating law schools, were invited to complete the first online survey and 713 (41 per cent) did so. Invitations to complete the second online survey were sent to the 713 students who completed the first survey. Four hundred and fifty-four students completed the second survey. This group of 454 students represent 64 per cent of the students who completed the first online survey and 26 per cent of the 1,740 students who were invited to complete the first survey.

Across the three participating law schools, as Table 1 illustrates, completion rates for both the first and second online surveys were highest at the University of Canterbury with 184 of the 327 students invited to complete the first online survey doing so (56 per cent). Members of the research team were involved in the teaching of the first-year law courses at Canterbury at the time the first survey was administered and we speculate this may be why this law school had the highest student response rate: students had a personal connection with at least some of the research team.

**Table 1. Surveys 1 and 2: Invitation and completion rates by law school**

	Total invited for survey 1	Numbers completing survey 1	Numbers completing survey 2	% of those completing survey 1 who completed survey 2
Auckland	1,216	438 (36.01%)	262 (21.55%)	59.82
Canterbury	327	184 (56.27%)	135 (41.28%)	73.37
Waikato	197	91 (46.19%)	57 (28.93%)	62.64
Total	1,740	713 (40.98%)	454 (26.09%)	63.67

### III. LAW STUDENTS' EXPECTATIONS AND EXPERIENCES

Results were analysed across the entire survey cohort and by law school, gender and ethnicity. The results of the analysis by gender, ethnicity and individual law school are included only where they differ significantly from the total cohort. Individual law school results, where included, are presented in order of Auckland, Canterbury and Waikato.



## A. Demographics

### 1. Ethnicity

Across all law schools, as shown in Figure 1, the largest ethnic group completing the first survey was New Zealander/Pākehā (330 students, 47 per cent of the 696 students who answered this question). The proportion of students identifying as New Zealander/Pākehā was lowest at Auckland (164 students, 37 per cent) and highest at Canterbury (118 students, 64 per cent). Forty-eight students (53 per cent) at Waikato identified as New Zealander/Pākehā.

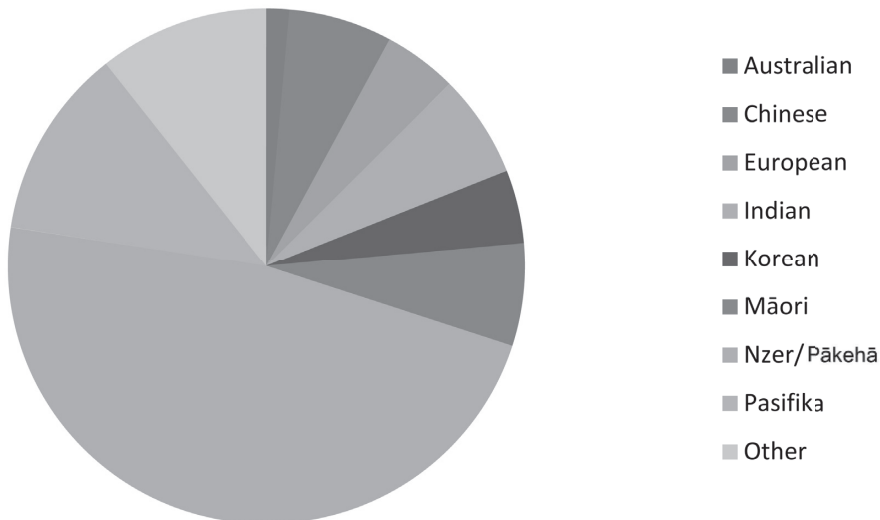
Across the law schools, only 45 students in the first survey identified as Māori (just over six per cent of the total). Individually, this comprised 27 students from Auckland (six per cent), five from Canterbury (three per cent) and 14 from Waikato (15 per cent).

Eighty-three students (12 per cent of the total) identified as Pasifika in the first survey. Pasifika students made up nearly 15 per cent of Auckland respondents, 10 per cent of Waikato students and six per cent of Canterbury students.

Across all three law schools, 45 students (just over six per cent) identified as Chinese in the first survey, with 45 (just over six per cent) identifying as Indian and 45 (just over six per cent as Korean). The proportion of students who identified as belonging to these ethnic groups was highest at Auckland.

With one exception, the ethnic groupings of students responding to the first survey were approximately representative of the total first-year cohort at the participating law schools. The exception was Asian students (those identifying as Chinese and Korean) who were disproportionately under-represented in the study. The participating students did not separately report numbers of Indian students.

**Figure 1. Survey 1: Ethnicity**



Of the 454 students who completed the second survey, 50 per cent (225) identified as New Zealand European/Pākehā, 10 per cent (46) as Pasifika, seven per cent (33) as Chinese, six per cent (29) as Māori, five per cent (24) as Indian, and four per cent (19) as Korean.

Eighty-seven per cent of students were New Zealand citizens.

## 2. Gender


More female students responded to the first and second surveys than did male students. Of the 700 students who answered the gender question in the first survey, 35 per cent (248) were male, 449 (64 per cent) were female, with the remaining one per cent indicating that they were either gender queer or gender fluid. The same proportions of male and female students responded to the second survey. Although the greater percentage of female students electing to complete the surveys reflects a pattern emerging from New Zealand and Australian empirical studies of law students,<sup>5</sup> it also reflects actual enrolment patterns.

Male and female students were proportionately represented across all but three ethnic groups. Female students made up 40 per cent of Australian students, 53 per cent of Korean students and 78 per cent of Pasifika students.

## 3. Age

As Table 2 shows, by far the greatest proportion of the 701 students who answered the question relating to age were aged 18 to 20: 487 students (69 per cent). A smaller percentage (52 per cent) reported being in this age bracket at Waikato. Although, overall, 83 per cent of students responding to this question were aged between 16 and 20, this was so for only 66 per cent of Waikato students.

**Table 2. Survey 1: Age on 28 February 2014**

Response	Chart	Percentage	Count
16–17		13.1%	92
18–20		69.5%	487
21–25		7.0%	49
26–30		2.6%	18
31–35		3.0%	21
36–40		2.0%	14
41–45		1.1%	8
46–50		0.7%	5
51–55		0.7%	5
56–60		0.3%	2
		<b>Total Responses</b>	<b>701</b>

Male students made up proportionately more of the 21–25 age group (43 per cent) and proportionately less of the 16–17 year age group (29 per cent).

A greater proportion of Māori (30 per cent) and Pasifika students (22 per cent) were aged 21 or over, compared to 17 per cent of New Zealand European/Pākehā students.

#### 4. *Prior experiences*

Although most of the students who completed the first online survey were aged 20 years or younger, not all had commenced their law studies straight from school, as Table 3 shows. Students were asked what they were doing in 2013 and were given a range of responses to select from. Students could select more than one option. Seven hundred and one students answered this question and 444 (63 per cent) reported that they had been at high school, with 134 (19 per cent) reporting they had been in employment and 130 (19 per cent) in other tertiary study. Consistent with the slightly different age demographic at Waikato, 54 per cent of Waikato students reported that they had been at high school, with a far higher proportion (35 per cent) reporting that they been in employment.

**Table 3. Survey 1: Prior experiences (701 total responses)**

Response	Chart	Percentage of total responses	Count
At High School		63.3%	444
Gap year		4.6%	32
In employment		19.1%	134
Caring for dependants		1.3%	9
Other tertiary study		18.5%	130
Voluntary work		2.4%	17
Beneficiary		0.7%	5
Other, please specify ...		4.7%	33
<b>Total Selections Made</b>			<b>701</b>

5 Sixty-five per cent of students in a study of level 200 and level 300 students at Victoria University of Wellington in 2004 were female: Caroline Morris “A ‘Mean Hard Place’? Law Students Tell It As It Is” (2005) 26 VUWLR 197 at 202. In a survey of 371 first-year LLB students at Monash University in 2009, 59 per cent were female: Melissa Castan and others “Early Optimism? First-Year Law Students’ Work Expectations and Aspirations” (2010) 20 Legal Ed Rev 1 at 5. In a survey of first-year LLB and JD students at the University of Melbourne, 62 per cent of LLB students and 65 per cent of JD students were female: Wendy Larcombe, Pip Nicholson and Ian Malkin “Commencing Students’ Interests and Expectations: Comparing Undergraduate and Graduate Cohorts” (2008) 1 JALTA 227 at 229. In a survey of first-year LLB students at the University of Western Australia in 2004 focusing on mental wellness, 72 per cent of students were female: Judy Allen and Paula Baron “Buttercup Goes to Law School: Student wellbeing in stressed law schools” (2004) 29 Alt LJ 285 at 286.

### 5. *Previous place of residence*

Five hundred and fifty-three students (80 per cent of the total of 690 who answered this question) reported that in 2013 they had mostly lived in the same region as the law school in which they had enrolled in 2014.

Of the total of 29 students who had lived in another country in 2013, six reported they had lived in the United Kingdom; four in each of Australia and Hong Kong, three in France; two in each of Malaysia, China and Singapore; and one in each of South Korea, Papua New Guinea, Taiwan, South Africa, the Cook Islands and the United Arab Emirates.

### 6. *Disability status*

Six hundred and eighty-nine students answered the question asking whether they had a disability that affected their ability to study and learn in the law degree. Most (655, 95 per cent) did not. Seven students (one per cent) indicated that they did have a disability and were receiving support from the university in which they were enrolled. Twenty-nine students (four per cent) responded that they did have a disability but were not receiving support from the university in which they were enrolled.

Māori students were proportionately more likely to report a disability affecting their ability to study and learn than other ethnic groups. Thirteen per cent of Māori students reported a disability compared to eight per cent of New Zealand European/Pākehā students and six per cent of Pasifika students. Māori students were also less likely to be receiving university assistance for their disability – 20 per cent of Māori students were receiving assistance compared to 39 per cent of New Zealand European/Pākehā students.

Although male and female students were equally affected by a disability, male students were less likely than their female counterparts to be receiving university assistance.

### 7. *Study status*

Students were asked whether they were studying part-time or full-time. Ninety-five per cent of Auckland students and 94 per cent of Canterbury students were studying full-time. Sixteen per cent of students from Waikato were studying part-time, over double the proportions at Auckland and Canterbury.

Proportionately, more Māori students (14 per cent) were studying part-time than New Zealand European/ Pākehā students (six per cent) or Pasifika students (nine per cent).

A greater proportion of male students were studying part-time.

### 8. *Degrees pursued in 2014*

The final question in the category of core demographics asked students what degrees they were pursuing in 2014. Some differences in enrolment patterns were apparent across the three law schools. At Auckland and Canterbury, the majority of students were enrolled in a double degree programme, with the most popular combination being a BA/LLB, followed by a BCom/LLB combination. Twenty-eight per cent of Canterbury students were enrolled only in a LLB degree, compared to eight per cent of Auckland students. The proportion of students enrolled only in an LLB degree was even higher at Waikato (52 per cent). Of the students enrolled in a double degree programme at Waikato, the most popular combination was again a BA/LLB programme, followed by a BMS/LLB combination. A possible explanation for the differing enrolment patterns is that entry into second-year law is limited at Auckland and Canterbury; it may be that students enrol

in a second degree programme as a back-up option if they are unsuccessful in gaining entry into second-year law.

## *B. Educational and Family Background*

### *1. Previous tertiary study*

Students were asked in the first survey whether they had already completed one or more degrees. Given that most of the students responding to the first survey were aged 20 or younger, it was not surprising that of the 689 students answering this question, 656 (95 per cent) had not. Again, consistent with the core demographics of the student cohort at Waikato law school with respect to age, a higher proportion of students at Waikato (nine per cent) had already completed one or more degrees.

Students who had completed a degree had the option of specifying their qualification. The qualification most commonly reported was a Bachelor of Arts (20 students), followed by a business degree (nine students).

### *2. Educational qualifications of parents*

Students were also asked in the first survey to identify the educational qualifications held by each of their parents. Seven hundred students answered this question and the results are shown in Table 4. Students were given a range of options to select from and could select more than one of those options. Across all three universities, the qualification most commonly held by both mothers and fathers was a Bachelor degree. In the case of mothers, the next most commonly held qualification across all three universities was a school qualification, followed by a post-school qualification. This was also true of the fathers of Auckland, Waikato and Canterbury students.

Across all universities, mothers with Bachelors and post-graduate degrees outnumbered fathers with those qualifications.

**Table 4. Survey 1: Educational qualifications of parents (700 total responses)**

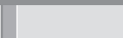

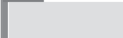


	Mother	Father	Count
Doctorate	12 (30.8%)	29 (74.4%)	39
Graduate qualification (eg MA)	87 (64.0%)	84 (61.8%)	136
Degree	230 (73.0%)	188 (59.7%)	315
Other post-school qualification	136 (64.8%)	128 (61.0%)	210
School	191 (76.4%)	165 (66.0%)	250
Not applicable	28 (47.5%)	49 (83.1%)	59
Don't know	64 (58.2%)	90 (81.8%)	110
<b>Total Selections Made</b>			<b>1,119</b>

### *3. Family connections to the law*

Students were asked in the first survey whether anyone in their family had a law degree. Students were given a range of options to select from. Students who had more than one family member with a law degree could select more than one option. Seven hundred students answered this question

and the response most commonly selected by students, as Table 5 shows, was that they had no family member or other significant person with a law degree who had influenced them.

**Table 5. Survey 1: Family connections to the law (700 total responses)**

Response	Chart	Percentage of total responses	Count
Parent I lived with while growing up		6.9%	48
Uncle, aunt or cousin		21.3%	149
Sister or brother		2.9%	20
Other relative or significant person who influenced you		10.0%	70
No one		67.4%	472
<b>Total Selections Made</b>			<b>759</b>

A greater proportion of Chinese (76 per cent) and Korean students (78 per cent) reported no family member or significant person with a law degree, compared to 62 per cent of New Zealand European/Pākehā, 70 per cent of Indian students, 65 per cent of Māori students and 45 per cent of Pasifika students.

Male students made up a higher proportion (54 per cent) of students with a parent with a law degree. A similar trend was apparent in those students whose sister or brother had a law degree. In contrast, a proportionately greater number of female students claimed that an “other relative or significant person” had a law degree.

### *C. Reasons for Enrolling in a Law Degree*

Students were asked if they intended to complete a law degree and, if so, their reasons for doing so. Six hundred and seventy-three students completed this question and the results are shown in Table 6. Students were given a range of options to select from and were also given the option to add additional reasons.

In terms of the given options, those indicating a significant degree of idealism and/or altruism strongly featured. “I am passionate about law and justice” was the most common reason (57 per cent), followed by “I want to make a difference” (55 per cent) and “I want to help people” (53 per cent). A view that law was a well-paid career was also important for a significant proportion of students (43 per cent), as was the respect accorded to the legal profession (51 per cent).

Consistent with responses to other questions, only a small proportion of students selected as a reason the fact that a family member was a lawyer. A small proportion of students also indicated that they were intending to complete a law degree because of someone else’s suggestion.

Of the “other” reasons given by students, providing assistance with other career paths was the most commonly occurring.

Analysis of the answers to this question by gender revealed that a greater proportion of male students selected the options relating to having a parent/sibling who is a lawyer (male students made up 40 per cent of the total responses) and law being a good, steady profession (39 per cent).

Proportionately, more female students selected the options relating to being passionate about law and justice (female students made up 69 per cent of total responses), wanting to help people (72 per cent) and wanting to make a difference (71 per cent). Male and female responses to the options relating to law being well-paid and law being a respected profession were approximately even.

Māori and Pasifika students were more likely to have chosen to study law because they wanted to help people and/or to make a difference. They also selected the options relating to pay and the respect accorded to the legal profession less frequently. In contrast, Chinese and Korean students were more likely to have chosen to study law because it was a well-respected profession.

**Table 6. Survey 1: If you are intending to go on to complete a law degree, what are your reasons? (673 total responses)**

Response	Chart	Percentage of total responses	Count
One or more of my parents/ siblings/ close relatives are lawyers		6.2%	42
It is a good, steady profession		44.6%	300
I am passionate about justice and the law		56.8%	382
Someone else suggested it (e.g.: parent, teacher)		15.8%	106
I want to help people		53.0%	357
I want to make a difference		55.0%	370
It is a well-paid career		42.9%	289
It is a respected profession		51.1%	344
Other, please specify...		11.7%	79
<b>Total Selections Made</b>			<b>2,269</b>

Students were also asked for the reason(s) why they enrolled at their chosen law school. Six hundred and seventy-eight students answered this question. Students were given a range of options to choose from, and were also given the option to add other reasons. Students were able to select more than one reason.

Most students indicated that they had enrolled at their chosen law school because it was at their local university (59 per cent) and/or their family lived locally (51 per cent). These reasons far outweighed the influence of friends, a reason selected by only 16 per cent of students.

Significant numbers of students also considered their chosen law school to be the “best law school” (55 per cent of Auckland students, 21 per cent of Canterbury students and 22 per cent of Waikato students) or had heard “good things about it” (42 per cent of Auckland students, 49 per cent of Canterbury students and 39 per cent of Waikato students).

The significance of “good scholarships” being on offer was of less importance and was selected by only 10 per cent of students.

Some differences in the “other” reasons given by students were apparent across the three law schools. The most frequently occurring “other” reason given by 10 Auckland students was Auckland law school’s good reputation. The most common “other” reason given by four Canterbury students was that they liked living in Christchurch. Other reasons offered by Waikato students were the bi-cultural nature of the law school (four students) and the ability to access online lectures (three students).

#### D. Future Plans

Students were asked in the first survey to indicate their interest in pursuing a legal career on a five-point scale with 1 representing no interest and five representing extreme interest. The results are presented in Table 7 below. Six hundred and eighty-nine students answered this question. Responses to earlier questions focusing on the reasons why students had chosen to study law suggested that most students had enrolled in a law degree intending to complete it. Responses to this question revealed that a majority of students (75 per cent) were either very interested or extremely interested in pursuing a legal career.

**Table 7. Survey 1: Interest in pursuing a legal career**

Response	Chart	Percentage	Count
1 No interest		3.2%	22
2		5.4%	37
3		16.7%	115
4		34.3%	236
5 Extreme interest		40.5%	279
<b>Total Responses</b>			<b>689</b>

Students were then asked if they were interested in pursuing a legal career, what type of career appealed to them. Students were given a range of options to select from and also had the option to write in other types of legal career. Students were able to select more than one option. A total of 656 students answered this question and, as Table 8 shows, the most popular option, selected by 70 per cent of students, was private practice as a lawyer.

What was notable, particularly given the idealism and altruism apparent in the responses to the question focusing on the reasons why students intended to complete a law degree, is the smaller proportion of students (26 per cent) intending to pursue a career in a non-governmental or community-based organisation. Working for such an organisation did however appeal to proportionately greater numbers of Māori and Pasifika students.



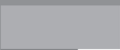












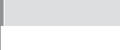

**Table 8. Survey 1: What type of legal career appeals to you? (656 total responses)**

Response	Chart	Percentage of total responses	Count
Private practice (working in a law firm)		69.7%	457
Government position		47.4%	311
In-house lawyer for employer that is not a law firm		25.6%	168
Non-governmental or community organisation		26.2%	172
Other, please specify ...		9.6%	63
<b>Total Selections Made</b>			<b>1,171</b>

Of the “other” career options given by students, the most frequently occurring response (seven students) was working for an international organisation such as the United Nations. Other options included becoming a judge, a legal academic, working for a trade union or joining the police force.

Students were asked in the first survey about the area(s) of law in which they had an interest and Table 9 illustrates the responses received. Students were given a range of responses to choose from and could also add other non-listed options. Students were able to select more than one option. Six hundred and eighty-five students answered this question. The most popular areas of law were criminal justice (60 per cent) and international law (50 per cent). These results illustrate a degree of dissonance with private practice as the preferred career destination of the majority of students given that neither criminal justice nor international law is likely to feature frequently in this particular career path. The options selected by students are, however, more in line with the idealistic reasons given by students when asked why they intended to complete a law degree. It was also the case that a number of traditional areas of private practice (commercial and company, property law and family law) attracted strong interest. We intend to measure the extent to which students’ views about their preferred legal career change in subsequent surveys.

**Table 9. Survey 1: Areas of law in which students had an interest (685 total responses)**

Response	Chart	Percentage of total responses	Count
Commercial and company		43.2%	296
Community		28.0%	192
Criminal justice		59.7%	409
Estates and wills		14.9%	102
Information and technology		11.4%	78
Media		24.2%	166
International		49.9%	342
Māori land and resource law		13.9%	95
Property law and land transfer		26.7%	183
Public		32.7%	224
Family		41.9%	287
Law and sport		15.6%	107
Law and medicine		17.1%	117
Other, please specify ...		9.3%	64
None		1.6%	11
<b>Total Selections Made</b>			<b>2.673</b>

“Other” responses included environmental law, intellectual property law, human rights and employment law.

Given male students make up only 35 per cent of the first survey cohort, male students were proportionately more interested than female students in the following subjects: information and technology (male responses made up 67 per cent of the total number of students selecting this option) and law and sport (49 per cent of total responses). Female students were proportionately more interested than their male students in community (female students made up 74 per cent of the total number of students selecting this option), family (80 per cent of total responses) and medicine (70 per cent of total responses).


New Zealand European/Pākehā students were far more interested in criminal justice than other groups. Pasifika students were the group most interested in community and family law. Māori students were the group most interested in Māori land and resource law. Indian and Chinese students were the groups most interested company and commercial law.

A follow-up question in the second survey asked students whether, as a result of their study in 2014, they wanted to practice as a lawyer, use their law degree in some other career or not complete or use a law degree in any profession. A total of 453 students answered this question.

As Table 10 shows, the proportion of students who indicated they wanted to practice as a lawyer decreased with this option attracting 48 per cent of responses, down from 70 per cent in the first survey.

Māori and Pasifika students were proportionately more likely to intend to use their law degree in some other career: 52 per cent of Māori students and 52 per cent of Pasifika students selected this option, compared to 43 per cent of New Zealand European/Pākehā students, 42 per cent of Korean students, 39 per cent of Chinese students and 29 per cent of Indian students.

**Table 10. Survey 2: What type of legal career are you interested in?**

Response	Chart	Percentage	Count
Want to practice as a lawyer?		47.7%	216
Think you will use your law degree in some other career?		44.2%	200
Not intending to complete or use a law degree in any profession?		8.2%	37
<b>Total Responses</b>			<b>453</b>

*E. Skills (expected and gained)*

In the first survey students were asked a qualitative question: what skills do you expect to gain from your law studies in 2014? Five hundred and ninety students answered this question.

The responses from all three law schools highlighted that the substantive knowledge that first-year law students expected to gain from their first-year course essentially fell across three broad categories. First, and most commonly, there was an expectation from student respondents that they would finish the course with an understanding of the structures and operation of New Zealand’s legal system. “A clearer understanding of the New Zealand government and the New Zealand constitution and to understand how law shapes and impacts, and is impacted by both” was how one Waikato student phrased this expectation. Secondly, students expected to acquire a working knowledge of some basic legal principles and concepts and thirdly, there was an expectation from some students (especially in Auckland) that theoretical understandings of the law and legal system would be instilled and developed, or, as one Auckland student noted, “[a] wider knowledge of law and sociology, and how history and modernity has sculptured the law, and our understanding of it.”

The second survey revealed that the first two expectations had been met for 90 per cent of the respondent students, and that the expectation of development of theoretical understandings of the law had been met for 70 per cent.

In addition to substantive knowledge acquisition, the students in their responses identified a wide variety of skills that were hoped for or expected from their first-year course. Notably, critical thinking and analytical skills, literacy skills (with a particular reference on enhanced writing skills, some referred to essays) and specific legal method skills (that is, case analysis, statutory interpretation) were most commonly identified. The second survey showed that 80 per cent of the respondent students felt that they had gained legal method skills, and 70 per cent critical thinking

analytical skills. Less than 40 per cent of the students overall reported enhancement of their literacy skills.

From the first survey, oral communication skills (referenced both to generic public speaking/debating skills and specific mooting/court advocacy skills), skills in effective argument, and training for a future career path also emerged with some frequency. A number of the respondent students in the first survey revealed that they simply expected the first-year course to prepare them for their future years of LLB study, and research skills were highlighted by a few students at each of the law schools.

Inevitably there was the occasional student who expressed some uncertainty over the skills that he or she expected to acquire. Much more typically, however, students would identify and proceed to list a variety of expected skills. One Canterbury student replied in this way: “[t]horough and excellent analysis skills, research and writing skills, be able to develop strong and informed arguments, and a whole lot more I can’t wait to learn!”

Personal skills were identified by a number of students at all the law schools, with increased personal confidence being identified in particular by many within this group, and attention to detail and organisation also being specified by a few. Time management skills also surfaced as a distinct and specific desired skill. Additionally, many students proffered skills that did not fit particularly neatly into any of the above designated categories. Thus the following were amongst the miscellaneous expectations put forward by the various respondents: “commercial awareness”, “good listening skills”, “prediction skills”, “good network of graduate friends”, “being able to absorb information and absorb it like a sponge”, “writing incredibly fast”, “open-mindedness”, “work ethic”, “stamina and energy” and finally, and presumably not entirely seriously, “dressing well”.

#### *F. Relationships with Teachers*

In order to gauge initial student expectations about their relationships with their teachers, students were asked a qualitative question in the first survey: what sort of support/contact do you expect from your law teachers this year? Five hundred and fifty-nine students responded to this question.

The most frequently mentioned expectation with respect to contact (18 per cent) was that teachers would be available and approachable via a variety of mediums – including email, one-to-one meetings during office hours or after class, and via online learning systems.

A follow-up quantitative question in the second survey asked students about the ways in which they had had contact with their law lecturers. Four hundred and fifty-three students answered this question. Students were given a range of responses to select from and could also add their own response. Students were able to select more than one response.

The most frequently occurring response (76 per cent), as Table 11 shows, was that contact had occurred in lectures. Contact during lectures might involve listening to the lecture, asking or answering questions during class time, or discussion with a lecturer immediately before or after class. Although this figure appears to suggest that a quarter of students overall did not attend lectures, it may be partially explained by the high rates of reported use of recorded lectures, particularly by Auckland and Waikato students.

A majority of students reported some contact with their lecturers outside of lectures, but this most frequently occurred by electronic means (email or via an online learning platform). What

is not clear is the extent to which this electronic communication was personalised or an all-class communication.

Analysis by ethnicity revealed that Pasifika students reported the most contact with their lecturers during office hours: 22 per cent of Pasifika students reported having done so, compared to 17 per cent of Māori students, 16 per cent of Korean students; 11 per cent of New Zealand European/Pākehā students and three per cent of Chinese students. Although Pasifika students reported the greatest frequency of face-to-face contact, they also reported the least contact by email.

**Table 11. Survey 2: In what ways have you had contact with your law lecturers in 2014? (453 total responses)**

Response	Chart	Percentage of total responses	Count
In lectures		75.7%	343
Communication on Moodle, Blackboard, Learn or other online learning platform		20.3%	92
Recorded lectures		43.0%	195
Office hours		12.4%	56
Email		50.6%	229
Phone		1.8%	8
Social occasions		7.7%	35
No contact except attending lectures		21.9%	99
Other, please specify ...		3.3%	15
<b>Total Selections Made</b>			<b>453</b>

Students were also asked a qualitative question in the second survey: what could have been done to improve contact with your law lecturers in 2014? Two hundred and nineteen students responded. The most common response was that students were satisfied with the level of contact available, but the most interesting set of comments answered the question by recognising that it was the responsibility of students to initiate contact and to approach lecturers for help.

UC provides students with multiple ways of getting in touch, it is up to the student to take full advantage of this. (Canterbury)

The lecturers are available as much as possible, I just need to make more use of them. (Waikato)

It is down to the individual motivation of students whether they want to talk to their lecturers. (Auckland)

Of the students who did suggest ways in which contact could have been improved, the greatest number related to the desirability of regular contact in a smaller group setting: suggestions on

this theme included individual “check-in” type sessions with lecturers, or lecturers attending or taking tutorials or teaching in smaller classes. Another common request was for contact via online learning platforms, with one reason given for this being anonymity in asking questions. A small number of students (13) noted that lecturers can seem unapproachable.

Of those students who expected to receive additional assistance from their law teachers (all but 66), the most frequently occurring expectation at the time of the first survey (20 per cent of the total) was that teachers would provide extra assistance as and when it was needed by students. As one Auckland student noted, “I do expect my lecturer to be able to (and want to) answer any queries I have to regarding course content if I struggle to find the answers through my own study.” Other common categories included support associated with effective teaching; assistance and/or guidance in completing assessment tasks; receiving appropriate feedback on completed assessments; and general encouragement or support.

In the second survey students were asked to specify the forms of support they had received from their law lecturers in 2014. Students were given a range of options to select from and could also add their own response. Students were able to select more than one response. Three hundred and fifty-eight students answered this question and Table 12 summarises their responses. The most frequently selected options were feedback on assignments, general encouragement and receipt of extra assistance when needed. These responses suggest that, for the most part, the support students received had met their initial expectations.

Analysis by ethnicity did reveal a number of differences. Māori students reported most frequently that they had received assistance with assessment tasks, but were also the group that reported receiving general encouragement to succeed the least frequently. Pasifika students, in contrast, were the group that reported receiving assistance with assessment tasks least frequently, but the group that reported receiving general encouragement to succeed most frequently.

**Table 12. Survey 2: What other forms of support have you had from your law lecturers in 2014? (358 total responses)**

Response	Chart	Percentage of total responses	Count
Extra assistance when needed		25.7%	92
Assistance with assessment tasks		20.7%	74
Feedback on assignments		57.3%	205
General encouragement to succeed		63.1%	226
Career guidance		10.6%	38
Support around personal/family issues		4.5%	16
Other, please specify ...		5.6%	20
<b>Total Selections Made</b>			<b>671</b>

Students were also asked in the second survey how satisfied they were with the support they had received from their law lecturers in 2014. Students were asked to select from a five-point scale, with one representing “very dissatisfied” and five representing “very satisfied”. The most frequently occurring response, as Table 13 shows, was point four on the scale (44 per cent) – an indication of being satisfied. Whilst it is again not clear whether all of the support received by students was of a personalised and individual kind, it is apparent that, overall, students were generally satisfied with the support they received. Eighty-six per cent of students selected point three on the scale or higher.

Analysis by ethnicity revealed that Māori students were proportionately more likely to be satisfied or very satisfied (59 per cent) when compared to other ethnic groups. Forty-five per cent of New Zealand European/Pākehā students ranked their satisfaction levels in these terms as did 50 per cent of Pasifika students and 39 per cent of Chinese students. Chinese and Korean students were slightly more likely to report low or very low satisfaction levels with 18 per cent of Chinese students and 16 per cent of Korean students doing so. Fifteen per cent of Pasifika students reported low or very low satisfaction levels, as did 14 per cent of Māori students and 12 per cent of New Zealand European/Pākehā students.

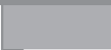








**Table 13. Survey 2: Satisfaction with support received from law lecturers**

Response	Chart	Percentage	Count
1 Very dissatisfied		1.8%	8
2 Dissatisfied		12.1%	55
3 Neutral		30.2%	137
4 Satisfied		43.8%	199
5 Very satisfied		12.1%	55
<b>Total Responses</b>			<b>454</b>

Students were also asked in the second survey to specify the contact they had had with their law tutors in 2014. Responses are summarised in Table 14 below. Four hundred and fifty-four students answered this question. Students were given a range of responses to select from and could also add their own response. Students were able to select more than one response.

Analysis by ethnicity revealed that Māori and Pasifika reported greater attendance during office hours: 17 per cent of Pasifika students and 14 per cent of Māori students reported this form of contact, compared to eight per cent of New Zealand European/Pākehā students, six per cent of Chinese students, five per cent of Korean students and four per cent of Indian students.

**Table 14. Survey 2: What contact have you had with your law tutors in 2014? (454 total responses)**

Response	Chart	Percentage of total responses	Count
In tutorials		85.5%	388
Communication on Moodle, Blackboard, Learn or other online learning platform		11.0%	50
Recorded lectures		3.3%	15
Office hours		8.6%	39
Email		36.3%	165
Phone		1.1%	5
Social occasions		2.0%	9
No contact except attending tutorials		20.7%	94
Other, please specify ...		1.8%	8
<b>Total Selections Made</b>			<b>773</b>

Students were also asked a follow-up qualitative question asking how contact with tutors could be improved. Two hundred students responded. Again, the most frequently occurring answer was that the amount of contact was acceptable. One area that was raised as a concern was contacting tutors outside of lectures as sometimes contact details were not supplied. A small number of students used this question as an opportunity to indicate a desire for more tutorials.

### G. Study Habits

The study habits of students were explored in a series of questions in the first and second surveys.

Students were asked in the first survey how many hours of study per week outside lecture and tutorial times they expected to devote to their law studies in 2014. Students were given a range of responses to choose from. A total of 650 students answered this question.

Unlike responses to many of the other questions, different patterns of answers emerged across the three law schools. The most frequently occurring response of Auckland students (40 per cent) was that students expected to spend three to five hours on their law studies each week. The most frequent response from Canterbury students (33 per cent) was that they expected to spend six to eight hours studying each week. In contrast, the most frequently chosen response by Waikato students (36 per cent) was that they expected to spend more than 10 hours studying per week.

Analysis by ethnicity showed that, proportionately, Māori and Korean students expected to spend more time on their studies than other ethnic groups. Forty-three per cent of Māori students and 48 per cent of Korean students expected to spend nine or more hours on their law studies each week compared to 31 per cent of New Zealand European/Pākehā students, 30 per cent of Pasifika students and 33 per cent of Chinese students.



In proportionate terms, slightly more female students expected to spend nine or more hours each week on their studies than male students, with female students making up 72 per cent of the total responses in these categories (female students made up 65 per cent of the total cohort of students responding to the first survey). Proportionately, slightly more male students expected to spend only one to two hours each week on their studies – male students made up 41 per cent of responses in this category.

A follow-up question in the second online survey asked students how many hours per week on average they had actually spent on their law courses in 2014. A total of 443 students answered this question. Three to five hours of study per week remained the most frequently chosen option by Auckland students, but the proportion of students selecting this option increased from 40 per cent to 50 per cent over the two surveys. The most frequently chosen option by Canterbury students in the second survey was three to five hours of study (55 per cent), down from six to eight hours (33 per cent) in the first survey. Student responses from Waikato gave the options of three to five hours and six to eight hours equal top placing with both attracting 29 per cent of responses.

Analysis of the follow-up question by ethnicity revealed that Pasifika students were proportionately more likely to have spent only one to two hours on their law studies per week: 24 per cent of Pasifika students identified as falling into this category compared to 18 per cent of Chinese students, 17 per cent of Māori students, 12 per cent of New Zealand European/Pākehā students and 11 per cent of Korean students. On the other hand, 17 per cent of Pasifika students reported spending nine or 10 hours on their studies, compared to 16 per cent of Korean students, 14 per cent of Māori students and 13 per cent of New Zealand European/Pākehā students.

A greater proportion of female students spent more than 10 hours on their studies than did their male counterparts with female students making up 84 per cent of the responses in this category. On the other hand, proportionately more male students spent only one to two hours on their studies (55 per cent of total responses). The proportion of male and female students spending between three and 10 hours per week was approximately equal.

What is notable is that although students at the three law schools began with different expectations in terms of the hours they expected to spend per week on their law studies, what was consistent in the responses in the second survey was that students were studying fewer hours per week than they had anticipated when responding to the first survey. The reasons for this can only remain speculative at this stage, but we see this data as concerning and justifying further investigation. Whilst the overall responses to some other questions (such as satisfaction with support received from teachers, overall satisfaction and future career intentions) do not suggest that large numbers of students were disengaging from their studies, the responses to this question do suggest that the actual experience of studying law is somewhat different to what many students had anticipated. Follow-up questions to determine exactly what students are doing in the hours that they spend on their law studies will be asked in subsequent surveys.

Students were asked in the second survey whether they had studied with other students. Of the total of 446 students who answered this question, a majority (68 per cent) had done so.

Korean students were the least likely to report studying with other students: 53 per cent of Korean students reported that they did so, compared to 61 per cent of Chinese students, 67 per cent of New European/Pākehā students, 76 per cent of Māori students, 79 per cent of Indian students and 85 per cent of Pasifika students.

A follow-up question asked the students who did study with other students how often this occurred. A total of 304 students answered this question and, as Table 15 shows, most reported

that they did so frequently: overall 63 per cent of students reported studying with other students fortnightly or more frequently.

**Table 15. Survey 2: How often do you study with other students?**

Response	Chart	Percentage	Count
Once a week or more often		44.1%	134
Every two weeks or so		19.1%	58
Once a month		9.9%	30
Less than once a month		3.0%	9
Only for tests and exams		24.0%	73
<b>Total Responses</b>			<b>304</b>

A slightly greater proportion of female students reported studying with other students more frequently than did male students. Forty-four per cent of female students reported studying with other students either once a week or every two weeks or so, compared to 34 per cent of male students. On the other hand, 18 per cent of male students reported studying with others only for tests and exams, compared to 14 per cent of female students.

Students were asked in the second survey how often they physically visited the law library and 444 students answered this question. Different patterns of attendance emerged across the law schools, as Table 16 shows. Auckland and Canterbury students reported that they had visited the law library far less frequently than did students from Waikato where 42 per cent of students reported that they had visited the library weekly or more often. The reasons for the disparity in attendance are not clear, but may include differences in the availability of study space within the law library and/or the frequency with which students are referred to materials only available in hard copy at the law library.

Analysis by ethnicity showed that Māori students were more likely to report visiting the library on a fortnightly or weekly or more often basis than other groups: 24 per cent of Māori students reported doing so, compared to 15 per cent of New Zealand European/Pākehā students, 13 per cent of Pasifika students, 12 per cent of Chinese students, eight per cent of Indian students and five per cent of Korean students.

**Table 16. Survey 2: How often have you physically visited the law library in 2014?**

Response	Chart	Percentage	Count
Never		34.7%	154
Occasionally		37.8%	168
Monthly		11.5%	51
Fortnightly		7.9%	35
Weekly or more often		8.1%	36
<b>Total Responses</b>			<b>444</b>

Students were also asked how often they used online legal resources available through their university library. A total of 444 students answered this question. Again, different patterns of use emerged across the three law schools, with students from Waikato reporting use of such materials far more frequently than students from Canterbury or Auckland. Sixty-four per cent of Waikato students reported that they used online legal resources available through their law library either fortnightly or weekly compared to 27 per cent of Canterbury students and 14 per cent of Auckland students.

Analysis by ethnicity revealed that Māori students and New Zealand European/Pākehā students were the groups reporting the most frequent use of online resources.

Students were also asked to respond to a qualitative question in the second survey by detailing the factors that helped them to settle in to law school in 2014. Two hundred and ninety-nine students responded. The most common response across all three law schools was having a support network, either an existing network (family) or creating a new network through the making of friends or forming study groups. As one Auckland student reported, it was “having friends in the same classes, who could relate to what I was going through” that helped. A Waikato student noted that “talking with other students and sharing our results” helped in understanding “what other things that lecturers could be looking for in our work”.

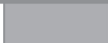


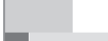


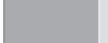

Another frequently noted factor was self-motivation or getting into good study habits. The importance of enjoying classes and of having approachable lecturers were also seen as relevant.

Another question in this category asked students what sorts of things had impacted on their law studies in 2014. Four hundred and twenty-three students responded. Students were given a range of options to select from and could also specify “other” matters. Students were able to select more than one option.

Overall, as Table 17 shows, the most frequently selected responses were home/family issues and personal issues. Things to do with study was also ranked highly on an overall assessment, but an analysis by law school showed that this factor was ranked far lower by Waikato students. On the other hand, and perhaps reflecting the greater numbers of part-time students at Waikato law school, work and employment issues were ranked more highly by Waikato students.

The least important factors impacting on study were accommodation issues and relationship issues.

**Table 17. Survey 2: What sorts of things impacted on your law studies in 2014? (423 total responses)**

Response	Chart	Percentage of total responses	Count
Home and family issues		49.9%	211
Relationship issues		23.6%	100
Personal issues		49.6%	210
Work and employment issues		32.6%	138
Accommodation issues		12.1%	51
Financial issues		25.8%	109
Things to do with studying at university		45.4%	192
Other, please specify ...		13.7%	58
<b>Total Selections Made</b>			<b>1.069</b>

### *H. Social Experiences*

A number of questions in the second survey were directed at the students' social experience at law school. The first question of this nature was whether students were members of a law students' association. A total of 445 students answered this question. Quite different patterns of membership emerged across the three law schools. Whilst a majority of Auckland students (83 per cent) and Waikato students (58 per cent) were not members of a students' association, the opposite was true at Canterbury students where 69 per cent of students were members of an association.

Students who were members of a students' association were then asked how important to them was the law students' association and the activities it organised. Across the three law schools it was apparent that students were ambivalent about membership of the association and/or the activities it organised: 51 per cent of Auckland students reported that it was neither important nor unimportant, as did 50 per cent of Canterbury students and 44 per cent of Waikato students. Just over 25 per cent of students at each of the law schools indicated that membership and/or activities were quite important to them.

The final question in this category asked students whether they used social media to communicate with other students. Eighty-eight per cent of the total of 304 students who answered this question had done so.

### *I. Debt Levels*

A question directed at levels of student debt was asked in the second survey. Of the 441 students who answered this question, the most frequently reported level of debt (47 per cent of all students) was \$5,001 to \$10,000, a pattern that was consistent across the three law schools. Overall responses to this question are summarised in Table 18.

**Table 18. Survey 2: Levels of student debt**

Response	Chart	Percentage	Count
None at all		20.4%	90
Up to \$5,000		13.8%	61
\$5,001 to \$10,000		47.2%	208
\$10,001 to \$20,000		12.9%	57
More than \$20,000		5.7%	25
		<b>Total Responses</b>	<b>441</b>

## J. Feelings of Confidence and Well-being

### 1. Confidence

Students asked in the first survey how confident they were about studying at university. Students were given a five-point scale to select from with one representing not at all confident and five representing very confident. Six hundred and sixty students answered this question and, as Table 19 shows, the majority (62 per cent, 407) selected points four and five on the scale.

**Table 19. Survey 1: Confidence about university study**

Response	Chart	Percentage	Count
1 Not confident at all		0.6%	4
2		4.7%	31
3		33.0%	218
4		45.6%	301
5 Very confident		16.1%	106
		<b>Total Responses</b>	<b>660</b>

A slightly higher proportion of male students indicated they were confident or very confident about university study with male responses making up 42 per cent of the total in these categories.

Analysis by ethnicity revealed interesting trends. Sixty-five per cent of New Zealand European/Pākehā students felt confident or very confident, as did 61 per cent of Indian students, 56 per cent of Chinese students, 59 per cent of Pasifika students, 53 per cent of Māori students and 48 per cent of Korean students. Korean students and Māori students were also disproportionately represented in the students who indicated they had little confidence about their studies.

Consistent with the responses indicating that a majority of students had enrolled in a law degree intending to complete it, Table 20 shows that a high proportion of students indicated that passing their law courses in 2014 was very important to them. Students were asked in the first survey how important passing their law course(s) was to them. Students were given a five-point scale to

select from with one representing not at all important and five representing very important. Of the 662 students who answered this question, 84 per cent selected point five on the given scale.

**Table 20. Survey 1: Importance of passing law courses**

Response	Chart	Percentage	Count
1 Not important		0.8%	5
2		0.9%	6
3		3.2%	21
4		10.9%	72
5 Very important		84.3%	558
		<b>Total Responses</b>	<b>662</b>

Students must pass their first-year law courses to have the opportunity to enrol in second-year law courses. Auckland and Canterbury students must also survive an additional limitation-of-entry hurdle. Consistent with the confidence levels about university study, most students were confident at the beginning of the year that they would be admitted to second-year law. In the first survey, students were asked to rank their confidence in being admitted to second-year law on a scale of one to five with one representing no confidence and five representing very confident. Because it may be possible for a student to enrol concurrently in both first- and second-stage law courses, this was given as a further option. An alternative option was given to Waikato students, to reflect current practice at that law school, that as long as students pass their first-year law courses, they will automatically be admitted into second-year law. A final option, of not intending to study second-year law papers, was also given.

Six hundred and seventy-eight students responded to this question across the three universities. The majority of Waikato students (57 per cent) selected the option that as long as they passed their courses they would automatically be admitted to second-year law. At Auckland and Canterbury where entry into second-year law is limited, a majority of students selected point three, the neutral point, on the five-point scale, (47 per cent of Auckland students and 45 per cent of Canterbury students). More Canterbury students were very confident of being admitted (42 per cent), than Auckland students (14 per cent). Overall, 60 per cent of Auckland students selected points three, four or five on the scale, compared to 89 per cent of Canterbury students.

Consistent with responses to earlier questions indicating that most students intend to complete a law degree, very few selected the option that they did not intend to study second-year law papers (six per cent of Auckland students and no Canterbury and Waikato students).

Analysis by ethnicity revealed a number of interesting trends. Overall, New Zealand European/Pākehā and Māori students were the most confident at this point in time. Thirty-three per cent of New Zealand European/Pākehā students and Māori students were confident or very confident, compared to 17 per cent of Pasifika students, 18 per cent of Chinese students, 18 per cent of Korean students and 10 per cent of Indian students. Thirteen per cent of New Zealand European/Pākehā students and 14 per cent of Korean students indicated that they were not at all confident or not very confident about their admittance prospects, compared to 21 per cent of Māori students, 26 per cent of Indian students, 27 per cent of Chinese students and 21 per cent of Pasifika students.

This question was repeated in the second survey and 458 students answered it.

A smaller proportion of Auckland students indicated confidence in being admitted to second-year law (31 per cent compared to 60 per cent in the first survey.) The responses from Canterbury and Waikato students also showed an overall drop in confidence levels. Eighty-nine per cent of Canterbury students indicated confidence in the first survey, but only 48 per cent did so in the second survey. Ninety-four per cent of Waikato students indicated confidence in the first survey, but only 65 per cent did so in the second survey. A sizeable proportion of Auckland and Canterbury students (31 per cent and 20 per cent respectively), indicated that they did not know whether they would do well enough to be admitted to second-year law. Confidence levels dropped most at the law schools with limited entry into second-year law.

Overall, however, it was still only a small proportion of students (nine per cent) who indicated that they did not intend to study law in 2015.

Given that male students make up only 35 per cent of the total survey cohort, male students were slightly more likely on a proportionate basis to indicate that they were pretty confident that they would do well enough to be admitted to second-year law (male responses made 42 per cent of the total selecting this option). Again proportionately, more female students were very worried that their grades would not be good enough (female responses made up 74 per cent of total selecting this option).

Analysis by ethnicity revealed that confidence in being admitted to second-year law remained highest amongst Māori students and New Zealand European/Pākehā students. Chinese and Pasifika students remained the least confident of being admitted.

Despite the overall drop in confidence, students generally responded positively to a question in the second survey asking if, no matter what the outcome of any selection process, they intended to continue studying law in 2015. For those no longer confident that they would be admitted to second-year law, this would likely entail repeating stage one law courses in 2015. A total of 454 students answered this question and results are summarised in Table 21 below. Eighty-two per cent of Waikato students were definite that they would do so, compared to 64 per cent of Canterbury students and 39 per cent of Auckland students. Twenty-six per cent of Auckland students were likely to do so, compared to 22 per cent of Canterbury students and five per cent of Waikato students.

Analysis by ethnicity revealed that Pasifika students were the least certain of whether they would continue their law studies: 35 per cent indicated that they intended to do so, but 35 per cent indicated they were unsure. In contrast, 62 per cent of Māori students intended to continue their legal studies, with only 14 per cent being unsure. Fifty-two per cent of Chinese students intended to continue, as did 45 per cent of Indian students, 53 per cent of Korean students and 53 per cent of New European/Pākehā students.

**Table 21. Survey 2: No matter what the outcome of any selection process, do you intend to continue studying law in 2015?**

Response	Chart	Percentage	Count
Yes I will		51.8%	235
It is likely		22.2%	101
I am unsure		15.9%	72
Probably not		4.0%	18
Definitely not (please state reason)		6.2%	28
<b>Total Responses</b>			<b>454</b>

Student views on the likelihood of their being admitted to second-year law were likely to be informed by the assessment results they had received. Students were asked in the second survey to what extent, on average, the results they had received in their law courses reflected their expectations. As Table 22 shows, the option most frequently selected was “they were about what I expected.” Overall, 48 per cent of students selected this category, with a further 20 per cent receiving results that were higher or much higher than expected. When considered in light of the overall drop in confidence in expectation of being admitted to second-year law, it seems likely that, for many students, the appreciation that continuing with their law studies might be more difficult than originally anticipated was a matter of self-realisation, rather than a result of receiving unexpectedly poor results.

Analysis by ethnicity revealed that Chinese and Indian students were more likely to have received results that were lower or much lower than their expectations: 46 per cent of Indian students fell within this category, as did 42 per cent of Chinese students, compared to 32 per cent of Korean students, 30 per cent of New Zealand European/Pākehā students, 28 per cent of Pasifika students and 21 per cent of Māori students.

**Table 22. Survey 2: To what extent, on average, have the assessment results you have received in your law courses reflected your expectations?**

Response	Chart	Percentage	Count
They were much lower than I expected		5.9%	26
They were lower than I expected		25.7%	114
They were about what I expected		48.4%	215
They were higher than I expected		16.9%	75
They were much higher than I expected		3.2%	14
<b>Total Responses</b>			<b>444</b>



The second survey also asked students to reflect on how prepared they had been by their high school experience for starting their law studies. Across the three law schools, a majority of students did not feel well prepared. Table 23 shows that, of the 445 students who completed this question, nearly 57 per cent indicated they were not prepared at all or only a little prepared.

Korean students were more likely to report that they were not prepared at all or only a little prepared: 79 per cent of Korean students did so, compared to 63 per cent of Indian students, 61 per cent of Chinese students, 59 per cent of Māori students, 52 per cent of New Zealand European/Pākehā students and 50 per cent of Pasifika students.

Proportionately, more male students considered themselves to be not too badly prepared or quite well prepared by their high school studies than did female students – male students making up 44 per cent of the responses in these categories.



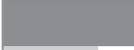



**Table 23. Survey 2: How prepared were you by your high school experience for starting your law studies?**

Response	Chart	Percentage	Count
Not applicable		14.8%	66
Not prepared at all		29.0%	129
A little prepared		27.6%	123
Not too bad		17.5%	78
Quite well prepared		8.3%	37
Very well prepared		2.7%	12
		<b>Total Responses</b>	<b>445</b>

Students were asked in the first survey what they were good at in terms of academic work, with the results shown in Table 24 below. Six hundred and sixty-one students answered this question. Students were given a range of responses to select from and were also able to add their own “other” option. Students were able to select more than one response. Fifty-eight per cent of students considered themselves to be good at essays, 53 per cent at in-class work, 38 per cent at oral presentations, but only 24 per cent at examinations. A sizeable proportion of students (20 per cent) did not know what they were good at.

A greater proportion of male students thought they were good at examinations (43 per cent of total responses) and oral presentations (42 per cent of total responses). Proportionately, more female students were unsure of what they were good at (72 per cent of total responses).

**Table 24. Survey 1: What students consider themselves to be good at? (661 total responses)**

Response	Chart	Percentage of total responses	Count
Examinations		24.2%	160
Essays		57.8%	382
In-class work		52.6%	348
Oral presentations		37.5%	248
Other, please specify ...		6.1%	40
I don't know what I am good at		20.3%	134
<b>Total Selections Made</b>			<b>1,312</b>

## 2. Well-being

Questions directed at students' feelings of well-being were included in both the first and second surveys.

The wellness question in the first survey asked students how they felt about studying law. Students were given a range of responses to choose from and also had the option of adding their own response. Students were able to select more than one response. Six hundred and sixty-two students answered this question.

Overall responses to this question are presented in Table 25. Responses indicated that students had a wide range of feelings about their legal studies: nervousness, excitement and feeling a bit stressed all ranked highly. Of note, however, is the proportion of students already feeling very stressed at the time of the first survey (18 per cent overall, but 22 per cent of Auckland students, 12 per cent of Canterbury students and 13 per cent of Waikato students).

A greater proportion of male students indicated that they felt confident (male responses made up 51 per cent of the total selecting this option, although males made up only 35 per cent of the survey cohort). In contrast, slightly more female students felt nervous (70 per cent of total responses) with a greater proportion feeling very stressed (78 per cent of total responses).

Chinese students were proportionately more likely to indicate that they felt very stressed.

**Table 25. Survey 1: How do you feel about studying law? (662 total responses)**

Response	Chart	Percentage of total responses	Count
Nervous		57.7%	382
Excited		61.0%	404
Confident		16.9%	112
OK		24.0%	159
A bit stressed		52.1%	345
Very stressed		18.1%	120
Other, please describe ...		5.3%	35
<b>Total Selections Made</b>			<b>1,557</b>

This question was repeated in qualitative form in the second survey. Three hundred and forty students responded. The most common responses indicated a positive view, examples including the following:

It has been tough but very interesting and rewarding. (Canterbury)

Confident and content – I’ve learned a lot (I hope) and enjoyed the process. (Auckland)

I love law. I love studying at Waikato, and feel that the atmosphere really encourages us all to succeed. Everyone wants to do well but they also want to see everyone else do well. People help each other. (Waikato)

Comments relating to being stressed and nervous were the next most common response, particularly from Auckland and Canterbury students. Many students combined their answers, reporting feeling both stressed and positive.

Forty-six students did report feeling dissatisfied, or feeling negative about their studies. One final interesting response was that a small number of students (10) reported feeling less stressed at the end of the year than they did at the time of the first survey.

The second survey also asked students to rate their feelings of general well-being. A total of 440 students answered this question and, as Table 26 shows, the most frequently selected response was that students felt “OK”. A higher proportion of students at Waikato (46 per cent) reported feeling good or great compared to 27 per cent of Auckland students and 36 per cent of Canterbury students. Twenty-three per cent of Auckland students reported feeling terrible or not too good, as did 17 per cent of Canterbury students and 11 per cent of Waikato students. Feelings of well-being by the time of the second survey were lowest at the law schools with limited entry into second-year law (Auckland and Canterbury).

**Table 26. Survey 2: Feelings of general well-being**

Response	Chart	Percentage	Count
I feel terrible		4.8%	21
I don't feel too good		14.3%	63
I am OK		48.2%	212
I feel good		25.0%	110
I feel great!		7.7%	34
<b>Total Responses</b>			<b>440</b>

Analysis by ethnicity showed that Māori students were the most likely to report feeling “good” or “great” (52 per cent) compared to 35 per cent of New Zealand European/Pākehā students, 33 per cent of Indian students, 31 per cent of Korean students, 21 per cent of Chinese students and 13 per cent of Pasifika students.

Chinese students were proportionately more likely to report feeling “terrible” or “not too good”: 33 per cent did so compared to 21 per cent of Korean students, 21 per cent of Indian students, 20 per cent of Pasifika students, 17 per cent of New Zealand European/Pākehā students and 10 per cent of Māori students.

Female and male students rated their well-being as being “OK” or “not too good” in roughly equal proportions. However, proportionately, slightly greater numbers of female students indicated that they felt “terrible” (70 per cent of total responses) and proportionately greater numbers of male students indicated that they felt “great” (47 per cent of total responses).

The quantitative well-being question in the first survey was tied specifically to the students’ law studies, but the question in the second survey was not, thus preventing a direct comparison between the results of the first and second survey. However the numbers of students reporting negative feelings (high levels of stress in the first survey and feeling “terrible” or “not too good” in the second survey) were generally consistent across the two surveys, although by the time of the second survey this was skewed in the sense that greater proportions of Auckland and Canterbury students fell into this category.

The results from the first and second surveys appear to show levels of well-being greater than those reported in Australian studies of first-year law students. As an example, in a recent study focusing on first-year law student well-being at Australian National University, 85 per cent of students surveyed in the first two weeks of their first semester of study reported normal or mild rates of depression, yet by the end of the first year of study, one-third of students reported rates of depression at moderate, severe or extremely severe levels.<sup>6</sup> Similar results occurred when levels

6 Molly Townes O’Brien, Stephen Tang and Kath Hall “Changing Our Thinking: Empirical Research on Student Wellbeing, Thinking Styles and the Law Curriculum” (2011) 21 *Legal Ed Rev* 149 at 159. Similar results were obtained in surveys of first-year law students at Monash University: Anthony Lester, Lloyd England and Natalia Antolak-Saper “Health and Wellbeing in the First Year: The Law School Experience” (2011) 36 *Alt LJ* 47. Similar results have also been reported in the USA: see Andrew Benjamin and others “The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers” (1986) 11 *American Bar Foundation Research Journal* 225 at 241; Kennon Sheldon and Lawrence Krieger “Does legal education have undermining effects on law students? Evaluating changes in motivation, values, and well-being” (2004) 22 *Behavioral Sciences and the Law* 261 at 271.

of stress were investigated. Reported levels of well-being at the beginning of the year had also dropped significantly by the end of the year.

There are no similar studies focusing on the well-being of first-year New Zealand law students. However reported levels of well-being in this study again appear to be higher than those reported in a survey of law students across the six New Zealand law schools carried out by the New Zealand Law Students’ Association in 2013. Eight hundred and eighty students completed the survey with 64 per cent reporting that they had high levels of stress as a result of their legal studies and 27 per cent reporting that they had developed a clinical mental health problem since beginning their university studies.<sup>7</sup>

The students participating in this study did not reveal levels of well-being significantly different from the general population. For example, the results of the Ministry of Health’s 2006 New Zealand Mental Survey showed that 28.6 per cent of young people aged 16–24 reported experiencing a mental health disorder in the previous 12 months with anxiety (17.7 per cent) and mood disorders (12.7 per cent) being the most frequently reported.<sup>8</sup>

One final question in the second survey, although not strictly a well-being question, asked students how satisfied they were with their experience at law school in 2014. Table 27 shows that, of the total of 443 students who answered this question, 62 per cent or more were either “satisfied” or “very satisfied”, a trend apparent across each of the three law schools. However, analysis by ethnicity revealed that Pasifika students were least likely to report themselves as satisfied or very satisfied: 39 per cent of Pasifika students did so compared to 42 per cent of Chinese students, 47 per cent of Korean students, 58 per cent of Indian students, 59 per cent of Māori students and 71 per cent of New Zealand European/Pākehā students.

**Table 27. Survey 2: How satisfied are you with your experience at Law School in 2014?**

Response	Chart	Percentage	Count
Very dissatisfied		1.6%	7
Dissatisfied		5.2%	23
Neutral		30.9%	137
Satisfied		50.6%	224
Very satisfied		11.7%	52
<b>Total Responses</b>			<b>443</b>

7 New Zealand Law Students Association “Mental Health Survey Results” (2013) <[www.nzlsa.co.nz](http://www.nzlsa.co.nz)>.

8 <[www.youthstats.mhd.govt.nz](http://www.youthstats.mhd.govt.nz)>. Ministry of Health *Te Rau Hinengaro: The New Zealand Mental Health Survey* (2006). These statistics were subsequently cited in a Mental Health Commission report, suggesting these are the most current statistics: Mental Health Commission *Child and Youth Mental Health and Addiction* (August 2011) at 4–5.

## IV. COMMENT

### A. Overall Trends

For the most part, the law students in this study commenced their law studies at their local university as a homogenous group. Although there was some variation when the data for Waikato law school was separately analysed, overall, students were, for the most part, young with no prior tertiary education experience. They entered law school for idealistic reasons, although, for many, these were tempered with a degree of pragmatism. They demonstrated a clear commitment to completing a law degree and most contemplated a future career in the law. Most had no family connection with the law.

Although many considered they had not been prepared by their experience at high school for the study of law, most appeared to be willing to rise to the challenge they faced. They were generally clear about the skills they expected to gain and, for the most part, reported achieving their expectations. They reported high levels of contact with teaching staff and were, for the most part, satisfied with the support they received from their teachers. Most also appeared to develop a relationship with their law student peers, with many reporting studying with other students on a regular basis.

Although most reported feeling confident to some degree about being admitted to second-year law at the beginning of the year, the practical reality is that not all will achieve this. Some may not pass their first-year papers, others studying at Auckland and Canterbury may not be invited into second-year law due to limitation of entry, even if it is the case that they pass their first-year law courses. By the time of the second survey, confidence levels had dropped, but a majority remained committed to the study of law. The drop was most notable at Auckland and Canterbury, the law schools with limited entry to second-year law. Most also reported receiving assessment results in line with their expectations. Their overall reported levels of well-being did not appear to change over the course of their year of study and remained consistent with reported levels in the wider community. Again, however, when results were separately analysed by law school, reported levels of well-being were lower at the law schools with limited entry into second-year law by the time of the second survey. However, overall, most students reported themselves satisfied with their law school experience.

What we believe is particularly interesting about this study is that a more detailed analysis by gender and ethnicity reveals particular groups with experiences that were either more positive or more negative than the norm. It is these results, which are summarised further below, that we believe require further investigation and attention.

### B. Gender

Aside from the gender imbalance in the cohort group itself (35 per cent male and 65 per cent female), significant differences between male and female students were few in terms of the core demographic data.

However some differences emerged in the reasons selected by male and female students for choosing to study law. Male students were slightly more likely to have chosen to study law because one of their parents or siblings was a lawyer and because law was a good, steady profession.

Female students were slightly more likely to have chosen to study law because they felt passionate about law and justice, wanted to help people or wanted to make a difference.

Differences of note also emerged in the subject areas in which male and female students indicated an interest. A greater proportion of male students were interested in commercial and company law, information technology law and law and sport. A greater proportion of female students were interested in traditionally female-dominated areas of legal practice, particularly family law. There were, however, no significant differences in the reported career intentions of male and female students in the second survey.

With respect to the law school experience, male and female students were in broad agreement about both the skills they expected to gain and the skills they felt they had gained by the time of the second survey. There were no significant differences between male and female students' reported satisfaction levels with the support they received from their law lecturers or in overall satisfaction with the law school experience.

Proportionately, female students were slightly more likely to study with other students. Of those male and female students who reported studying with other students, female students did so more frequently than male students. Male and female students reported that they had used the law library and online legal resources with approximately the same frequency. There was no difference in the reported membership rates of law students' associations.

A notable difference between male and female students occurred in reported confidence levels. A greater proportion of male students felt "confident" or "very confident" about studying law at the time of the first survey. By the time of the second survey, a greater proportion of male students reported themselves to be "not too badly prepared" or "well prepared" by high school for their legal studies. By the time of the second survey, a greater proportion of male students were "pretty confident" they would do well enough to be admitted to second-year law. A greater proportion of female students were more likely to be very worried that their grades would not be good enough.

A greater proportion of male students indicated that they felt confident about their law studies in the first survey. Proportionately, more female students felt nervous or very stressed. In the second survey, male and female students reported their well-being as being "OK" and "not too good" in approximately the same proportions. However, a greater proportion of female students reported themselves as feeling terrible and a greater proportion of male students as feeling great.

Overall, although female students were likely to have chosen to study law for idealistic reasons, they were consistently over-represented, although not always by a large margin, when it came to reporting negative experiences or feelings. They were less confident about their studies, more unsure of what they were good at, and more likely to feel nervous or stressed. Nevertheless these negative feelings did not appear to have an impact on overall reported satisfaction rates with the law school experience or in the support received from teaching staff.

Studies reporting greater negativity on the part of female law students are not unusual.<sup>9</sup> For example, Caroline Morris concluded in a 2005 survey of second- and third-year law students at Victoria University of Wellington:<sup>10</sup>

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9 For a useful summary of studies from the United States see Catherine Carroll and April Brayfield "Lingering Nuances: Gendered Career Motivations and the Aspirations of First-Year Law Students" (2007) 27 *Sociological Spectrum* 225.

10 Morris, above n 5, at 220.

It also seems that increased numbers of women attending law school has had little impact on the negatively gendered nature of the experience. Academically, women law students at VUW found the place more competitive than men, were more dissatisfied with their performance, spoke up less frequently in class and were less happy about it. Socially, they were less engaged with student organisations, and believed that the activities they offered were more appealing to men than women.

Morris's findings were in line with the overall trend emerging from overseas studies:<sup>11</sup>

One constant theme that has emerged from this line of work is that the law school experience is significantly gendered. ... In particular, women enter with identical grades to their male counterparts but leave with lower ones; experience a greater negative shift in their desire to use their degrees in the public interest; and are especially alienated by the teaching methods, particularly Socratic teaching, at law school (citations omitted).

What is notable is that the findings of this study revealed that female students reported more negative feelings right from the beginning of their first year of study, suggesting that these feelings may not necessarily have been engendered by their law studies. What is also notable is that these negative feelings did not appear to have had a significant and/or detrimental impact on their overall perception of their law school experience as male and female students reported very similar satisfaction levels and those satisfaction levels were, for the most part, positive. Whether these trends continue will be monitored in subsequent surveys.

### C. Ethnicity

This section reports on trends emerging in the responses from Māori, Pasifika, Chinese, Indian and Korean students. Student responses have not been analysed to determine the extent to which they reflect cultural mores and values, such as the *tikanga* of learning or the *tikanga* of knowledge in the case of Māori students.<sup>12</sup> This form of analysis is certainly warranted and is intended to be the subject of a future report. The responses are presented as they stand and in comparison with the experiences and views of other groups.

#### 1. Māori students

Forty-five students identifying as Māori (six per cent) responded to the first survey and 29 (six per cent) to the second survey. Although these numbers appear low, it appears that they represent the largest single cohort of Māori law students responding to a published study. There have been very few published studies focusing on the experience of Māori law students<sup>13</sup> and none were located focusing on the first-year experience of Māori students.

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11 At 199.

12 *Tikanga* "is the set of beliefs associated with practices and procedures to be followed in conducting the affairs of a group or an individual. These procedures are established by precedents through time, are held to be ritually correct, are validated by usually more than one generation and are always subject to what a group or an individual is able to do": Hirini Moko Mead *Tikanga Māori – Living by Māori Values* (Huia Publishers, Wellington, 2003) at 12.

13 One of the few is the LLM thesis of Mikaere Papuni-Ball, focusing on the experiences of 17 of the 23 Māori students who graduated at Waikato Law School's first graduation ceremony in 1994: Mikaere Papuni-Ball "Caught in the Cross-Fire: The Realities of Being Māori at a Bi-cultural Law School" (LLM Thesis, University of Waikato, 1996). The experience of Māori law students at Waikato Law School is also addressed in Stephanie Milroy and Leah Whiu "Waikato Law School; an experiment in bicultural legal education" (2005) 8 *Yearbook of New Zealand Jurisprudence* 173. In a 2005 report of a study focusing on the experiences of 533 second- and third-year law students at Victoria University of Wellington, the responses of the 37 Māori students were included: see Morris, above n 5.



In terms of core demographics, Māori students had the greatest proportion of students aged over 21 (30 per cent) and the greatest proportion of students studying part-time (14 per cent). Māori students were proportionately more likely to report a disability affecting their ability to study and learn compared with other ethnic groups (13 per cent did so).

Māori students were less likely to have a parent whose highest qualification was a Bachelors degree or higher and more likely to have a parent whose highest qualification was a school qualification.

Māori students were more likely to have chosen to study law because they wanted to help people or to make a difference and were less likely to see pay or the respect accorded to the legal profession as significant. Working for a non-governmental or community organisation appealed to a greater proportion of Māori students in the first survey. By the time of the second survey, Māori students were more likely than most other groups to intend to use their law degree (once completed) in a career other than private practice.

At the time of the first survey, Māori students expected to spend more time on their law studies than all other groups other than Korean students, although few actually had done so by the time of the second survey, a finding that was consistent across all groups.

Although at the time of the first survey Māori students were amongst the least confident about studying at university, at the time of both the first and second survey they (along with New Zealand European/Pākehā students) were more likely to report high confidence levels about being admitted to second-year law in both the first and second surveys. They were also more likely to report that they were very satisfied or extremely satisfied with the support they had received from their law lecturers.

Overall, where the results reported by Māori students differed from other groups, it was largely for positive reasons.<sup>14</sup> Whether this result has its source in cultural values or the general and targeted support that is available to Māori students requires further investigation, if only so that it can be shared and applied to the other groups that did not fare so well in a comparative analysis.

## 2. *Pasifika students*

An initial point of note is the large number of Pasifika students completing the survey: 83 (12 per cent) in the first survey and 36 (10 per cent) in the second survey. Pasifika students made up the second largest ethnic grouping after New Zealand European/Pākehā students. Given that no other published study focusing on the experience of Pasifika law students was located,<sup>15</sup> this makes the findings of this study of some significance.

In terms of core demographics, 78 per cent of Pasifika students were female, a significantly higher proportion than in other ethnic groups. A greater proportion of Pasifika students were aged over 21 than in all other groups except Māori students.

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14 This is in contrast to the reported experiences of indigenous law students in Australia: see Heather Douglas, "It's Not Just About Me: Indigenous Students' Insights About Law School Study" (1998) 20 *Adelaide Law Review* 315; Asmi Wood "Law Studies and Indigenous Students' Wellbeing: Closing the (Many) Gaps" (2011) 21 *Legal Ed Rev* 251.

15 There is, however, a recent study focusing on Māori and Pasifika students in a foundation health course at the University of Auckland: see Elena Curtis and Sonia Townsend "Improving Indigenous and ethnic minority student success in foundation health study" (2012) 17 *Teaching in Higher Education* 589.

Pasifika students were less likely to have a parent whose highest qualification was a Bachelors degree or higher and more likely to have a parent whose highest qualification was a school qualification.

Pasifika students were more likely to have chosen to study law because they wanted to help people or to make a difference and less likely to see pay or the respect accorded to the legal profession as significant. Working for a non-governmental or community organisation appealed to proportionately greater numbers of Pasifika students. They were more interested in community and family law than any other ethnic group. By the time of the second survey, Pasifika students were more likely than students from other ethnicities to intend to use their law degree (once completed) in a career other than private practice.

Pasifika students were the most likely to have reported in the second survey that they had spent only one to two hours on their legal studies, as well as being the most likely to report spending nine or more hours each week on their studies. They were the most likely to report that they had studied with other students.

Pasifika students were amongst those most likely to report they that were not confident of being admitted to second-year law in both the first and second surveys. They were more likely to have reported in the second survey that they were unsure of whether they would continue their legal studies. They were less likely to have reported themselves very satisfied or extremely satisfied with their law school experience and were among those least likely to report feeling good or great at the time of the second survey.

Pasifika students were proportionately more likely than all other groups (except New Zealand European/Pākehā) to report belonging to a law students' association.

Overall, where the responses of Pasifika students differed from other groups, it was for negative reasons, a matter which warrants further investigation.

### *3. Indian students*

Forty-five students in the cohort responding to the first survey identified as Indian, just under seven per cent of the total cohort. Twenty-four (five per cent) responded to the second survey. The answers of Indian students stood out from other groups in only a few instances, and for mixed reasons.

Indian students, along with Korean students, were proportionately most likely to have a parent whose highest qualification was a Bachelors degree or higher.

A career in private legal practice appealed to proportionately greater numbers of Indian students and they were more interested in company and commercial law than most other ethnic groups.

Indian students were proportionately amongst those most likely to report receiving results that were lower or much lower than their expectations.

### *4. Chinese students*

Forty-five students in the cohort responding to the first survey identified as Chinese, just under seven per cent of the total cohort, with 33 (six per cent) responding to the second survey.

Chinese students were amongst those most likely to have a parent with a law degree, were most likely to have chosen to study law because it is a well-respected profession, and were more interested in company and commercial law than other ethnic groups.

Chinese students were amongst those most likely to report receiving results that were lower or much lower than their expectations and also amongst those most likely to report that they were

not confident of being admitted to second-year law in both the first and second surveys. They were more likely to report feeling very stressed at the time of the first survey and most likely to report they were feeling terrible or not good in the second survey. They were also amongst the least likely to report feeling good or great or to be very or extremely satisfied with their law school experience.

We note that the number of Chinese students responding to the surveys was not necessarily representative of the total number of Chinese students in the total first-year cohort: overall the participating law schools report that Asian students make up a far greater proportion of the total cohort. However it is a point of concern that the Chinese students answering both the first and second surveys stood out in terms of negative responses. Further investigative work needs to be done to ascertain the extent to which the responses of the Chinese students participating in this study are representative of Chinese students in general.

### *5. Korean students*

Forty-five students in the cohort responding to the first survey identified as Korean, just under seven per cent of the total cohort, with 19 (four per cent) responding to the second survey.

Korean students, along with Indian students, were proportionately most likely to have a parent whose highest qualification was a Bachelors degree or higher and the most likely to have a parent with a law degree. They were more likely to have chosen to study law because it is a well-respected profession and a career in private legal practice appealed to proportionately greater numbers of them.

Korean students were the most likely to report that they were not prepared or only a little prepared by their high school experience for starting their law studies. They expected to spend more time on their law studies than all other groups at the time of the first survey, but most did not fulfil this expectation. They were the group least likely to report that they had studied with other students and the most likely to report that they were good at examinations. Finally, they were less likely to feel very or extremely confident about their university studies at the time of the first survey.

Korean students, it seems, have slightly different study habits and perceived strengths in comparison with other groups, but this does not appear to have translated into a significantly more negative first-year experience, as appears to have been the case with Chinese and Pasifika students. We do, however, note that the numbers of Korean students participating was not necessarily representative of the total number of Korean students in the total first-year cohort: overall the participating law schools report that Asian students make up a far greater proportion of the total cohort.

## V. CONCLUSION

At this early stage of the project only tentative suggestions can be made about possible future directions for the research. Subsequent phases of the project comprise further annual surveys of the same 2014 cohort of students, as they progress through their studies and enter the workforce, in order to determine their developing understanding of skills required and their actual law school, and then career, experience. A particular challenge is likely to be maintaining the numbers in the cohort especially given that limitation of entry into second-year law at both Auckland and Canterbury is likely to have a significant negative impact on the number in the original cohort who are still studying law in 2015.

As the study progresses, focus groups and interviews will be used to “drill down” further into areas of particular interest. The two areas which currently stand out in our results as requiring more detailed investigation are gender and ethnicity differences with a view to determining why and when the differences we have identified occurred and the extent to which they continue over the students’ subsequent years of study. We also intend to investigate whether students’ preferred legal career destination changes over the time of their studies and, if so, when the change occurs. One further point for investigation is what students actually do in the time that they spend on their legal studies. Whilst it is beyond the scope of this study, a more detailed investigation of the effect of limited entry into second-year study on student well-being and stress levels would also be of interest.

We are excited at the comprehensive data we have gathered from the first phase of this longitudinal study. We believe this data, together with the data to be elicited in later phases of the project, will provide an invaluable resource for all the New Zealand law schools; and it is our hope that the information derived from our project will lead to positive outcomes for the staff and students involved in the teaching and learning of law in New Zealand.

# YOUR DIGITAL IDENTITY AND ASSETS ARE IMPORTANT. SO WHAT CAN YOU DO TO PROTECT THEM?

BY CAREY CHURCH\*

## I. INTRODUCTION

Who we are and what we have has always been important to us. In the digital age, where 90 per cent of households in New Zealand are connected to the Internet, who we are online and what have in the digital realm is becoming more important.<sup>1</sup> For many people their digital identity and assets are located in multiple online places and jurisdictions. Commonly, they are also not well protected. In addition to protecting our identity, assets and memories against fraud and theft, we also need to ensure that we take care of how we are perceived online.

Between 0.2 per cent and 7.0 per cent of people read the terms and conditions of online agreements that they enter into.<sup>2</sup> By having a clear understanding of the terms and conditions of the agreements that we are entering into online and the privacy that we are often forgoing, we can start to take actions to protect our identity, assets and reputation.

There are various methods you can use to protect your digital identity and assets, which are not difficult to put in place – it just takes a little time. This paper addresses the reasons that you need to protect your identity, what the legal arrangements are that you are likely to be entering into and outlines strategies to retain your privacy and reputation, and to protect your online self against fraud.

## II. YOUR DIGITAL IDENTITY

### A. *What is Your Digital Identity?*

Your identity is an accumulation of your experiences, knowledge and beliefs, as well as what you look like and how you communicate. You can have different identities at different times of your life and in different settings. Your identity while on holiday may be different to your work identity. We can choose which parts of our identity other people see in different situations.

Similarly, we can choose our digital identity. We can construct different identities or choose to only show some of ourselves to certain audiences. We can engage with others under pseudonyms providing anonymity or we can share all our thoughts and beliefs under our real identity.

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1 Statistics New Zealand “Internet Service Provider Survey 2014” (2014) <[www.stats.govt.nz/browse\\_for\\_stats/industry\\_sectors/information\\_technology\\_and\\_communications/ISPSurvey\\_HOTP2014/Commentary.aspx](http://www.stats.govt.nz/browse_for_stats/industry_sectors/information_technology_and_communications/ISPSurvey_HOTP2014/Commentary.aspx)>.

2 “Skandia Takes the Terminal out of Terms and Conditions” *PR Newswire* (online ed, 23 May 2011); Yannis Bakos, Florencia Marotta-Wurgler and David Trossen “Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts” (2014) 43 JLS 1.

As an Australian Government publication outlines:<sup>3</sup>

Your identity is one of the most valuable things you have. Being able to prove who you are is important for most aspects of your life – from getting a home loan to starting a new job, to buying something online. If criminals steal your identity you may find everyday activities like these more difficult. The stress and financial costs can last for years.

Jackson and Hughes divide our identity into our “legal identity” and “private identity”.<sup>4</sup> Further definition is provided by Boston Consulting Group: “[d]igital identity is the sum of all digitally available information about an individual”.<sup>5</sup> They categorise digital identity as having three types of characteristics:<sup>6</sup>

1. Inherent characteristics (Where do you come from?)
  - a. Date of birth
  - b. Gender
  - c. Nationality
2. Acquired characteristics (What do you do?)
  - a. Address
  - b. Medical Record
  - c. Purchase history
3. Individual characteristics (What do you like?)
  - a. Favourite brands
  - b. Taste in music
  - c. TV shows
  - d. Hobbies

## B. *Should You use a Pseudonym or Your Real Identity?*

Protecting your identity may mean that you want to present yourself under a pseudonym, or remain anonymous. There are many reasons why you may wish to use a pseudonym.

This may depend on the type of site that you are using. If you are using a dating site, you may wish to protect your privacy until you are comfortable with sharing more information. Whereas participating under a pseudonym is expected in the online virtual world “Second Life”.<sup>7</sup> When

<sup>3</sup> *Protecting your Identity, What Everyone needs to Know* (2nd ed, Commonwealth of Australia, 2013).

<sup>4</sup> Margaret Jackson and Gordon Hughes *Private Life in a Digital World* (Thomson Reuters, NSW, 2015) at 14: “Legal identity, that is information that might be required to identify an individual for legal purpose, such as to gain government benefits or to be involved in financial transactions, and a private identity, that is information that makes you who you are, such as your likes and dislikes about products, and how you like to spend your time.”

<sup>5</sup> The Boston Consulting Group “The Value of Our Digital Identity” (November 2012) <[www.libertyglobal.com/PDF/public-policy/The-Value-of-Our-Digital-Identity.pdf](http://www.libertyglobal.com/PDF/public-policy/The-Value-of-Our-Digital-Identity.pdf)> at 3.

<sup>6</sup> Jackson and Hughes, above n 4, at 14.

<sup>7</sup> “What is Second Life?” Second Life <<http://secondlife.com/whatis>>.

you comment on news items or blogs that have a strong following, you may choose to post under a pseudonym so that your identity remains anonymous. Journalists and commentators also use pseudonyms as a tool for protection.<sup>8</sup>

When you use sites where your general information is available to the public, pseudonyms can assist you in sharing part of your identity with a specific group of people (your sexuality, religion, beliefs), rather than everyone you know. However, some social media sites (including Facebook) require you to use your “real name” at all times. This policy is controversial, it has been criticised as being “arbitrarily enforced” and as limiting freedom of speech.<sup>9</sup> A German court has instructed Facebook to allow people to use pseudonyms, finding that forcing people to stick to their real names, rather than their chosen names, violated their privacy rights.<sup>10</sup>

While there are legal and genuine reasons for remaining anonymous, the ability to “hide” behind another identity can create opportunities for illegal activities.<sup>11</sup> However, it is important to note that with technological innovations “it’s very hard to preserve anonymity”.<sup>12</sup>

### C. *What are Your Digital Assets?*

Anything that has value or is useful to you is an asset.<sup>13</sup> That value does not have to be financial. It can be a memory, a skill, knowledge, or a relationship. Our digital assets cover a wide range of things, including:

- (a) personal computers, mobile devices, tablets, e-readers, cameras;
- (b) personal information on work computers and devices;
- (c) email addresses and emails;
- (d) financial arrangements (banking, investments);
- (e) Social media profiles (Facebook, Instagram, LinkedIn, Twitter);
- (f) photos (on your computer, or in iCloud, Google +, Flickr, Shutterfly);
- (g) purchased items (iTunes, Kindle, Amazon, magazine subscriptions);
- (h) your reputation;
- (i) any credits on e-commerce sites (PayPal, eBay, Trade Me);
- (j) your blog, personal or family domain name;
- (k) credits that you have through loyalty programmes, Frequent Flyer Mile programmes;
- (l) your medical records and tax documents; and
- (m) intellectual property, copyrighted materials, trademarks and any code that you have written and own.

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8 Nadia Khomami “Journalist Laurie Penny banned from Facebook for using pseudonym” *The Guardian* (online ed, 24 June 2015).

9 Nadia Drake “Help, I’m Trapped in Facebook’s Absurd Pseudonym Purgatory” *Wired* (online ed, 19 June 2015).

10 Julia Fioretti “German regulator orders Facebook to allow pseudonyms” *Reuters* (online ed, 28 July 2015).

11 Hannah Gaiss “Anonymity helps us curate our online selves” *Al Jazeera* (online ed, 9 December 2014).

12 John Edwards “The-New-I-AM-Identity” (Te Papa Tongarewa, 18–19 May 2015) The Privacy Commissioner at 8 <[www.privacy.org.nz/assets/Files/Speeches-presentations/The-New-I-AM-Identity-Conference-Speech-John-Edwards.pdf](http://www.privacy.org.nz/assets/Files/Speeches-presentations/The-New-I-AM-Identity-Conference-Speech-John-Edwards.pdf)>.

13 Collins English Dictionary “asset” <[www.collinsdictionary.com/dictionary/english/asset](http://www.collinsdictionary.com/dictionary/english/asset)>.

### D. *What is the Value of Your Digital Life?*

According to research in the United Kingdom at the end of 2013, the average person owns:<sup>14</sup>

- 42 e-books;
- 30 TV shows;
- 2678 individual songs; and
- 28 digital films.

The value of United Kingdom consumers' digital assets was £25 billion. Adjusting for population and currency, on this basis, New Zealand consumers have \$3.9 billion in digital assets.<sup>15</sup>

Our digital devices store much of these assets; 73 per cent of people store personal photos and videos on their digital device, 69 per cent store personal emails and messages and 57 per cent store music.<sup>16</sup>

## III. WHAT LEGAL RIGHTS DO YOU HAVE IN RELATION TO YOUR DIGITAL IDENTITY AND ASSETS?

### A. *Ownership*

It is a common assumption that we own everything relating to our identity and that when we purchase something, we have full ownership of it. Historically, when purchases were of physical items and our identity was limited to our name, date of birth, address and our physical appearance, this assumption was probably valid.

However, today it is vital to understand the legal relationships that you enter into when you create a digital presence or purchase a digital asset.

#### 1. *Is your identity your property?*

Your "identity" is recognised when it is stolen and the crime of identity fraud is perpetuated.<sup>17</sup> Your identity is generally not considered to be property, but may be a personal property right.<sup>18</sup> Since 1890 the issue of whether the rights of an individual should be covered by property law has been raised "again and again", with no current resolution.<sup>19</sup>

However, in the New Zealand Crimes Act 1961, the definition of property indicates that a person's identity may indeed be considered as property.<sup>20</sup> In *Davies v Police*, when finding that Internet usage is property, the Court identified that all personal rights in property are a "chose

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14 PWC "Digital Lives: we value our digital assets at £25 billion" (2013) <[www.pwc.co.uk/cyber-security/insights/digital-lives-we-value-our-digital-assets-at-25-billion.jhtml](http://www.pwc.co.uk/cyber-security/insights/digital-lives-we-value-our-digital-assets-at-25-billion.jhtml)>.

15 United Kingdom Population 64.1m; New Zealand population 4.5m.; Exchange rate 1NZD:£0.45.

16 Edwards, above n 12.

17 "Protect yourself from identity theft" (25 March 2015) New Zealand Government <[www.govt.nz/browse/consumer-rights-and-complaints/protect-yourself-from-identity-theft](http://www.govt.nz/browse/consumer-rights-and-complaints/protect-yourself-from-identity-theft)>.

18 Jackson and Hughes, above n 4, at 20.

19 Jackson and Hughes, above n 4, at 20.

20 Crimes Act 1961, s 2: "property includes real and personal property, and any estate or interest in any real or personal property, money, electricity, and any debt, and anything in action, and any other right or interest."



in action”.<sup>21</sup> If personal identity is legally considered to be property in New Zealand, additional remedies would be available other than those outlined here. However, these would be subject to any contractual agreements that you have willingly entered into.

## 2. *Physical digital assets purchased*

When you purchase a physical digital asset (i.e. computer, phone, tablet) these items become your property. You own these physical assets and you are protected by a variety of legislation in New Zealand.<sup>22</sup> However, you only own the box. To make the box work you require software, and you can only access this through purchasing a licence.

## 3. *Intangible digital assets purchased*

In the last month of 2014, 37 per cent of Internet users purchased music to download, 35 per cent purchased an e-book and 33 per cent purchased a TV/film download to keep.<sup>23</sup> However, the “traditional” purchase rules (you pay, you own the asset), do not apply to these digital assets.

Digital purchases are commonly sold subject to Terms and Conditions (T&C).<sup>24</sup> These purchases are also often subject to privacy policies which state that the purchase provides a “licence”, not ownership.<sup>25</sup>

When making a purchase, and accepting the T&C, you are entering into a contract with the seller.<sup>26</sup> There are two main types of agreements that you are likely to encounter: “click-wrap” and “browse-wrap”. A click-wrap agreement is where you cannot go any further with a purchase without clicking a button or a tick-box to “agree” to the T&C. The T&C are presented for you to read and review before you “accept”. If you don’t accept, you will not be able to continue with your purchase. A browse-wrap agreement is where the T&C are posted on the website, but there is no requirement for you to acknowledge that you have read, seen or agreed to them.

These contracts are enforceable when a user has “actual or constructive notice of the terms and conditions prior to using the website or completing the relevant transaction”.<sup>27</sup>

When purchasing computer software it is likely that you will be required to “agree” to an End User Licence Agreement (EULA).

## 4. *Do we actually read and understand the Terms and Conditions and Privacy Policies?*

These T&C, privacy policies and EULAs can be long, complicated and written in language that the average person would find difficult to understand. The current Apple agreement for New Zealand

21 *Davies v Police* [2008] 1 NZLR 638 (HC) at [32]; David Harvey *internet.law.nz: selected issues* (4th ed, LexisNexis, Wellington, 2015) at 302.

22 Sale of Goods Act 1908; Consumer Guarantees Act 1993; Fair Trading Act 1986.

23 “Online and mobile content which internet users paid for in the past month as of 4th quarter 2014” (2015) Statista <[www.statista.com/statistics/388215/paid-online-mobile-content](http://www.statista.com/statistics/388215/paid-online-mobile-content)>.

24 Also referred to as Terms of Service or Terms of Use.

25 Dan Gillmor “The Bruce Willis dilemma? In the digital era, we own nothing” *The Guardian* (online ed, 4 September 2012).

26 The Terms and Conditions fulfil the legal requirements of contract formation: 1. Offer, 2. Acceptance, 3. Communication of Acceptance, 4 Certainty, 5. Intention to be Legally Bound. See John Burrows, Jeremy Finn and Stephen Todd *The Law of Contract in New Zealand* (4th ed, LexisNexis, Wellington, 2012) at 3.2.3.

27 Karen Ngan “Internet and the Law: Enforceability of browse-wrap terms and conditions” (4 April 2013) Simpson Grierson <[www.simpsongrierson.com/articles/2013/internet-and-the-law-enforceability-of-browse-wrap-terms-and-conditions](http://www.simpsongrierson.com/articles/2013/internet-and-the-law-enforceability-of-browse-wrap-terms-and-conditions)>.

is 48 pages long.<sup>28</sup> In 2011, research undertaken by Skandia in the United Kingdom identified that only 7 per cent of adults read the T&C before agreeing. Of the people who don't always read them, 43 per cent said they are boring or contain wording they don't understand.<sup>29</sup>

Since 2011 digital purchasing has increased, and there is little reason to believe that more people will be reading the T&C. This suggests that there is a lack of awareness and knowledge of what the purchasers' obligations are, and about what they are actually purchasing. A 2009 study by New York University School of Law on "actual" behaviour raises questions about how accurate the 7 per cent self-reported number is. In the survey, they tracked 48,154 visitors to 90 software companies over a period of one month. The survey found that only 0.2 per cent of "shoppers" accessed the EULA for at least one second.<sup>30</sup>

### 5. *What should you look for in these agreements?*

You should be aware of the obligations that you are entering into. These agreements (and your associated rights and obligations) are subject to continuous change. Continued use of some services is enough for you to have deemed acceptance of changes without notice.<sup>31</sup> Some changes provide you with new rights. Apple and Amazon have introduced "family sharing" for digital purchases, which enables your "licence" to be used by up to six family members, expanding your rights.<sup>32</sup> Other changes (like the recent Spotify change in privacy rules) erode your privacy and impose additional obligations on you.<sup>33</sup>

In 2008 a Carnegie Mellon study estimated that it would take the average Internet user 75 days to read all their privacy policies. As well as privacy policies, there will be T&C, possibly a EULA and other relevant legal documentation to be read.

To understand your key obligations and rights, below are some crucial things to do or consider in relation to these agreements:

1. Read the sections in ALL CAPITALS. These are the "important" words.
2. Will my information be shared with third parties and affiliates? How?
3. Can I opt out? How will the contract be terminated? What notice periods are required?
4. What are my legal options in a dispute? Am I limited to arbitration only?
5. What am I allowed to do? What am I not allowed to do?
6. What waivers or releases am I agreeing to? Can the company use my information without my permission? Am I agreeing to give up any claim against the company? Do I have any rights in regards to copyright?

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28 Apple "Terms and Conditions" <[www.apple.com/legal/internet-services/itunes/nz/terms.html](http://www.apple.com/legal/internet-services/itunes/nz/terms.html)>.

29 *PR Newswire*, above n 2.

30 Bakos, Marotta-Wurgler and Trossen, above n 2.

31 Burrows, Finn and Todd, above n 26 at 3.2.3.

32 "About Family Library" Amazon.com <[www.amazon.com/gp/help/customer/display.html?nodeId=201620400&ref\\_=hh\\_myx\\_learn\\_more](http://www.amazon.com/gp/help/customer/display.html?nodeId=201620400&ref_=hh_myx_learn_more)>.

33 Gordon Gottsegen "You can't do squat about Spotify's eerie new privacy policy" *Wired* (online ed, 20 August 2015).

### 6. *What about “free” services?*

Providing “free” services has become a highly profitable business model.<sup>34</sup> Facebook, Twitter, Instagram and most social media platforms provide a “free service” to users. Hotmail and Gmail are the most popular “free email” services. However, there is no free lunch. Gmail “filters” your emails – to check for spam, but also so that they can target advertising to you.<sup>35</sup> You agreed to this when you accepted their T&C.

Along with other “free services” Google and Facebook collect information, share that information with “third parties” and target advertising to you. They learn a lot of information about you and you have given them permission to use the information. The T&C that you agree to can also mean that you forfeit any copyright to images and words that you upload.

Things to consider when you sign up to a free service should include:<sup>36</sup>

1. What right do I have to my content?
2. What uses can the provider make of my content?
3. How can and can’t I use this service?

### 7. *Protecting your copyright*

If you are uploading words, photos or videos to social media websites, blogs or other online platforms you need to be aware of whether you retain any copyright or intellectual property in those assets. You should also search T&C to see whether they include the words “perpetual”, “irrevocable”, “fully paid” “royalty-free”, “exclusive licence” or “by all means and in any media now known or hereafter developed”.<sup>37</sup>

While the agreement may confirm that you retain ownership, you may be granting an almost unlimited licence to have your content “transferred”; “sub-licensed” to third parties.<sup>38</sup> It is important that you read and understand the context of the words, and relate the information to the rest of the agreement.

### 8. *Are these likely to be unfair contracts?*

As these are “standard form” consumer contracts, they are subject to the unfair contract terms provisions in the Fair Trading Act effective from March 2015. This raises questions about the ongoing validity of these T&C.<sup>39</sup>

As well as providing a “grey list” of potentially unfair terms, a term must also be assessed for transparency and viewed in light of the contract as a whole. Transparency means that a term is:<sup>40</sup>

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34 Liyan Chen “The World’s Largest Tech Companies: Apple Beats Samsung, Microsoft, Google” *Forbes* (online ed, 12 May 2015).

35 Sharon Gaudin “There’s no free lunch when it comes to Google’s Gmail” *Computerworld* (online ed, 15 August 2013).

36 Thorin Klosowski “How to Quickly Read a Terms of Service” *Lifhacker* (online ed, 12 March 2012).

37 Jim M Goldstein “How I evaluate Terms of Service for Social Media Web Sites” JMG Galleries <[www.jmg-galleries.com/blog/2011/07/08/how-i-evaluate-terms-of-service-for-social-media-web-sites-google](http://www.jmg-galleries.com/blog/2011/07/08/how-i-evaluate-terms-of-service-for-social-media-web-sites-google)>.

38 “What is yours stays yours – oh really?” (October 2014) Terms of Service; Didn’t Read Blog <<http://blog.tosdr.org/posts/tosdr-in-action-owned>>.

39 Steve Nightingale and others “Online Terms and Conditions – Time for a Revamp?” (5 December 2014) Buddle Findlay <[www.buddlefindlay.com/article/2014/12/05/online-terms-and-conditions-time-for-a-revamp](http://www.buddlefindlay.com/article/2014/12/05/online-terms-and-conditions-time-for-a-revamp)>.

40 Fair Trading Act, s 2(1).

- (a) expressed in reasonably plain language; and
- (b) legible; and
- (c) presented clearly; and
- (d) readily available to any party affected by the term.

9. *Has there been “informed consent” by the consumer when entering into this agreement?*

In the United Kingdom concern has been expressed by legislators that the wording of these agreements “are simply too long and complex for any reasonable person to make any real sense of”.<sup>41</sup> The report also finds that for the purpose of enabling informed consent “the terms and conditions are simply not fit for purpose.”<sup>42</sup> Through upgraded privacy guidelines and applying unfair terms legislation, the United Kingdom is addressing these issues.<sup>43</sup>

B. *Criminal Law – Identity Theft and Computer Crimes*

In a variety of jurisdictions, because your “identity” is not considered to be property, it cannot be stolen.<sup>44</sup> Without specific legislation to address identity theft, the crime is often categorised under fraud or forgery crimes.<sup>45</sup> In New Zealand, the Crimes Act provides effective tools to law enforcement for crimes involving computers in identity theft cases.<sup>46</sup> There is also specific protection relating to impersonation in New Zealand law.<sup>47</sup>

C. *Using the Law to Protect your Reputation*

Your reputation is an important part of your identity. In New Zealand the Defamation Act 1992 provides recourse if you can prove the required tests. If you can prove that your personal property right of your identity is being “passed off” you can take civil action.<sup>48</sup> Intellectual property law and copyright law can assist you with protecting any trademarks or items or representations that fulfil the required criteria.<sup>49</sup>

1. *The right to be forgotten*

Principle 7 of the Privacy Act 1993 provides assistance for you to get information corrected if you think it is wrong, inaccurate, out of date, incomplete or misleading.<sup>50</sup> However, the questions of

41 House of Commons Science and Technology Committee *Responsible Use of Data – Fourth report of session 2014–2015* (House of Commons United Kingdom, 19 November 2014) at 3.

42 At 3.

43 United Kingdom Government “Response to Responsible Use of Data recommendations” (5 March 2015) <[www.publications.parliament.uk/pa/cm201415/cmselect/cmsctech/1086/108604.htm](http://www.publications.parliament.uk/pa/cm201415/cmselect/cmsctech/1086/108604.htm)>.

44 Jackson and Hughes, above n4 at 36.

45 *R v John Kenneth Slavich* [2008] NZCA 116 at [3]; Crimes Act, ss 255–265, Forgery; ss 240–242, Crimes involving deceit; s 228, Dishonestly taking or using a document; s 217, Definition of Document.

46 Crimes Act, ss 248–252; *R v Grygoruk* HC Auckland CRI 2006–092–12831, 23 May 2008.

47 Immigration Act 2009, s 346; Land Transport Act 1988, s 75; Policing Act 2008, s 48; Civil Aviation Act 1990, s 55.

48 Jackson and Hughes, above n 4, at 21.

49 Trademarks Act 2002; Copyright Act 1994.

50 Richard Stephen “Bankruptcy and the right to be forgotten” (20 August 2015) Office of the Privacy Commissioner <[www.privacy.org.nz/blog/bankruptcy-and-right-to-be-forgotten](http://www.privacy.org.nz/blog/bankruptcy-and-right-to-be-forgotten)>.

jurisdiction complicate matters if you are looking to correct information held by an organisation that is not clearly within New Zealand jurisdiction.

The Privacy Commissioner has raised the question (presently unresolved) about how Principles 7, 8 and 9 of the Privacy Act would operate if you wanted to get Google to adjust information.<sup>51</sup>

## IV. HOW CAN YOU PROTECT YOUR DIGITAL IDENTITY AND ASSETS?

### *A. Why do You Need to Protect Your Digital Identity and Assets?*

In the physical world we protect our assets by locking doors, setting burglar alarms or putting in place insurance policies. We manage our identities by being careful who we associate with, by choosing to be law abiding and by deciding how we present ourselves.

In the digital world the rules shouldn't be any different. You may have "nothing to hide" but your digital footprint builds up your digital identity. This information has commercial value to other people. Your footprint can include the information that you upload, your location settings, your online shopping and filtering of your email services. By monitoring these activities while you are using your computer and mobile devices and using small bits of code in "cookies", data collectors can find an average of 50 different attributes about you.<sup>52</sup> According to TRUSTe, the 100 most widely used websites are monitored by more than 1,300 firms. Some of these firms share data with other outsiders, an arrangement known as "piggybacking".<sup>53</sup>

Whether you are managing your real or "constructed" identity there are five reasons that you need to manage and protect your identity.<sup>54</sup>

#### *1. Protect against identity theft and fraud*

Up to 133,000 people may be victims of identity theft in New Zealand each year.<sup>55</sup> Identity theft is when people use your information and pretend to be you for their own gain. Your password and information can be exposed in four main ways: a data breach of information at a site you have used; by a "brute force attack" where hackers work out your password; by a "scam" where you are tricked into giving your information or if the hacker deliberately targets you. Since 2013, more than 3.673 trillion records have been hacked globally.<sup>56</sup> In the first seven months of 2015, the seven largest hacks included over 163,000,000 records.<sup>57</sup> Many of these 2015 targets were for sensitive information, including health and financial information and the Ashley Madison "cheating" site.

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51 John Edwards "A right to be forgotten for New Zealand" (1 July 2015) Office of the Privacy Commissioner <[www.privacy.org.nz/blog/right-to-be-forgotten](http://www.privacy.org.nz/blog/right-to-be-forgotten)>.

52 "Getting to Know You" The Economist (online ed, 13 September 2013).

53 Stephen, above n 50.

54 Internet Society "Your Digital Footprint Matters" Internet Society <[www.internetsociety.org/your-digital-footprint-matters](http://www.internetsociety.org/your-digital-footprint-matters)>.

55 Department of Internal Affairs "What is identity theft?" New Zealand Government <[www.dia.govt.nz/Identity---What-is-identity-theft](http://www.dia.govt.nz/Identity---What-is-identity-theft)>.

56 SafeNet "Breach Level Index" (2016) <[www.breachlevelindex.com/#sthash.cwcrxDhR.dpbs](http://www.breachlevelindex.com/#sthash.cwcrxDhR.dpbs)>.

57 Susan Xu "2015 Midyear Review: The Biggest Data Breaches Year to Date" (28 July 2015) Digital Guardian <<https://digitalguardian.com/blog/2015-midyear-review-biggest-data-breaches-year-date>>

There are three main reasons that other people might want your information:

- (a) To steal your identity to commit financial fraud (getting money from your bank accounts, buying things using your credit cards, using your information to apply for credit).
- (b) To use your identity to commit a crime, including organised crime, drug trafficking, alien smuggling, computer and cybercrimes.<sup>58</sup>
- (c) To blackmail you or damage your reputation.

## 2. *Loss of assets and memories*

Your emails, documents, photos, digital purchases and conversations can be lost to you in a virus or ransomware attack. Unless you have regularly backed up this information somewhere that is “isolated” from your computer (for examples, a separate cloud, a flash drive), these assets and memories are gone.

## 3. *Protecting your reputation*

Even if you have nothing to hide, not everything is appropriate to every audience and things can be taken out of context. Any online information about you is available with a simple Google search, whether the information is accurate or not. It is common to “check someone out” before meeting them and the information available online can have a strong influence on other people’s perceptions of who you are. 70 per cent of human resource professionals have rejected job applicants based on the information they found online – without verifying the information.<sup>59</sup>

Gaining access to your digital identity and stealing it does not have to be financially driven. Examples of non-financial attacks could be if racist and “hate” posts were made to your social media accounts.<sup>60</sup> The damage to your reputation can be irreparable, no matter how much you explain what happened.

## 4. *Your privacy: maintaining your ability to decide where and how your information is shared*

Your medical information may be relevant to be shared with your family, but not your employer. In some countries, sharing your religious affiliations may be dangerous. Just as you may choose to use a pseudonym and only reveal parts of your identity to different audiences, you may prefer that the “big data” collectors don’t see everything you are doing and share it with advertisers.

There is no easy way for you to say “no” to tracking, and no way to say “share this, but not that”. You can delete cookies and your browsing history on your computer and turn off your social media apps when you are browsing. You can manage the privacy settings on your social media sites to the extent available. However, when Google bypassed the privacy settings on Apple’s Safari browser to track people, it became clear that you might still be able to be tracked when you have taken every precaution available to you.<sup>61</sup>

It is also important to note that the organisations that are “tracking you” will release your information to the Government if they are requested to. Google provides information on the information that they have released in their Transparency Reports. Google will release

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58 Lee Ann Obringer “How Identity Theft Works” (10 September 2002) HowStuffWorks.com. <<http://money.howstuffworks.com/identity-theft.htm>>.

59 Shuzhe Yang “Understanding Personal Online Reputation Management: A Grounded Theory Study.” (2015) PACIS 2015 Proceedings, Paper 66 <<http://aisel.aisnet.org/pacis2015/66>>.

60 Mat Honan “How Apple and Amazon Security Flaws Led to My Epic Hacking” *Wired* (online ed, 8 June 2012).

61 “Safari users win right to sue Google over privacy” *BBC News* (online ed, 27 March 2015).

information for non-United States jurisdictions if there is a Mutual Legal Assistance Treaty or a joint investigation. In the last year, Google have complied with 71 per cent of requests from New Zealand covering 65 user accounts.<sup>62</sup>

Once your privacy is lost it is very difficult to get it back.

### *1. Your liberty and freedom*

Your freedom to express yourself is different around the world. If you are in a jurisdiction that has far more limited rights, and you say something online that contravenes the rules of that country, you could find yourself in prison.

Therefore, it is important to take care of what you say, how you say it, and respect the rules of the country that you are in. Digital tools have been used to pinpoint people and accuse them of committing a crime, based only on the location of a person's phone.<sup>63</sup>

## *B. What can You do to Protect Your Digital Identity and Assets?*

### *1. Take basic security measures*

- (a) Ensure that you have security (anti-virus and malware) software installed and keep it up to date on your computer and mobile devices.
- (b) Always accept software updates – they include updated virus protection.
- (c) Avoid using public computers and unsecured Wi-Fi for sensitive activities.
- (d) Be aware of common scams. Criminals are continually coming up with new ways to get your information or money. Most governments provide an “online scam” register and media may report new scams.<sup>64</sup> Ensure you keep up to date with how you can fall victim and be careful about what you open online. Only open emails from people you know, be careful about what websites you go to.
- (e) Be cautious about the information that you put on social media. It is easy for other people to cross reference this information with your other information to attack you. Check your privacy and security settings; there may be ways that you can add protection to your information on social media sites.
- (f) Use PayPal for online transactions where possible. It is designed as a firewall between you and an online retailer and enables you to buy things without having to give up your credit card details directly to the retailer.<sup>65</sup>
- (g) Understand what you are agreeing to when you download an app to your phone. How much data can that app access?<sup>66</sup> Is it malicious, does it have a virus in it?

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62 “Google Transparency Report” Google <[www.google.com/transparencyreport/userdatarequests/legalprocess](http://www.google.com/transparencyreport/userdatarequests/legalprocess)>.

63 Shaun Walker and Oksana Grytsenko “Text messages warn Ukraine protesters they are participants in mass riot” *The Guardian* (online ed, 21 January 2014).

64 “Reported Scams” Department of Internal Affairs <[www.dia.govt.nz/Services-Anti-Spam-Reported-Scams#lat](http://www.dia.govt.nz/Services-Anti-Spam-Reported-Scams#lat)>.

65 Nathan Taylor “Protecting your Digital Identity” (2013) 33(2) APC (Bauer Media Group) 36.

66 “Smartphone Security Report 2014” (29 May 2014) NetSafe <<http://smartphones.netsafe.org.nz>>.

## 2. Password hygiene (computer and mobile)

### (a) Password access to services

To purchase items online, participate in social media, post blogs, upload photos and carry out online banking you will need to create a password. There are five basic rules relating to creating and using passwords:

1. Don't use common passwords, such as 12345, password, your date of birth, children's names, or similar combinations as they are easy to guess.
2. Don't use "patterns on your keyboard" or phone. More than 10 per cent of Android swipe passwords are in the first letter of the name of a family member.<sup>67</sup>
3. Have a variety of passwords for different sites.
4. Keep your passwords safe, secure and confidential.
5. Don't share your passwords with other people.

We seem to be lulled into a false sense of security about the risks that we face with our online presence. Six per cent of New Zealanders use the same password for everything.<sup>68</sup> 44 per cent of us use less than three unique passwords.<sup>69</sup> Hacking software is continually becoming more sophisticated. In 2013 a popular password cracking programme was upgraded to enable 55 character passwords to be cracked and it was able to make 8 billion guesses per second.<sup>70</sup> Although most reputable sites will "hash and salt" users' passwords, (essentially using cryptography and adding other unique information to each individual password), you still have to take responsibility for your own password management.<sup>71</sup>

### (b) Password access to your computer and mobile devices

As we become more mobile and carry our information around with us on phones, tablets and laptops, the importance of keeping our information and data safe and secure increases.

We are doing our banking online, carrying private information about ourselves and potentially about our clients on objects that weigh 130 grams. If these objects fall into someone else's hands – whether criminal or not – our identity, reputation, memories and potentially our liberty can be compromised. 66 per cent of New Zealanders secure their personal smartphone with a password, but only half secure their work smartphone with a password or pin.<sup>72</sup> 90 per cent of us use a pin, password, swipe pattern or biometric measures to secure our mobile devices.<sup>73</sup> 75 per cent of New Zealanders believe there is nothing sensitive stored on their smartphone even though

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67 Dan Goodin "New data uncovers the surprising predictability of Android lock patterns" *Ars Technica* (online ed, 20 August 2015).

68 "ConnectSmart – Understanding public perceptions towards cyber security" (June 2014) Connect Smart <[www.connectsmart.govt.nz/assets/Uploads/Connect-Smart-understanding-public-perceptions-toward-cyber-security-991513.pdf](http://www.connectsmart.govt.nz/assets/Uploads/Connect-Smart-understanding-public-perceptions-toward-cyber-security-991513.pdf)>.

69 Jared Newman "Not even long passwords will save you from a hack attack" *PC World* (online ed, 27 August 2013).

70 Newman, above n 69.

71 Netsafe, above n 66.

72 ASB Fastnet Classic Terms and Conditions" (26 August 2015) ASB Bank <[www.asb.co.nz/story\\_images/33\\_FastNetClassicTerm\\_s6040.pdf](http://www.asb.co.nz/story_images/33_FastNetClassicTerm_s6040.pdf)>.

73 Apple, above n 28.



62 per cent use their phone to bank online and 64 per cent have completed a purchase on their phone.<sup>74</sup>

(c) How do you remember all those passwords?

In your contract with online service providers the actions that you are agreeing to take in relation to your passwords fall into three categories:

1. You can't write down or share your password with anyone. You are likely to find these requirements in a financial or banking agreement.<sup>75</sup>
2. You have to "keep your passwords safe and secure or confidential". Historically most services have required you to do this. However, this is now more likely to be found on services where you provide financial information (such as your credit card).
3. You are required to "not share your password".<sup>76</sup>

If you breach these terms and conditions, you will be breaching the contract.

(d) How can you manage this situation and protect yourself?

Good password hygiene requires you to have multiple, complex passwords.<sup>77</sup> Internationally, most people have an average of 6.5 passwords.<sup>78</sup> While the ideal is to have a unique password for each service, this may not be realistic.

To manage your passwords, you could consider the type of sites that you are using and put them into categories. Consider what would happen if that website was hacked and your password was available to other people. What other sites would the hackers be able to access with that password? At a minimum, you should have unique passwords for any websites that would give a hacker access to any financial information or credit card information. You might decide that you are comfortable having the same password for all your social media sites, or all the sites where you source information and don't actually provide any personal information.

(e) How can you store your passwords safely and securely?

Where your agreement specifies that you are not permitted to write down your password or share it, you will have to memorise it. However, keeping your password "safe and secure or confidential" provides you with more options.

(i) *Writing down your passwords*

If you decide to record your passwords, it is important to ensure that you "code" the information, don't write down the name of the site, username and password together.<sup>79</sup>

Writing down the passwords that you have physically (in a notebook or on a sticky note) means that they cannot be accessed electronically through your system. However, if you have a physical intruder, or if you carry your passwords around with your laptop this does not provide "safety, security or confidentiality"

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74 Sharon Profis "The guide to password security (and why you should care)" (25 November 2014) CNET <[www.cnet.com/how-to/the-guide-to-password-security-and-why-you-should-care](http://www.cnet.com/how-to/the-guide-to-password-security-and-why-you-should-care)>.

75 ASB Bank, above n 72.

76 Apple, above n 28.

77 Profis, above n 74.

78 Dinei Florencio and Cormac Herley "A Large-Scale Study of Web Password Habit" (2007) Microsoft Research <<https://research.microsoft.com/pubs/74164/www2007.pdf>>.

79 Hayley Tsukayama "How to keep track of your passwords without going insane" *Washington Post* (online ed, 7 August 2014).

The other option is to store the passwords in a spreadsheet, and store it on a flash drive or a single purpose cloud storage facility. To make these options secure, you should encrypt the drive, add encryption to the spreadsheet and have password access. It is important that you then update the information regularly.

(ii) *Using a password manager*

These services provide an online storage locker for your passwords, which are all hidden behind a single password that you memorise. You install the programme on your web browser and your phone and it records your passwords. The software can also generate random passwords and memorise them for you. The downside is that you are still storing everything in one place – which can be hacked and if for some reason you can't access the service you can end up being unable to access a site.<sup>80</sup>

“Last Password”, one of the most popular services, has been hacked recently. This highlights the need to memorise your passwords to financial and other sensitive accounts and to use a strong password as your master password and two-factor authentication where possible.<sup>81</sup>

(iii) *Isolate your information*

Use a separate email account that is linked to only your most sensitive online accounts (often those that relate to your money) and don't use it for anything else. This makes it harder to hack and link back to your digital identity.<sup>82</sup>

(f) Use two-factor authentication (2FA) where it is available

Taking two or more steps to prove who you are can seem like a hassle. But in today's environment of multiple data breaches, and sophisticated hacking software, it provides a strong protection for your identity and assets. 2FA requires you to have three types of credentials before being able to access an account.<sup>83</sup> These are usually your user name and password PLUS one of the following:

1. Something you know, such as a personal identification number (PIN), password or a pattern (which may have been mailed to you).
2. Something you have, such as an ATM card, phone (where you can receive texts) or a fob.
3. Something you are, such as a biometric – a fingerprint or voice print.<sup>84</sup>

Many financial institutions require 2FA to access a bank account and make transactions over a certain limit. You can choose to opt in to 2FA for additional security on many services, including Apple, Google, Twitter, Microsoft and Amazon.

Although hackers are now working out how to access information through 2FA,<sup>85</sup> it is more difficult to be hacked when the “third credential” requires you to put in information that is not available online (such as a text, your finger or voice print, or a pattern or password that has been mailed to you.)

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80 Tsukayama, above n 79.

81 Jose Pagliery “Irony Alert, Password-storage company is hacked” *CNN* (online ed, 16 June 2015).

82 Tsukayama, above n 79.

83 Seth Rosenblatt and Jason Cipriana “Two-factor authentication: What you need to know (FAQ)” (15 June 2015) CNET <[www.cnet.com/news/two-factor-authentication-what-you-need-to-know-faq/](http://www.cnet.com/news/two-factor-authentication-what-you-need-to-know-faq/)>.

84 Andrew Cunningham “Phone and laptop encryption guide: Protect your stuff and yourself” *Ars Technica* (online ed, 24 August 2015).

85 Rosenblatt, above n 83.

(g) Why would you need to share your password?

You agree not to share your password with others in licence agreements. But in reality why would you need to? Your social media accounts are your own digital identity. If you have a bank account that needs joint access with your partner, they can get their own login. With “Family Sharing” through Apple and Amazon, you can share your items with up to five family members.

The main issue that arises with not being permitted to share your password is if you are incapacitated or die and someone else needs to get access to your accounts.

(h) Use encryption to protect your data

While password protection makes things more difficult for criminals to get your information, there are still ways that the information can be accessed if you lose your computer or phone.<sup>86</sup>

Encryption involves using software to put a “code” on your data. This makes the hackers’ job more difficult. To crack a 128-bit key would require testing over 339,000,000,000,000,000,000,000,000,000 possible key combinations.<sup>87</sup> It would take over a million years to guess the correct key with this “brute force attack”, and that’s using the most powerful supercomputers in existence.<sup>88</sup>

There are a few downsides of encryption – if your drive gets corrupted you can lose your data and encryption can slow down performance.<sup>89</sup> When you use any of the 13 major cloud storage services, your information is automatically encrypted.<sup>90</sup>

Today encryption is an option or automatic on many software programmes and you can encrypt flash drives.<sup>91</sup> As more information is hacked, it is good idea to find out how to encrypt your information. After encryption you will often need a key or strong password to access the information. Using 2FA in conjunction with encryption will further strengthen your security.

(i) Separate email address

It is common to have a work email address and a private email address. With the ability to set up free email addresses, you can have different email addresses for different purposes. Although it involves a little more work to manage multiple addresses, having a designated email address for all your financial-related communications may increase your security. Another email address might relate to specific private conversations that you don’t wish to share.

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86 Cunningham, above n 84.

87 Bryan Clark “How Does Encryption Work, and Is It Really Safe?” (9 March 2015) [makeuseof <www.makeuseof.com/tag/encryption-care>](http://www.makeuseof.com/tag/encryption-care/).

88 Clark, above n 87.

89 Cunningham, above n 84.

90 Martyn Casserly “13 best cloud storage services 2015: Dropbox vs Google Drive, OneDrive, iCloud & More” (21 July 2015) [PC Adviser <www.pcadvisor.co.uk/test-centre/internet/best-cloud-storage-dropbox-google-drive-onedrive-icloud-3506734>](http://www.pcadvisor.co.uk/test-centre/internet/best-cloud-storage-dropbox-google-drive-onedrive-icloud-3506734).

91 Cunningham, above n 84.

## (j) Blocking the trackers

While many people may welcome seeing an advertisement online about something they want to purchase, other people find this “tracking” an invasion of privacy. There are some simple techniques to block this tracking:<sup>92</sup>

1. Enabling “do not track” in your browser.
2. Blocking or turning off tracking cookies.
3. Regularly clearing out cookies and browsing history.
4. Blocking or turning off location data.

## (k) Using The Onion Router (Tor)

A friend is wary of her online privacy so eschews email or online interaction. While it is nice to get a letter from her, it does mean we communicate less often. If she chose to use Tor she could have confidence that she had extensive privacy protection. While The Onion Router (Tor) is known for aiding and abetting criminals,<sup>93</sup> it is also a tool for legitimate communications, where your privacy is a concern.<sup>94</sup>

Tor ... uses a vast network of computers to route your Web traffic through a number of encrypted layers to obscure the origin of the traffic. Tor is a vital tool for political dissidents and whistle-blowers to anonymously share information, and you can just as easily use it to help protect your privacy.

3. *How do you protect your reputation in the digital world?*

Your reputation is important, fragile and is based on what other people think of you, not how you perceive yourself.<sup>95</sup> Your reputation is pure perception that may or may not be based on fact.<sup>96</sup>

The accessibility of information online provides a “mega-phone for the disgruntled – with no entry barrier, little legal accountability, instant commentary, full multimedia communication and a free distribution channel to millions worldwide.”<sup>97</sup> It can be difficult to sort out what information is true and it is easy to attack someone online.

To manage your reputation you need to take care with what information you provide and what “voice” you use to express yourself. When you comment online – on news articles, blogs, social media – your opinions are not private to the world (unless you use a pseudonym to post). It is important to remember that what you say, which photos you post and what you “like” online exists indefinitely. It is difficult to “undo” something you have said online in New Zealand; you don’t

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92 Grant Brunner “The ultimate guide to staying anonymous and protecting your privacy online” (13 August 2015) ExtremeTech <[www.extremetech.com/internet/180485-the-ultimate-guide-to-staying-anonymous-and-protecting-your-privacy-online](http://www.extremetech.com/internet/180485-the-ultimate-guide-to-staying-anonymous-and-protecting-your-privacy-online)>.

93 Joshua Bearman and Tomer Hanuka “The Untold Story of Silk Road” *Wired* (online ed 23 May 2015).

94 Bearman, above n 93.

95 Alex Lickerman “The Value of a Good Reputation” (22 April 2010) *Psychology Today* <[www.psychologytoday.com/blog/happiness-in-world/201004/the-value-good-reputation](http://www.psychologytoday.com/blog/happiness-in-world/201004/the-value-good-reputation)>.

96 Andy Beall and Dr Judy Strauss *Radically Transparent Monitoring and Managing Reputations Online* (Wiley Publishing Inc, Indiana, 2008) at 13.

97 Beall, above n 96.

have the power to ask Google to remove information (as the European finding relating to Google and “the right to be forgotten” does not apply in New Zealand.)<sup>98</sup>

If you want to change your reputation, you can pay a specialist to help you, or you can gradually add information that is more recent and more suitable. There are legal mechanisms (as outlined in part III) that you can use, but the most effective way to manage your reputation is to “stop and think” before you post something.

## V. CONCLUSION

While technology is changing at an ever increasing pace, some things stay constant. We have our identity and we have assets that are valuable to us. The digital world has allowed us to share our identity in a wider sphere than our small community of contacts. It has also created companies that make strong profits from providing services to us, and delivering targeted advertisements.

With the growth in digital interaction and purchasing, the security of personal data is regularly tested by increasingly sophisticated “hacking” software and “scams”. Hundreds of millions of data records have been hacked in the last 10 years, providing information for identity fraud, blackmail and reputation damage. Historically, law has developed based on geographic jurisdictions and now that we are interacting globally through the World Wide Web, jurisdictional-based law poses a number of difficulties.

Personal identity has value to a person. However, at present your identity is not legally recognised as property throughout the world. Section 2 of the Crimes Act in New Zealand indicates that personal identity may be property, but until this is tested in the New Zealand Courts uncertainty exists.

Much interaction in the digital world is through contractual agreements, which are regularly updated by the service supplier, and can be thousands of words in length. The individual is regularly “deemed” to have accepted the new terms by continuing to use the service, with little real informed consent or negotiating power for the individual. While the individual can implement a variety of techniques to protect their data, they purchase and interact on a licence basis, and only “own” purchases for the duration of their life.<sup>99</sup>

Given the difficulties involved in getting agreement and establishing international laws, it is unlikely that there will be non-jurisdictional laws relating to an individual’s digital identity and assets.<sup>100</sup>

Consequently it is important that as individuals we are aware of the legal obligations that we are entering into and that these are subject to constant change. To protect our identity and assets, we need to be aware of the risks and take all relevant measures to protect ourselves.

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98 Edwards, above n 12.

99 Craig Dickson “The Digital Legacy Conundrum: Who really owns what?” (4 June 2015) Social Science Research Network <[www.ssrn.com/abstract=2616578](http://www.ssrn.com/abstract=2616578)>.

100 “International Law” United Nations <[www.un.org/en/globalissues/internationallaw](http://www.un.org/en/globalissues/internationallaw)>.

# FEMALE GENITAL CUTTING: A NEW WAY FORWARD

BY KATIE CLAYTON-GREENE\*

## I. INTRODUCTION

The universal application of international human rights law (IHRL) and its struggle with cultural relativism is demonstrated by the practice of female genital cutting (FGC). Although the international human rights community has been actively involved in banning FGC, the practice persists in parts of Africa, Asia and the Middle East.<sup>1</sup> The aspirational eradication of FGC has effects globally. This is demonstrated by the increasing number of women seeking asylum, on the grounds of facing the practice in their home countries.<sup>2</sup>

Why does FGC continue, even with mass eradication efforts by the international community?

This article will establish that the goal of eradication cannot succeed. The current human rights aspirations, around FGC, are misconceived. International human rights efforts need to focus on education to provide informed consent and medicalisation of the practice. It will be established by this article that this should be the aspiration of IHRL.

Firstly, I will give a brief definition of FGC. I will highlight the issues around giving the practice(s) a name. Secondly, I will establish how FGC has become framed as a human rights issue. This provides legitimacy to the efforts for eradication. In a globalised world the efforts for eradication, and the practice itself, has huge implications on (traditionally) non-practicing states. I will establish that FGC is now an international issue.

Thirdly, the cultural, religious and traditional background of FGC will be discussed. I will establish that the context and history of FGC must be understood before it can be evaluated for its human rights implications. I will establish why the foundations of FGC are problematic for human rights law.

Fourthly, I will expand on IHRL and FGC. I will specifically deal with: women's and children's rights; consent; health risks and medicalisation.

In concluding this article, I will review the current campaign for eradication of FGC. I will discuss the issue of cultural relativism. It will be established, that the human rights justifications for eradication are culturally relative. I will conclude that a purely educational campaign needs to be implemented; empowering women, and the communities in which they live, to make informed decisions about FGC.

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1 Charlotte Feldman-Jacobs and Donna Clifton “Female Genital Mutilation/Cutting: Data and Trends” (2014) Population Reference Bureau <[www.prp.org](http://www.prp.org)>.

2 Leana Hosea “Yarl’s Wood Detention Centre is a Prison” (7 June 2015) BBC News <[www.bbc.com](http://www.bbc.com)>; Rachel Pugh “Female Genital Mutilation: asylum seeker fights deportation to the Gambia” (6 November 2012) <[www.theguardian.com](http://www.theguardian.com)>; “Genital Mutilation: One Woman’s Victory” (23 September 2008) The New York Times <[www.nytimes.com](http://www.nytimes.com)>.

## II. FGC AND INTERNATIONAL HUMAN RIGHTS LAW

### A. Definition

The World Health Organisation (WHO) defines FGC as “all procedures involving partial or total removal of the external female genitalia or other injury to the female related organs for non-medical reasons”.<sup>3</sup> FGC has no known health benefits.<sup>4</sup> The WHO, UNICEF and UNFPA (United Nations Population Fund) Joint Statement classified FGC into four categories.<sup>5</sup> Type I: clitoridectomy; Type II: excision; Type III: infibulation; Type IV: all other harmful procedures to the female genitalia for non-medical purposes.<sup>6</sup> All of these practices have been condemned by the international community and have been targeted for elimination.<sup>7</sup> FGC is usually performed on girls, between the ages of 0 and 15 years.<sup>8</sup>

I will use the term “female genital cutting” as opposed to “female genital mutilation” (FGM) as a way to not inflict judgement on practicing communities.<sup>9</sup> There was support for the term “FGM” as being “more accurate”.<sup>10</sup> However, the actual term or label used to describe the practice itself has an impact on the effectiveness of measures taken by the state or international community to abolish FGC.<sup>11</sup> The label of “mutilation” has created a worldwide revulsion against the cultural practice.<sup>12</sup> This, in turn, limits the effectiveness of human rights efforts. FGC is a non-judgemental description and, therefore, should be used by all human rights groups if they want to have meaningful success in their eradication efforts. However, as will be developed by this article, the term “mutilation” is only part of the failure to eradicate FGC.

### B. FGC Is a Human Rights Issue

FGC has become an international human rights issue, although it is not explicitly referred to in any international human rights instruments. FGC has been recognised as a violation of girls’ and women’s human rights and an obstacle to gender equality.<sup>13</sup> It is argued that FGC invokes cultural, social, economic and political rights. These rights are protected and affirmed by IHRL. To establish FGC as a human rights issue, I will briefly set out some of the IHRL surrounding FGC.

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3 World Health Organisation and others “Eliminating Female Genital Mutilation an Interagency Statement” (2008) World Health Organisation <www.who.int> at 1.

4 World Health Organisation and others, above n 3, at 1.

5 At 4.

6 At 4.

7 Bettina Shell-Duncan “From Health to Human Rights: Female Genital Cutting and the Politics of Intervention” (2008) 110 *American Anthropologist* 225.

8 World Health Organisation and others, above n 3, at 4.

9 At 3.

10 Catherine Annas “The Irreversible Error: The Power and Prejudice of Female Genital Mutilation” (1996) 12 *J Contempt Health Law and Pol* 325 at 326.

11 John Tobin “The International Obligation to Abolish Traditional Practices Harmful to Children’s Health: What Does It Mean and Require of States?” (2009) 9 *HRLR* 373 at 386.

12 Radhika Coomaraswamy “Identity Within: Cultural Relativism, Minority Rights and The Empowerment of Women” (2002) 34 *The George Washington International Law Review* 483 at 491.

13 Charlotte Feldman-Jacobs “Ending Female Genital Mutilation/Cutting: Lessons from a Decade of Practice” (2013) <www.prb.org> at 3.

### 1. *Right to health*

It is argued that FGC is a violation of the right to health and bodily integrity.<sup>14</sup> Article 15 of the Universal Declaration of Human Rights (UDHR) states that “everyone has the right to a standard of living adequate for the health and well-being of himself”.<sup>15</sup> Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises the right to the highest attainable standard of physical and mental health.<sup>16</sup> Bleeding and pain are reportedly a common consequence of FGC.<sup>17</sup> It is argued that as FGC has significant detrimental effects on a woman’s health it is, therefore, a violation of the right to health. Although this argument is less judgmental and more politically acceptable,<sup>18</sup> current research demonstrates that a substantial amount of health issues surrounding FGC could be resolved by the medicalisation of the practice.<sup>19</sup> However, medicalisation is highly condemned by the international human rights community.<sup>20</sup>

### 2. *Cultural right*

FGC is a cultural issue, as it is often carried out for cultural reasons. Article 1 of ICESCR recognises the right of all peoples to freely pursue their cultural development.<sup>21</sup> Article 3 protects “the right of men and women to the enjoyment of . . . all cultural rights set forth in the covenant”.<sup>22</sup> Article 15 of ICESCR recognises “the right of everyone to take part in cultural life”.<sup>23</sup> The International Covenant on Civil and Political Rights (ICCPR), art one recognises people’s freedom to self-determination and “by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”.<sup>24</sup> The Vienna Declaration explicitly recognises the significance of national and regional particularities and that various “historical, cultural, and religious backgrounds must be borne in mind”.<sup>25</sup>

The ICESCR and the ICCPR protect FGC as a cultural practice. However, a counter argument is that the cultural pressure to undergo FGC results in women having no choice in pursuing their cultural development. The cultural significance of FGC, in accordance with this perspective, makes women unable to consent to it. This view manipulates any cultural aspect of FGC to, in turn, work

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14 Human Rights Watch “Iraqi Kurdistan: Girls and Women Suffer the Consequences of Female Genital Mutilation” (16 June 2010) <[www.hrw.org](http://www.hrw.org)>; United Nations International Children’s Emergency Fund “Female Genital Mutilation/Cutting” (May 2006) <[www.unicef.org](http://www.unicef.org)>.

15 Universal Declaration of Human Rights (adopted on 10 December 1948), art 15.

16 International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976), art 12.

17 World Health Organisation and others, above n 3, at 11.

18 Shell-Duncan, above n 7, at 225.

19 At 225.

20 United Nations General Assembly Sixty-Seventh Session Third Committee “Intensifying Global Efforts for the elimination of female genital mutilations” 16 November 2012 <[www.unfpa.org](http://www.unfpa.org)>; Amnesty International “Indonesia: Authorities must enact legislation prohibiting all forms of female genital mutilation” 9 March 2012 <[www.amnesty.org.nz](http://www.amnesty.org.nz)>; Human Rights Watch “Letter to president-elect Joko Widodo Re: Human Rights Concerns in Indonesia” 28 August 2014 <[www.hrw.org](http://www.hrw.org)>.

21 International Covenant on Economic, Social and Cultural Rights, above n 16, art 1.

22 Article 3.

23 Article 15.

24 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 1.

25 Vienna Declaration and Programme of Action A/CONF.157/23 (adopted on 25 June 1993), art 5.



against the practice. The issue of consent and/or choice does not give rise to a legitimate human rights mandate for eradication, and this issue will be expanded on.

### 3. *Freedom of religion*

FGC is also performed for religious reasons. The UDHR protects the right to freedom of religion, under art 18.<sup>26</sup> There are issues with the basis of FGC as a religious practice, but it has been performed on this basis for centuries.<sup>27</sup> Traditional FGC communities viewed the practice as legitimised by Islam, Judaism or Christianity. However, both the Bible and the Qur'an do not explicitly mention FGC.<sup>28</sup> As with the majority of religious conclusions, this is a matter of religious interpretation.

### 4. *Freedom from torture*

FGC is often argued as a being a form of torture. The Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, art 1, defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person ... for reasons based on discrimination of any kind”.<sup>29</sup> The Convention goes on to require that the torture be inflicted “with the consent or acquiescence of a public official or other person acting in an official capacity”.<sup>30</sup>

Under the current conditions, in which FGC predominantly occurs, FGC does not fall within this definition as it is, usually, carried out in a private setting.<sup>31</sup> The Special Rapporteur has reiterated that “consent or acquiescence of a public official” extends state obligations into the private sphere.<sup>32</sup> FGC could be claimed to be a form of torture if the state recognised what was occurring, in the private sphere, by adopting medicalised standards.<sup>33</sup> As states have an obligation to protect persons within their jurisdiction from being subject to these acts.<sup>34</sup> However, this would be dependent on the definition of “pain or suffering being intentionally inflicted” for the purpose of FGC.

The ICCPR art 7 states “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”.<sup>35</sup> It is also difficult to class FGC as a form of torture, when it is consented

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26 Universal Declaration of Human Rights, above n 15, art 18.

27 Abbie Chesler “Justifying the Unjustifiable: Rite v Wrong” (1997) 45 Buff L Rev 555 at 573.

28 “What’s Culture Got to Do with It? Excising the Harmful Tradition of Female Circumcision” (1993) 106 Harv L Rev 1944 at 1951.

29 United Nations Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987), art 1.

30 United Nations Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment, above n 29, art 1.

31 Theresa Tobin “Using Rights to Counter ‘Gender’ Specific Wrongs” (2009) 10 Human Rights Rev 521.

32 Report of the Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment, Manfred Nowak “Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development” United Nations General Assembly 15 January 2008 at 7.

33 United Nations Voluntary Fund for Victims of Torture “Interpretation of Torture in the Light of the Practice and Jurisprudence of International Bodies” (2011) <[www.ohchr.org](http://www.ohchr.org)> at 5/30.

34 At 5/30; United Nations Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment, above n 29, art 1.

35 International Covenant on Civil and Political Rights, above n 24, art 7.

to.<sup>36</sup> The argument, in this context, does not surpass the definition of what actually is “torture” as defined by IHRL.

### *1. Women’s rights*

With the global feminist movement,<sup>37</sup> came the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).<sup>38</sup> CEDAW created an obligation for the state to:<sup>39</sup>

... modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of [gender inequality].

In CEDAW’s General Recommendation No. 14, FGC is recognised as a harmful practice perpetuated by economic, cultural and traditional pressures.<sup>40</sup> It is argued that FGC is used to subordinate women. However, this argument falls apart when the decision to perform FGC is put firmly in the control of an educated, fully informed woman.<sup>41</sup> This issue will be expanded on throughout the article.

It would seem, from this brief outline, FGC is as much protected as it is denounced by international law. I acknowledge that FGC is a human rights issue and that its practice can give rise to a human rights abuse. However, FGC is not specifically dealt with by international law and this gives rise to a lack of guidance and varied interpretation on how to deal with it. There is mounting international pressure to pass legislation banning FGC.<sup>42</sup> It will be argued that any mandate to deal with FGC, needs to be consistent with approaches taken on similar “western” practices.

## *C. The Significance of the International Mandate to Eradicate FGC*

### *1. Refugee status*

The WHO has estimated that between 100,000,000 and 140,000,000 girls and women worldwide have been subjected to one of the first three types of FGC.<sup>43</sup> FGC is mainly practiced in Africa, the Middle East and a few counties in Asia.<sup>44</sup> However, the effects of FGC are being felt beyond these countries’ borders.

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36 Theresa Tobin, above n 31.

37 Theresa Tobin, above n 31, at 522.

38 Convention on the Elimination of all Forms of Discrimination Against Women 2131 UNTS 83 (opened for signature 18 December 1979, entered into force 3 September 1981).

39 Article 5.

40 CEDAW General Recommendation No. 14: Female Circumcision Adopted at the Ninth Session of the Committee on the Elimination of Discrimination against Women (1990) (Contained in Document A/45/38 and Corrigenum) <[www.un.org](http://www.un.org)>.

41 Fuambai Sia Ahmadu “Who Are You Fooling – Exposing the Tricks and Tricksters of Anti-FGM Campaigns” (March 2014) <[www.fuambaisiaahmadu.com](http://www.fuambaisiaahmadu.com)>; Shell-Duncan, above n 7, at 231.

42 United Nations News Centre “Ban welcomes UN General Assembly resolutions eliminating female genital mutilation” 21 December 2012 <[www.un.org](http://www.un.org)>.

43 World Health Organisation and others, above n 3, at 4.

44 At 4.

The United Nations High Commissioner for Refugees (UNHCR) released a “Guidance Note on Refugee Claims Relating to Female Genital Mutilation”. The UNHCR states that:<sup>45</sup>

... to expel or return a girl or [woman] to a country where she would be subjected to FGM may thus amount to a breach by the State concerned of its obligations under international human rights law.

Therefore, the issue of the FGC is no longer confined to the traditional practicing countries. This demonstrates that the international mandate on eradicating FGC is now affecting the entire international community.

In November 2014 the United Nations Committee on the Elimination of Discrimination against Women published a set of practical, authoritative guidelines in relation to women fleeing gender-related forms of persecution.<sup>46</sup> The Committee’s General Recommendation provides authoritative guidance to states on legislative, policy and other appropriate measures to ensure the implementation of their obligations under the Convention.<sup>47</sup> How international human rights law classifies and deals with FGC will now affect more than just the traditional practicing states. States are now being told to adopt policy measures to deal with FGC, as part of the international means to eradicate FGC.

## 2. *Female genital cosmetic surgery*

There is an increasing demand for “female genital cosmetic surgery” (FGCS) in westernised nations.<sup>48</sup> There is a category of women with congenital conditions, for which current standard practice advises such procedures.<sup>49</sup> However, my focus is on women with no underlying condition that affects their genital development who seek surgery to alter the appearance of their genitals.<sup>50</sup> Women seeking FGCS for purely “cosmetic” reasons. In these circumstances FGCS would seem to fall under category four of the WHO’s definition of FGC.<sup>51</sup> However, FGCS continues unscathed by the international human rights community.

There is a dominant perception that FGCS is underpinned by a woman’s need to look unnaturally young and conform to standards set by pornography.<sup>52</sup> The practice been associated with girls as young as eleven.<sup>53</sup> There are issues of informed consent as the information to understand the full implications of FGCS is simply unavailable.<sup>54</sup> There is a lack of clear guidance, for medical

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45 United Nations High Commissioner for Refugees “Guidance Note on Refugee Claims Relating to Female Genital Mutilation” (2009) <[www.refworld.org](http://www.refworld.org)> at 6.

46 Officer of the High Commissioner for Human Rights “Rights and plight of women asylum seekers and refugees brought into stark focus in new UN human rights paper” (6 November 2014) <[www.ohchr.org](http://www.ohchr.org)>.

47 Officer of the High Commissioner for Human Rights, above n 46.

48 NS Crouch and others “Clinical characteristics of well women seeking labial reduction surgery: a prospective study” (2011) 118 *BJOG* 1507 at 1507.

49 Jillian Lloyd and others “Female genital appearances: ‘normality’ unfolds” (2005) 112 *BJOG* 643 at 643.

50 At 643.

51 World Health Organisation and others, above n 3, at 1.

52 Ekaterina Yahyaoui Krivenko “Rethinking Human Rights & Culture Through Female Genital Surgeries” (2015) 37 *Human Rts Q* 107 at 130.

53 Crouch and others, above n 48, at 1510.

54 At 1510.

professionals, around FGCS.<sup>55</sup> This topical issue demonstrates that female genital procedures, carried out for non-medical reasons, are now an international issue.

### 3. *National laws*

The international mandate for eradication has had an impact in New Zealand. In 2004, the New Zealand legislature amended the Crimes Act 1961 (CA) and inserted s 204A which states:<sup>56</sup>

Subject to subsection (3), everyone is liable to imprisonment for a term not exceeding 7 years who performs, or causes to be performed, on any other person, any act involving female genital mutilation.

There is a small exception to the rule. Under subs 3, FGM (the terminology used in the CA) may lawfully be carried out in certain circumstances for the benefit of that person's physical or mental health.<sup>57</sup> The Crimes Act definition of FGM, is the excision, infibulation, or mutilation of the whole or part of the labia majora, labia minora, or clitoris of any person.<sup>58</sup> Interestingly, FGCS is offered openly by Auckland based surgeons.<sup>59</sup> How FGCS fits within the Crimes Act definition of FGM is unclear. I will outline the issue of FGCS and FGC, later in this article. Consent is specifically noted as no defence to a charge under this section.<sup>60</sup> The issue of consent and FGC, as will be demonstrated, has become a significant point of debate. I have outlined s 204 of the Crimes Act to demonstrate New Zealand's commitment to the international effort for eradication of FGC and the conundrum this leaves with FGCS being openly practised within New Zealand.<sup>61</sup>

## III. ORIGINS OF FGC

### A. *A Cultural, Religious, and Traditional Practice*

To be able to work effectively with women, children and within traditional communities the origins of FGC must be clearly understood.<sup>62</sup> FGC has a long and complex history. It has been shown that FGC predates Christianity and Islam.<sup>63</sup> Although the relationship between religion and FGC is not consistent,<sup>64</sup> it appears that the decision of whether or not a particular area of the African continent engages in the practice is dependent on certain factors of customs, beliefs and expectations.<sup>65</sup> Today

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55 At 1510.

56 Crimes Act 1961, s 204A.

57 Section 204A(3).

58 Section 204A(1).

59 Rees and ChaLain "Procedures" Auckland Plastic Surgical Centre <[www.plastic-surgery.co.nz](http://www.plastic-surgery.co.nz)>; Murray Beagley Cosmetic and Reconstructive Plastic Surgeon <[www.cosmeticsurgeon.org.nz](http://www.cosmeticsurgeon.org.nz)>.

60 Crimes Act, s 204A(6).

61 Section 204A(3).

62 Susie Costello and others "In the Best Interests of the Child: Preventing Female Genital Cutting (FGC)" (2013) British Journal of Social Work 1 at 4.

63 United Nations Office of the High Commissioner for Human Rights, *Fact Sheet No. 23 Harmful Traditional Practices Affecting the Health of Women and Children*, GA Res 34/180 (1979) <[www.ohchr.org](http://www.ohchr.org)> at A.

64 United Nations International Children's Emergency Fund "Female Genital Mutilation/Cutting – A Statistical Exploration" (2005) <[www.unicef.org](http://www.unicef.org)> at 10.

the practicing communities claim to adhere to both cultural values and religious doctrine in their continuation of the practice.<sup>66</sup>

Those who practice FGC today, view it as encapsulating the continuing survival of the tribal group and the initiation into adulthood.<sup>67</sup> FGC can be seen as based on tradition, and reluctance to break with age old practices that symbolise shared heritage of a particular ethnic group.<sup>68</sup> It has been said that there is “an intergenerational” peer convention that perpetuates the continuation of FGC.<sup>69</sup> It is in the severing of the traditional basis of FGC that the current international human rights mandate for eradication fails.

International actors fail to recognise that FGC was not always linked to women’s subordination. In the Maasai culture, historically, FGC was linked to significant economic and political power for women.<sup>70</sup> This link remains, however, during formal colonisation gender relations were transformed into roles of economic and political dependence.<sup>71</sup> It is argued that FGC cannot solely be blamed for oppression of Maasai women: it is rooted in complex interactions between existing social relations and colonial rule.<sup>72</sup>

It is a common view among proponents of eradication that “female circumcision rests on insufficient doctrinal foundation, the argument [FGC based on religion] ultimately misuses religion as an instrument of fear, oppression and exploitation”.<sup>73</sup> Whether this statement is right or wrong, it is full of judgement and condemnation. I find it surprising that international human rights groups are shocked when their efforts to eradicate FGC are not welcomed by traditional communities. It seems patently obvious that (possibly ignorant) judgement is not met with open arms by the people it seeks to criticise.

## *B. Women’s and Children’s Rights*

### *1. A violation of women’s rights*

The international human rights community views cultural practices as being based on the idea of the inferiority or the superiority of the sexes.<sup>74</sup> Traditional practices have become recognised, at an international level, as affecting women’s and children’s rights. At the World Conference on Human Rights in Vienna in 1993 the slogan “Women’s Rights as Human Rights” was adopted.<sup>75</sup>

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65 Robbie Steele “Silencing the Deadly Ritual: Efforts to End Female Genital Mutilation” (1995) 9 *Geo Immigr LJ* 105 at 120.

66 Chesler, above n 27, at 573.

67 At 573.

68 “What’s Culture Got to Do with It? Excising the Harmful Tradition of Female Circumcision”, above n 28, at 1949.

69 Bettina Shell-Duncan and others “Dynamics of change in the practice of female genital cutting in Senegambia: Testing predictions of social convention theory” (2011) 73 *Social Science and Medicine* 1275 at 1281.

70 Theresa Tobin, above n 31, at 522.

71 At 522.

72 At 522.

73 “What’s Culture Got to Do with It? Excising the Harmful Tradition of Female Circumcision”, above n 28, at 1952.

74 Convention on the Elimination all forms of Discrimination Against Women, above n 38, art 5.

75 United Nations Office of the High Commissioner for Human Rights, above n 63.

This signalled the beginning for the recognition of women's rights in the private sphere.<sup>76</sup> It is argued that FGC can no longer continue unscathed as a private, cultural issue. It is now the subject of national and international scrutiny and action.<sup>77</sup>

FGC is advocated as a form of violence against women (VAW).<sup>78</sup> FGC is seen as a means to control a woman's sexuality by deciding on her behalf under what circumstances she should (or should not) engage in sexual activity.<sup>79</sup> It is also said to encourage discriminatory conduct against women.<sup>80</sup> The image portrayed of FGC today is stark in contrast to the traditional practice of FGC, such as, in the Maasai culture. The western perspective of FGC, is viewed differently from those who continue to practice it. It could be argued that those who leave these traditional communities and pursue this VAW discourse, no longer see FGC through the traditional, cultural lens but instead through an imposed westernised view.

It has been argued that the VAW discourse, in international law, has succeeded partly because of its appeal to the victim subject.<sup>81</sup> However, the limitations of this approach have to be addressed. The VAW discourse assumes that women have a coherent group identity, within different cultures.<sup>82</sup> The VAW discourse relies on a universal subject,<sup>83</sup> which only exists through the eyes of westernised women.

It is not my intention to downplay the effects that FGC has on a woman's place in some practicing communities, for example, where FGC is used as a form of sexual and/or behavioural control. However, I do intend to demonstrate that gender is not static.<sup>84</sup> The issues and concerns of a woman in a developing nation are going to be very different from those of a western woman. However, it is often the western women who define the issues facing all women. This creates a risk of misidentifying the nature of the moral violations under scrutiny and implementing ineffective eradication strategies.<sup>85</sup> I would argue, this is what has occurred in relation to the international mandate for eradication of FGC.

## 2. *Children and FGC*

It is argued by human rights groups that FGC being performed on children raises not only health implications but issues around what are the "best interests of the child"?<sup>86</sup> The health implications will be dealt with in the following section. The United Nations Convention on the Rights of a Child

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76 Ratna Kapur "The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics" (2002) 15 Harv Hum Rts J 1 at 3.

77 United Nations Office of the High Commissioner for Human Rights, above n 63.

78 Amnesty International "Indonesia Must Repeal Female Genital Mutilation Law" (June 2011) <[www.amnesty.org.au](http://www.amnesty.org.au)>.

79 Amnesty International, above n 78.

80 Amnesty International, above n 78.

81 Kapur, above n 76, at 3.

82 At 3.

83 At 3.

84 Theresa Tobin, above n 31, at 528.

85 At 528.

86 The United Nations Convention on the Rights of a Child, 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990).

(CRC) sets out that the “best interests of the child” shall be a primary consideration.<sup>87</sup> The “best interests of a child” is recognised as the “primordial consideration” under art 5 of CEDAW.<sup>88</sup>

The “best interests” principle may be given very diverse interpretations according to the setting in which it is applied.<sup>89</sup> In communities where FGC continues, parents and/or guardians primarily, choose for their daughters to undergo FGC, as they see this as being in their best interest,<sup>90</sup> as women and children in these communities who have not undergone FGC are seen as outcasts. Decision makers seem to be most concerned with the overt sanctioning they and their girls will face as a result of a choice to circumcise or not.<sup>91</sup>

Article 24(3) of the CRC requires that “States Parties shall take all effective and appropriate measures with a view to abolishing harmful traditional practices”.<sup>92</sup> The CRC does not provide a list of “harmful traditional practices”. However, it is well established that FGC is recognised as such.<sup>93</sup> Article 30 of the CRC affirms the value of traditional practices as a right to be enjoyed rather than something to be imposed on a child.<sup>94</sup> State measures must be “effective and appropriate” under art 24(3) of the CRC.<sup>95</sup>

Cultural and social values, invariably, influence the understanding of harm, especially psychological harm.<sup>96</sup> This can be much more difficult to assess, when compared to physical harm. However, to base “harm” solely on physical medical evidence, would obscure the true harm that would be inflicted upon girls who do not undergo FGC.<sup>97</sup> The assessment of a child’s health and best interests needs to take into account, not only the medical implications, but also the psychological harm.<sup>98</sup> Girls and women who have not been cut are often ostracised from their communities and unable to be deemed “fit for marriage”.<sup>99</sup> This significantly inhibits their future prospects for a successful life within their communities, from the perspectives of those who continue to practice FGC.

### 3. *Consent and/or choice*

The predominant conclusion, in the international human rights community, is that women who have been circumcised are either forced to undergo FGC and/or they were unable to make an informed decision. Although some women may choose to undergo FGC because of cultural and family pressure, a woman’s right to self-determination and individual freedom needs to be

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87 Article 3.

88 Convention on the Elimination of all Forms of Discrimination Against Women, above n 38, art 5.

89 Philip Alston “The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights” (1994) 8 IJLPF 1 at 5.

90 Yael Tamir “Hands off Clitoridectomy” (Boston Review, June 2006) <www.bostonreview.net>.

91 Shell-Duncan and others, above n 69, at 1281.

92 The United Nations Convention on the Rights of a Child, above n 86, art 24.

93 United National Economic and Social Council, Sub-Commission on Prevention of Discrimination and Protection of Minorities (46th Session) 22 July 1994 <www.ohchr.org>.

94 John Tobin, above n 11, at 376.

95 At 375.

96 At 375.

97 At 378.

98 At 378.

99 Shell-Duncan and others, above n 69, at 1278; Costello and others, above n 62 at 18.

protected.<sup>100</sup> Therefore, it will be established that culture and family pressure is not, in itself, a justified reason to seek to eradicate FGC.

The decision for women to undergo FGC is predominantly made by the collective rather than the individual.<sup>101</sup> It is presumed that these women would have no choice but to undergo the operation.<sup>102</sup> However, this disregards how traditional communities operate. In communities where decision making is made by the collective, there is no such thing as individual autonomy, or individual decisions.<sup>103</sup> Accessing the validity of consent cannot and should not, solely, be viewed from a western, individualistic perspective.

In regards to FGCS, choice is often served as a “bottom line argument”.<sup>104</sup> It is about a “woman’s right to choose”.<sup>105</sup> It is fair to say that most western women, including those who would not choose to undergo FGCS, would feel it would be taking away part of their agency, if the state were to ban all forms of FGCS.<sup>106</sup> Again, it is about a woman’s right to choose. I recognise that there are women within the society in which I live who choose to undergo, legitimately and legally, FGCS. Although I may not (fully) understand why they choose to undergo FGCS, I acknowledge and accept that this is a personal choice. It is not hard to then apply this line of thinking to FGC, if women are provided the means to understand the implications of the procedure and, therefore, able to provide informed consent. FGC should, in those circumstances, be viewed as a legitimate, genital-altering procedure, under law.

It is about here that proponents of eradication argue that FGC is forced upon women or performed without their consent.<sup>107</sup> I acknowledge that many women are forced to undergo FGC. However, I also acknowledge that there are women who wish to continue the practice of FGC.<sup>108</sup> It is not my intention to justify all forms of FGC. I seek to establish that if we provide women the opportunity to choose and to give informed consent this would legitimise the practice.

It is argued by proponents of eradication that valid, informed consent is impossible because of problems of access to education and information necessary to make a valid decision due to social pressure, which may vitiate the woman’s consent.<sup>109</sup> This supports my conclusion that decisions to undergo FGC need to be underpinned by education. Although I will expand on this issue in my conclusion, the human rights community must focus on education in the mandate to deal with FGC.

It is not sustainable that consent to FGC is deemed impossible, while FGCS continues without any question about the validity of a “western” woman’s choice. There has been questions raised into the validity of a “western” woman’s choice, in relation to the cultural influence on her aesthetic

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100 International Covenant on Civil and Political Rights, above n 24, art 1; and International Covenant on Economic, Social and Cultural Rights, above n 16, preamble.

101 Feldman-Jacobs, above n 13, at 7.

102 Yahyaoui Krivenko, above n 52, at 125.

103 Theresa Tobin, above n 31, at 526.

104 Virginia Braun “‘Women are Doing it for Themselves’ The Rhetoric of Choice and Agency around Female Genital ‘Cosmetic Surgery’” (2009) 24 *Australian Feminist Studies* 233 at 237.

105 At 237.

106 At 237.

107 Robyn Smith “Female Circumcision: Bringing Women’s Perspective Into the International Debate” (1991) 65 *S Cal L Rev* 2449 at 2478.

108 Ahmadu, above n 41.

109 Sally Sheldon and Stephen Wilkinson “Female Genital Mutilation and Cosmetic Surgery: Regulating Non-Therapeutic Body Modification” (1998) 12 *Bioethics* 263 at 271.



influence and desires.<sup>110</sup> This demonstrates that, although questions exist around the validity of consent and FGCS, it remains an accepted form of genital altering surgery. Therefore, issues around a woman's consent and FGC, although they should be dealt with in the form of education, do not lend themselves to the logical conclusion of an outright ban.

There seems to be a line of thinking from the western perspective that it is an inconceivable notion that any reasonable and educated woman would ever consent to FGC.<sup>111</sup> Although we cannot ensure that women are "reasonable", we can ensure that women are educated. Education can be provided to girls, women, men and all those involved in the decision-making process. This may challenge the popular notion about those who choose FGC and their level of education.

#### IV. SOLUTIONS

##### *A. Health Risks and Medicalisation*

Traditionally, FGC was carried out by "traditional surgeons".<sup>112</sup> The tools used, traditionally, included pieces of glass and homemade tools.<sup>113</sup> The practice was, and continues by some groups, to be performed without anaesthetic and under conditions that are not sterile.<sup>114</sup> This gives rise to legitimate concerns about FGC and its associated health risks and consequences.<sup>115</sup> However, some of these health concerns can be dealt with through medicalisation.

The WHO findings show that almost all women will experience pain and bleeding, associated with the FGC. There are short-term and long-term physical and psychological health problems that occur with varying frequency.<sup>116</sup> There are no definitive findings on the long-term health consequences of FGC. This is due to the varieties of FGC that exist and a lack of data that is collected.<sup>117</sup>

Medicalisation refers to FGC being carried out by a medical professional for the purpose of physical harm reduction.<sup>118</sup> It has been said that an inadvertent consequence of anti-FGC campaigns, focusing solely on the health risks of FGC, was the rise of medicalisation of FGC.<sup>119</sup> This move is not supported by the international human rights community.<sup>120</sup>

It is argued that even with medicalisation of FGC, sexual relations for women will be uncomfortable and sometimes painful.<sup>121</sup> However the right to sexuality has yet to be recognised

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110 Braun, above n 104, at 238.

111 Yahyaoui Krivenko, above n 52, at 125.

112 Robert Myers and others "Circumcision: Its Nature and Practice Among Some Ethnic Groups in Southern Sudan" (1985) 21 *Social Science and Medicine* at 585.

113 At 586.

114 "What's Culture Got to Do with It? Excising the Harmful Tradition of Female Circumcision", above n 28, at 1947.

115 World Health Organisation and others, above n 3, at 11.

116 At 4.

117 Shell-Duncan, above n 7, at 226.

118 Feldman-Jacobs, above n 13, at 7.

119 At 7.

120 World Health Organisation and others, above n 3, at 18.

121 Coomaraswamy, above n 12, at 491.

and endorsed by the international community.<sup>122</sup> Furthermore, medicalisation of anything will have some consequences. It is the knowledge of the consequences that makes them legitimate.

Medicalisation enables FGC to continue within a healthcare system. However, UNICEF's position is that medicalisation obscures the human rights issues surrounding FGC and prevents the development of effective and long-term solutions for ending it.<sup>123</sup> UNICEF's states that:<sup>124</sup>

Medicalisation, and the involvement of health professionals, undermines the message that FGC remains a discriminatory act of violence that denies women and girls their right to the highest attainable standard of health and physical integrity.

This argument is underpinned by the mandate for eradication. The international human rights community perceives eradication as the only alternative to FGC.

In 2011 the Indonesian Ministry of Health issued guidelines to health professionals on how to perform FGC. The new regulation also stipulates that the procedure may only be carried out with the request and consent of the person concerned, parents and/or guardians.<sup>125</sup> These guidelines were highly criticised by Amnesty International as a violation of Indonesian law, which ratifies international treaties and conventions.<sup>126</sup> The Indonesian guidelines were also highly criticised by the WHO and non-governmental organisations (NGOs) (including UNICEF), given their perspective on medicalisation of FGC.<sup>127</sup>

The majority of countries where FGC is most prevalent are Third World nations or developing countries. Most of the people in these countries do not have access (either at all or limited) to health care professionals. Where FGC is sought to be performed by a medical professional it is at the expense of the family. In these circumstances, the health consequences and implications are being fully acknowledged and the dramatic step is being taken to seek medical assistance to alleviate these concerns. It seems counter-intuitive to then tell these nations that allowing FGC to be performed by a medical professional, is derogating from their obligations under international law. Medicalisation of FGC should be embraced by the international community, where opportunities for education and informed consent are provided.

I do not wish to attach little importance to the health consequences of FGC. It is acknowledged that some of the attested medical ramifications of FGC result, plainly, from the type of procedure that is carried out. However, it has been concluded that because of the scarcity of data in this area, it is impossible to determine whether reported conditions are circumcision related.<sup>128</sup> What is clear, is that some of the (short-term) attested medical complications associated with FGC, such as infections, could be remedied by medicalisation.<sup>129</sup> Traditionally it was only through infections, associated with FGC, in which women would seek medical assistance. If medical assistance was sought from the beginning, the effects on women, arguably, could be substantially reduced. It must

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122 At 491.

123 United Nations International Children's Emergency Fund, above n 64, at 10.

124 At 10.

125 Feldman-Jacobs, above n 13, at 18.

126 Amnesty International, above n 78.

127 World Health Organisation and others, above n 3, at 18.

128 Bettina Shell-Duncan "The medicalization of female "circumcision": harm reduction or promotion of a dangerous practice" (2001) 52 *Social Science and Medicine* 1013 at 1016.

129 At 1016.

also be said, that condemning the medicalisation of FGC risks pushing the practice underground into even more unsafe and unsanitary conditions.

A comparison of FGC and FGCS, from a medical perspective, would also tend to negate the argument against medicalisation. If both procedures are performed on female genitalia, carried out for non-medical reasons, by medical professionals, why should one practice be condemned by the international community and the other go unquestioned? Medical standards can and should be established to educate both the practitioner (medically capable of performing FGC) and the patient (women) about FGC.<sup>130</sup> Through the medicalisation of FGC, it should be viewed as a legitimate, genital-altering practice, comparable to FGCS.

## V. CURRENT CAMPAIGNS

### A. *Cultural Relativism*

IHRL is underpinned by universalism; the idea that human rights are “for all, without distinction.”<sup>131</sup> Human rights are natural-born rights for all humans universally.<sup>132</sup> This is clearly set out in the title of the Universal Declaration of Human Rights. This is part of what gives international human rights their legitimacy. Therefore, IHRL seeks to distance itself from being culturally imperialist or culturally relative. However, cultural relativism is rife in the mandate to eradicate FGC, issued by the international human rights community.<sup>133</sup> Even in attempting to name the practice as a form of “mutilation”, the cultural bias rears its head.<sup>134</sup> I do not seek to use cultural imperialism as a way to justify FGC. I seek to demonstrate that cultural relativism encompasses the mandate for eradication. It has become a common thought among African scholars that FGC has become the vehicle for “the arrogant gaze”, in which the west looks and passes judgement on other cultures.<sup>135</sup>

The debate over cultural relativism, in international law, was suppressed in favour of an ideologically dominated East-West dispute over civil and political rights.<sup>136</sup> The debate has never been resolved and continues to go unaddressed by the international human rights community. Human Rights are supposed to be grounded in cross-culturally recognised moral values.<sup>137</sup> As demonstrated by FGC, cultural values are consistently imposed rather than recognised.

A lot of the discussion in this article has been based on the idea of cultural relativism. There is a deep entrenchment between “western” women and “other” women in women’s rights campaigns; the way in which Third World women are represented as “sexually constrained and

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130 Annas, above n 10, at 341.

131 Diana Ayton-Shenker “The Challenge of Human Rights and Cultural Diversity” Background Note: United Nations (1993) <[www.un.org](http://www.un.org)>.

132 Ayton-Shenker, above n 131.

133 UN News Centre “Ban Welcomes UN General Assembly resolution eliminating female genital mutilation” (December 2012) <[www.un.org](http://www.un.org)>; Amnesty International “Fight Against Female Genital Mutilation wins UN Backing” (November 2012) <[www.amnesty.org.nz](http://www.amnesty.org.nz)>.

134 Steele, above n 65, at 106.

135 Coomaraswamy, above n 12, at 492.

136 Alston, above n 89, at 5.

137 “What’s Culture Got to Do with It? Excising the Harmful Tradition of Female Circumcision”, above n 28, at 1959.

tradition-bound”.<sup>138</sup> This critique is based on certain cultural assumptions.<sup>139</sup> This does not create a unified group to support the liberation of women, but creates division of “us” and “them”. The way in which the international community has represented that choice and FGC have no correlation as no “reasonable person” would ever consent to such a practice.

The issue of consent raises cultural relativist implications. As a woman seeking female genital surgery, the grounds of culture, religion or tradition (which is FGC) are not an accepted form of consent or choice. However, a western woman’s consent for seeking female genital surgery to alter the appearance of their genitals is never questioned. This position cannot be maintained if the international human rights community seeks to maintain their “universal” and “cross culturally recognised moral values” platform.<sup>140</sup>

However, as discussed, FGCS continues unscathed in the western world. The representations of FGC, by the international community, will continue to be claimed as culturally relative unless a uniform approach is taken. If western women can continue to have their genitals altered for the sake of their body image, FGC should be allowed to continue in the name of culture, tradition or religion. This approach cannot be, legitimately, implemented if we do not provide the educational means to all those involved in the practice of FGC and the decision to undergo it.

### *B. A Review of the Current Eradication Campaign*

It has been suggested that the slow decline in the prevalence of FGC, after four decades of campaigning against FGC, raises questions about the effectiveness of intervention.<sup>141</sup> The saying goes “if you keep doing what you have always done, you will always get what you have always got”. If the international community continues to use their resources to pursue eradication, their efforts will not be noted for any significant change in the life of women who, predominantly, live in the poorest of conditions. This approach needs to be re-evaluated and serious questions asked about its effectiveness.

In contradiction to popular thought, FGC is no longer supported through social pressure but is actively promoted by those who practice it.<sup>142</sup> The practice of FGC has changed, in response to legislative bans in traditionally FGC practicing countries. It is now described as “cutting without ritual”.<sup>143</sup> No longer are there celebrations or ceremonies around the practice, but instead FGC continues without outward acknowledgement. This has allowed FGC to continue without repercussions from the law.

This demonstrates that a change in the practices surrounding FGC would be more acceptable than change in the actual practice.<sup>144</sup> These communities do not accept the international and/or national eradication efforts. However, medicalisation may be more acceptable to these communities.

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138 Kapur, above n 76, at 26.

139 At 26.

140 “What’s Culture Got to Do with It? Excising the Harmful Tradition of Female Circumcision”, above n 28, at 1959; “What are Human Rights?” <[www.ohchr.org](http://www.ohchr.org)>.

141 Elise Johansen and others “What Works and What Does Not: A Discussion of Popular Approaches for the Abandonment of Female Genital Mutilation” (2013) *Obstetrics and Gynaecology International* at 7.

142 Shell-Duncan and others, above n 69, at 1281.

143 At 1281.

144 Shell-Duncan and others, above n 69, at 1281.

In Egypt, FGC has been banned for nine years. Although, it is estimated that over 90 per cent of Muslim girls and women in Egypt have undergone FGC,<sup>145</sup> and 77 per cent of girls (who have undergone FGM) were cut by a medical professional.<sup>146</sup> However, it has taken until 2015 for there to be a prosecution.<sup>147</sup> A doctor was prosecuted for carrying out a procedure on a 13-year-old girl, who died in a botched procedure, and was found guilty of manslaughter.<sup>148</sup>

As there is such a high prevalence of FGM in Egypt, one prosecution in nine years demonstrates that the laws around FGM are not actually being implemented. It is likely that the only reason this case saw any legal action is because a death was involved. If the procedure was carried out without complications, there would not have been any demand to prosecute the doctor. Egypt's commitment to eradication is merely words on paper, and has not resulted in actual enforcement of legislation, except where death is involved.<sup>149</sup>

It has been acknowledged that legal prohibition, in relation to FGC, doesn't work.<sup>150</sup> It has been established that the current international campaign cannot realistically or legitimately succeed in their goal of eradication. However, I offer a more comprehensive strategy in assisting women and their families to deal with FGC.

### *C. A Revamped Educational Campaign*

As previously addressed, FGC continues, as it is deeply enshrined in culture, tradition and religion (from the view of those who practice FGC). The focus on elimination has not produced liberated women. However, it has been shown that the decision to abandon FGC can be a by-product of larger efforts to improve education and the status of women in the community.<sup>151</sup> Attempting to eradicate FGC has not been shown to improve women's rights and is merely "talking" around the issues that actually face women in these communities. The issue is education. The focus of the international community needs to be on education and health. If we educate women, it is more likely they will choose to undergo FGC in a more sanitary environment.<sup>152</sup>

The United Nations High Commission for Refugees report on "Female Genital Mutilation and Cutting", recognised that "tackling sensitive issues such as FGM within a wider education initiative, has proven more successful than stand-alone sensitization work about those issues".<sup>153</sup> The report supported the establishment of safe spaces for girls to be able to share issues and

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145 United Nations International Children's Emergency Fund "Female Genital Mutilation/Cutting" (2010) <[www.unicef.org](http://www.unicef.org)>.

146 United Nations Children's Fund "Female Genital Mutilation/Cutting: A statistical overview and exploration of the dynamics of change" July 2013 <[www.childinfo.org](http://www.childinfo.org)>.

147 Patrick Kingsley "Egyptian Doctor to Stand Trial for Female Genital Mutilation in a Landmark Case" (May 2014) <[www.theguardian.com](http://www.theguardian.com)>.

148 Kingsley, above n 147.

149 Human Rights Watch "Egypt: Trial Shows Need to Combat Female Genital Mutilation" (27 November 2014) <[www.hrw.org](http://www.hrw.org)>.

150 Annas, above n 10.

151 Feldman-Jacobs, above n 13, at 16.

152 Steele, above n 65, at 132.

153 Input from UNHCR to OHCHR Report "Female Genital Mutilation and Cutting" (December 2014) <[www.ohchr.org](http://www.ohchr.org)>.

foster decision-making.<sup>154</sup> Promoting and supporting female education, both for adults and by the enrolment of girls in schools, was recognised as a priority.<sup>155</sup>

Similarly to the current campaign being waged, the empowerment of girls and women is the key.<sup>156</sup> Empowering women through education is not a new idea and there is no need to implement different resources than those being used in the current eradication campaign. However, what does need to change is the underpinning mandate of eradication.

“Tostan – Dignity for All” is an NGO which has developed a strategy, similar to the one I am proposing. Tostan’s programme is a “human rights based Community Empowerment Programme (CEP)”, where participants learn about their right to health and their right to be free from violence.<sup>157</sup> Contributing to the abandonment of FGC was not one of their original goals; however, many communities they have worked with have publicly declared their decision to abandon FGC.<sup>158</sup>

The CEP demonstrates that providing communities an educational platform, can enable them to make informed decisions about their future and the future of their families. The programme is purely educational, without any underlying goals: encouraging dialogue, rather than criticising or blaming.<sup>159</sup> This is the reason for the CEP’s success and reinforces the need for a purely education campaign.

The Tostan CEP approach was grounded in traditional learning models that made it familiar and accessible to participants.<sup>160</sup>

The type of education that should be offered cannot be adequately addressed for the purposes of this article. However, the education offered should not be based on western ideologies of accepted cultural practices. The educational approach should be “well-rounded” including, not only scientific evidence of the health risks and implications of FGC, but also information about rights and obligations that exist under IHRL and national law. It is acknowledged that such an approach risks being implemented in a cultural relative manner. However, the revamped campaign will be underpinned purely by education, minimising any cultural relativist effects.

If FGC is eradicated, we are still left with millions of girls who are uneducated and, therefore, unable to better themselves. By giving women and girls an education, we enable them to have the skills to make decisions for themselves, with knowledge of the risks. By making education and health a top priority, women can make informed choices about the procedure.<sup>161</sup> The culture and tradition underpinning FGC is so deeply entrenched, that efforts should not be wasted on eradication but, instead, placed on educating these vulnerable girls and women. Through education women will be given the skills to make choices and to be able to further themselves throughout their lives.

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154 Input from UNHCR to OHCHR Report, above n 153.

155 Input from UNHCR to OHCHR Report, above n 153.

156 Feldman-Jacobs, above n 13, at 7.

157 Tostan – Dignity for All “Cross Cutting Issues” (2015) <[www.tostan.org](http://www.tostan.org)>.

158 Tostan, above n 157; Nafisstou Diop, Amadou Moreau and Hélène Benga “Evaluation of the Long-Term Impact of the TOSTAN Programme on the Abandonment of FGM/C and Early Marriage: Results from a qualitative study in Senegal” (January 2008) <[www.unicef.org](http://www.unicef.org)> at 24.

159 Tostan, above n 157.

160 United Nations International Children’s Emergency Fund “Somalia: TOSTAN Pilot Project on “Ending FGM/C” in Northwest and Northeast Zone in Somalia” (2012) <[www.unicef.org](http://www.unicef.org)>.

161 Steele, above n 65, at 131.

## VI. CONCLUSION

The medicalisation of all forms of FGC should be the aspiration of international human rights law. FGC and FGCS should be able to be performed on a fully informed and consenting adult, or on a child with fully informed and consenting parents and/or caregivers. The international human rights mandate should not focus on banning FGC, but seeking to educate everyone involved in the process about its health risks. This would be consistent with rights to education and rights to health as set out in IHRL.<sup>162</sup> Therefore, the educational campaigns should continue. This would maintain the universalism of international human rights law and give women the educational tools to achieve equality.

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<sup>162</sup> International Covenant on Economic, Social and Cultural Rights, above n 16, art 12 and art 13; Universal Declaration of Human Rights, above n 15, art 15.

# CASE COMMENT: *RE FAMILY FIRST NEW ZEALAND*

BY JULIET CHEVALIER-WATTS\*

*Re Family First New Zealand*<sup>1</sup> has been a much anticipated case because it is the first case, as far as the author is aware, to have considered, and applied the principles set out so eloquently in the 2014 Supreme Court case of *Re Greenpeace of New Zealand Inc.*<sup>2</sup> The *Greenpeace* decision was fundamental with regard to charity law in New Zealand because the majority of the Court held that political purposes and charitable purposes were not mutually exclusive and asserted that “[i]t is difficult to construct any adequate or principled theory to support blanket exclusion” in relation to political purpose or advocacy.<sup>3</sup> As a result, the exclusion of political purpose in charity law is now unnecessary in New Zealand. The High Court case of *Re Family First* therefore provides the first consideration of this contemporary approach. In summary, Collins J allowed the appeal brought by Family First against the Charities Board of the Department of Internal Affairs – Charities Services (the Board), in which it was determined that Family First was no longer eligible to be registered as a charitable trust. In allowing the appeal, his Honour directed the Board to reconsider Family First’s application, in light of the *Greenpeace* judgment, and indeed, this judgment. In arriving at that conclusion, Collins J provided some useful consideration of charity law principles.

For a body to be registered as a charity in New Zealand, it must fall under one or more of the four principal categories of charitable purpose, or heads of charity, which are: the relief of poverty, the advancement of education, the advancement of religion, and any other matters beneficial to the community.<sup>4</sup> The purposes must also be for public benefit. Where any one of the first three heads of charity is established, it is assumed, unless there is evidence to rebut that assumption, that the charity is for the public benefit. For the fourth category, the public benefit must be expressly established. A non-charitable activity will not negate charity so long as that activity is ancillary to the overall charitable purpose.<sup>5</sup>

Before addressing those considerations, we should firstly contextualise the background to the Family First judgment. The Family First trust deed was created on 26 March 2006, and it set out its six purposes, including: promoting and advancing research and policy supporting marriage and family as foundational to a strong and enduring society, and to educate the public in their understanding of the institutional, legal and moral framework that makes a just and democratic society possible. In 2006, it was incorporated under the Charitable Trusts Act 1957, and approved as a charitable entity by the Charities Commission (as it was then known), and registered under the Charities Act 2005 in 2007.

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1 *Re Family First New Zealand* [2015] NZHC 1493.

2 *Re Greenpeace of New Zealand Inc* [2014] NZSC 105, [2015] 1 NZLR 169.

3 At [69].

4 Charities Act 2005, s 5(1); *Commissioners for Special Purposes of Income Tax v Pemsell* [1891] AC 531 at 583.

5 Charities Act, s 5(3) and (4).



In 2008, the Charities Commission made inquiries as to the extent of Family First's activities, including advocacy. As a result of these inquiries, the Charities Board (as it is now known) resolved to deregister Family First from the Charities Register in 2013. Family First filed a notice of appeal to the High Court shortly afterwards, and both parties agreed that Family First's appeal should be deferred until after the Supreme Court gave its judgment in *Greenpeace*, which was delivered in August 2014.

Obviously, the Board did not utilise the Supreme Court judgment in making its decision to deregister Family First; rather it was heavily influenced by the earlier Court of Appeal judgment, whereby that Court considered that the level of advocacy conducted by Greenpeace was beyond the permitted, at the time, level of ancillary to its charitable purposes, thus referring it back to the Board for further consideration. Greenpeace appealed the approach of the Court of Appeal with regard to political activity, hence leading to the Supreme Court judgment.

Collins J noted that there were four grounds of appeal, and for the purposes of this case comment, we will concentrate on the first three. Firstly, that the Board erred when it concluded that Family First's role and advocacy for its views in relation to the family is political and not a charitable purpose. This was addressed under the heading of "political purpose." Secondly, that the Board erred in deciding that the organisation's purposes do not include a purpose that is beneficial to the public under the fourth head of charity. This was addressed under the heading "benefit to the public." Thirdly, that the Board erred in deciding that Family First's purposes do not include the charitable purpose of advancing education. This was addressed under the heading "education purpose." I will address each point in turn.

## I. POLITICAL PURPOSE

In relation to the deregistration of Family First, the Board had asserted that Family First had two purposes that were political. Firstly, with regard to its views about family life, the Board asserted that this purpose did not have self-evident public benefit; that it was political, and as a result, not charitable. Secondly, the entity had a purpose to procure government action that would be consistent with its own view. The Board asserted that this purpose was directed to procuring legislative change and government policies, which was political and not charitable.

Collins J noted however that the Board's position that Family First's political objects could not be charitable was not reconcilable with the Supreme Court's approach taken in *Greenpeace*. This was because the Board's decision was based on a legal proposition that has now been found to be incorrect. His Honour affirmed the Supreme Court's determination that political purposes are not irreconcilable with political purposes. This therefore means that the appropriate course of action will be for the Board to reconsider the position of Family First in light of the Supreme Court judgment.

The Board had also asserted that Family First's advocacy role was "controversial", and therefore self-evidently not of public benefit. The Supreme Court however stated that it was not a criterion for registration as a charitable entity that the advocacy undertaken, or views expressed, should be generally acceptable or non-contentious.<sup>6</sup> As a result, Collins J stated that the Board should reconsider their approach with regard to controversial views, again in light of the Supreme Court determination.

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6 Re Greenpeace of New Zealand Inc [2014] NZSC 105, [2015] 1 NZLR 169 at [75].

## II. BENEFIT TO THE PUBLIC

Collins J stated that the Board should refer to analogous cases to determine public benefit. Nonetheless, his Honour did make a point of urging perhaps some restraint on this matter. The Board should be cautious not to match carefully the entity's purposes with organisations that have successfully been recognised as charitable entities. This approach would risk undermining the view of the Supreme Court that political purposes should not be excluded from being classified as charitable.

Instead, his Honour noted that cases that could be of assistance to the Board in undertaking its analogical assessment would be entities that advocate for the mental and moral improvement of society. However, Collins J did state that the Board should not automatically accept that Family First's purposes are charitable. The correct approach for the Board should be to assess whether Family First's activities are aimed at promoting the moral improvement of society. It is possible that some members of the Board may not personally approve of the views of Family First, but their subjective views should not be taken into consideration, and it may be possible to find a legitimate analogy between its role and other entities who have been found to be charitable. This methodology would be consistent with the obligations on the members of the Board to act with honesty, integrity and good faith.<sup>7</sup>

## III. EDUCATION PURPOSE

The Board concluded that Family First advanced its polemical views on traditional forms of marriage under the guise of education, and therefore this was not genuine advancement of education. To be a charitable educational activity, the organisation must promote learning, and this may be achieved via a variety of means. For instance, training programmes, conferences, or by carrying out or disseminating research that improves knowledge around a particular issue.<sup>8</sup>

Collins J did note that a report Family First commissioned from the New Zealand Institute of Economic Research was a legitimate piece of research that contained significant research that had not been undertaken previously. This report was not referred to by the Board in its decision-making process. As a result, his Honour stated that when the Board re-examines Family First's case, it will need to examine carefully this report, and determine if it is sufficient to qualify the entity's activities as including the advancement of education for the public benefit.

This judgment has been useful for two key reasons. Firstly, it illustrates how the principles enunciated in the much anticipated Supreme Court case of *Greenpeace* may be applied practically, even in potentially contentious circumstances. What this speaks to is the underpinning of fundamental charity law provisions, including the doctrine of public benefit, and the necessity for charity law to respond to contextual social frameworks. Charity law is therefore not constrained by historical approaches that may not be applicable, or relevant in a contemporary society, but at the same time, the High Court recognises the importance of ensuring that critical legal requirements of charity law are fulfilled.

Secondly, it demonstrates the importance of exercising objective assessment when considering appropriate and legitimate analogies between the role of Family First and organisations that have

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<sup>7</sup> Charities Act, sch 2, cls 17 and 18.

<sup>8</sup> *Re Hopkins Will Trusts* [1965] 1 Ch 669 at 680; *Re South Place Ethical Society* [1980] 1 WLR 1565 (Ch) at 1576.

advocated for similar improvements in society, as advocated by Family First. By undertaking such assessments, the decision that is reached is likely to demonstrate rational and legitimate considerations. This therefore has been a welcome decision in terms of demonstrating the evolution of charity law in a contemporary context.

## BOOK REVIEW

EMPLOYMENT LAW IN NEW ZEALAND by Gordon Anderson (Author, with John Hughes), LexisNexis NZ Ltd, Wellington, 2014, 743 pp, recommended retail price \$120.

Employment Law in New Zealand by Gordon Anderson and John Hughes, is an essential text for anyone seeking a comprehensive introduction and general overview of the law in this area. The highly experienced authors, Professor Anderson, who has written extensively on employment law in his role of Professor in Law at Victoria University while also working as a barrister and representing clients in the various employment institutions, and John Hughes, a solicitor in private practice who has also lectured in law in universities here in New Zealand and the United Kingdom, provide us with a text of relevant New Zealand employment law in an accessible format that will appeal to not only students of law and law professionals, but also business managers and perhaps even enquiring employees eager to understand their workplace with more confidence.

The authors' professional backgrounds have no doubt influenced the approach of this book as it is both practical and informative. The enormity of employment law as a topic renders it difficult to cover in a single volume. Nonetheless, the authors' ability to address core areas in a reasonable level of detail is impressive. It covers not just the Employment Relations Act 2000, but also includes an extensive inventory of other employment-related legislation, including the Accident Compensation Act 2001, the Privacy Act 1993, the Health and Safety in Employment Act 1992, the Evidence Act 2006, the Holidays Act 2003 and the New Zealand Bill of Rights Act 1990. In providing such vast legislative coverage this book makes it apparent that employment law, possibly more than any other area of law, has the greatest impact on our daily lives.

It is easy to navigate your way through this book by way of 14 logically ordered chapters with various sub-headings, aided by a comprehensive index. The authors give the reader more than just a basic introduction to each topic, they also include commentary on the leading and recent case law under each subject heading. The inclusion of overseas authorities in the analysis of law in the New Zealand context adds a greater perspective to discussions. The case citations are helpfully collated in footnotes on the bottom of each page, so as not to intrude the flow of the reader.

This book commences by dealing with some of the issues that Professor Anderson addressed in his book *Reconstructing New Zealand's Labour Law* in 2011,<sup>1</sup> such as an overview of the history of labour law and the story of employers struggling to gain control over their economic security since 1840. Professor Anderson discusses the state of unrest that New Zealand labour law and industrial relations systems have been in over the past 40 years and illuminates the manner in which workers rights have been consistently eroded during this period. He throws light on the Employment Contracts Act 1991 as a turning point following a century of pluralist labour legislation. The concern since this enactment is now primarily with restructuring the labour market to individualised employment relationships with increased managerial control. This leads ultimately to an overview of the changing structures of labour law that resulted in the Employment Relations Act 2000 and its partial restoration of the right to effective collective bargaining.

This attempt to place contemporary New Zealand employment law in its historical context helps illustrate some of the factors that have shaped the structure of the law today. This historical overview demonstrates that employment law is particularly susceptible to economic, political

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1 Gordon Anderson *Reconstructing New Zealand's Labour Law* (Victoria University Press, Wellington, 2011).

and social pressure, and highlights how in a relatively short amount of time, rapid change has occurred in the employment law landscape of New Zealand. This socio-economic and political nature of the commentary reflects the practical realities of employment law and provides context to assist the reader in navigating the myriad of issues seeking regulation. It is also a realisation that the Employment Relations Act 2000 marks the beginning of an incomplete era in employment regulation in New Zealand.

Furthermore, this historical overview of the changing structures of labour law in New Zealand provides a platform for an analysis of the current state of employment law and its effect on areas, such as the contract of employment, collective bargaining, security of employment, and trade unions. Professor Anderson tackles the current tensions that are likely to impact on the development of the law and the structure of employment and industrial relations in the future with diplomacy. It is unfortunate that a personal experience of the Christchurch earthquakes reduced the contribution that John Hughes was able to make towards this book. His wealth of experience in employment law would no doubt have added further value to this text.

*Employment Law In New Zealand* contains a practical and readable discussion of employment law, together with accurate references to statutory instruments and case law. It provides a comprehensive overview of a growing and shifting field of law, as well as avenues for further research on specific issues. This book discusses employment law from both individual and collective perspectives. It addresses the law on the employment relation's concept of good faith, employment contracts, working hours, remuneration, disputes, grievances, termination of employment, health and safety, human rights and privacy. Decisions of the Employment Relations Authority and the courts are used to demonstrate the legal interpretation and practical application of employment law and the resulting real-life outcomes.

This book is based on the law as stated as at 30 June 2014, together with significant case decisions and developments in practice to that date. Unfortunately, various changes to employment law in New Zealand took effect from March 2015 after this book was written, as a result of the Parliamentary Bill introduced in April 2013 amending the Employment Relations Act 2000. As a result, some of the legislation and statistics appear somewhat dated. This issue is also relevant to a discussion on social media included in the book, although I am not entirely sure how an individual is expected to keep a pace with social media, let alone a text book. However, website references pointing the reader towards additional resources remedies this problem, allowing the reader to verify more recent data and commentary on various topics. While there is argument that the case law mentioned, along with the legislation and other topics, such as the use of social media, will lose some of its contemporaneousness, nonetheless, this book provides a solid foundation for anyone embarking on an enquiry into any multitude of employment law issues found in the New Zealand workplace.

In this respect I think this book achieves its goal. It is an excellent "guide" to employment law in New Zealand. It does not set out to be a "bible" for the experienced employment lawyer. Nonetheless, those wanting to refresh themselves on basic aspects of employment law would not be disappointed. And those who wish to pursue more detailed study in a particular area will find this book a useful starting point as it includes a multitude of references to assist in the undertaking of more specific research. Individual chapters include further reading and additional resource suggestions.

The price of this text at \$120 is very reasonable given the content that is crowded into its 743 pages. However, considering its potentially large audience of law students this price may seem

a little steep, confining the student's experience of the text to the perils of an overburdened law library loan service.

In conclusion, this is a comprehensible and readable guide to major and often complex topics of relevance to employment law in New Zealand.

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