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TE AHO KAWE KAUPAPA TURE A NGĀ WĀHINE

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What started out as an idea between two friends in mid-2016 has truly flourished. As young women finishing our studies, we turned our minds to how we would serve our profession and the wider community as young lawyers. Our mutual passion lay in contributing to the creation of a world where everyone is equal, first by tackling gender inequality. Our vision for how we would start to chip away at this life-long goal was for Aotearoa to join the ranks of so many other nations around the world: to have an academic journal dedicated to examining legal issues affecting women.

The New Zealand Women's Law Journal — Te Aho Kawe Kaupapa Ture a ngā Wāhine is now a network of women across all ages, stages and areas of the legal profession, as well as a platform to raise awareness about how the law affects women, both within the profession and more broadly. We hope that the Journal will also be a mechanism to encourage genuine conversations about gender issues in our communities.

We are incredibly proud and humbled by how fast the Journal has grown in the last 18 months. We have been overwhelmed by support and enthusiasm from women from all walks of life. We are especially grateful to all who have been involved, whether it was giving advice in those early days, being a member of one of our boards or staff, financially backing the Journal, spending late nights with us editing and typesetting, or being courageous enough to submit a piece of work for publication. Everyone we have spoken to throughout the journey has been kind, encouraging and passionate about the Journal's aims. We thank you from the bottom of our hearts and want you to know that the Journal would not be what it is without your involvement. It has been an honour to work alongside so many intelligent, hard-working and special women. We also thank our family, friends and colleagues who have supported us in realising our goals.

We are now proud to present this inaugural edition and look forward with excitement to our second issue in 2018. We hope the Journal will offer

new ideas, provoke new conversations and help widen the horizons of all those who read it.

> He rangi tā Matawhāiti, he rangi tā Matawhānui.
>
> The person with a narrow vision sees a narrow horizon, the person with a wide vision sees a wide horizon.

Ana Lenard and Allanah Colley
Editors-in-Chief
29 October 2017

FOREWORD — KUPU WHAKATAKI

The website of The New Zealand Women's Law Journal — Te Aho Kawe Kaupapa Ture a ngā Wāhine says that it is "the only academic publication that is solely dedicated to publishing and supporting the work of women lawyers in New Zealand". It joins a number of other prestigious women's law journals around the world.

The mission statements of the various journals show how important these publications are to broadening legal scholarship so that it encompasses other voices and points of view and, in the process, enriches the law and contributes to a better, more inclusive society.

The Michigan Journal of Gender and Law is "dedicated to providing a forum for exploring how gender issues (and related issues of race, class, sexual orientation, gender identity, and culture) impact law and society". The Columbia Journal of Gender and Law aims to promote "dialogue, debate, and awareness that will broaden the very concept of feminism", while the Duke Journal of Gender Law & Policy takes an expansive view of the law to meet its goal "not only to explore what the law was and is, but what it could and should be".

The UCLA Women's Law Journal says that it "uses the power of language to educate people and make women's voices heard". It focuses "not only on the common struggles of women, but also on diversity as a strength in feminist legal scholarship". It seeks to "represent the reality of all women's lives and experiences, without separating voices into exclusionary categories". The Australian Feminist Law Journal (published out of Griffith University) "focuses on scholarly research using critical feminist approaches to law and justice". The Canadian Journal of Women and the Law's mandate is to "provide an outlet for those wishing to explore the impact of law on women's social, economic and legal status, and on the general conditions of their lives". It aims

to "increase the volume and improve the accessibility of legal scholarship by Canadian women".

In the tenth anniversary edition of the Harvard Journal of Law and Gender[1] the editor, Christine Littleton,[2] described the importance of feminist jurisprudence and of the journal as follows:[3]

> Rather than seeking merely to distinguish ourselves from others, in the time-honored manner of traditional male legal discourse, feminists must explore the paradox of commonality in diversity that is our experience as women. Part of the strength of the feminist jurisprudence which the Harvard Women's Law Journal has helped to foster has been the embracing of just this paradox.

Te Aho Kawe Kaupapa Ture a ngā Wāhine is off to a good start in living up to these words. The first edition of the Journal begins with a speech by the Chief Justice of New Zealand, the Rt Hon Dame Sian Elias, identifying her experience as a woman in the law. This is followed by an analysis of the State of the Nation by Caren Fox, Deputy Chief Judge of the Māori Land Court, Deborah Chambers QC, a leading barrister, and the President of the New Zealand Law Society, Kathryn Beck. Louise Grey and Nicole Ashby, both currently working in large commercial law firms, contribute other articles on the profession. The range of articles indicates a commitment to using multiple voices and experiences to explore the position of women in the legal profession.

The Journal embraces diversity more generally in all its manifestations, including in thought, ethnicity, and perspective. Tunisia Napia's piece on challenges for women and tikanga Māori exemplifies this. The Journal has an international perspective. Taylor Mitchell considers the role of gender in the negotiation and text of the Paris Agreement. It is also not afraid to tackle somewhat thorny issues that invariably disproportionately affect women, such as Joy Guo's consideration of paid parental leave and Anjori Mitra, Erica Burke and Jackie Edmond's contributions addressing abortion law, both domestically and in terms of international human rights law.

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1 The oldest continuously published feminist law journal in the United States and "devoted to the advancement of feminist jurisprudence and the study of law and gender".

2 Now a professor of law and women's studies emerita at UCLA.

3 Christina A Littlejohn "In Search of a Feminist Jurisprudence" (1987) 10 Harv Women's LJ 1 at 7.

Everyone involved with this publishing initiative is to be congratulated on the quality of this inaugural edition. And I look forward to the next one.

Hon Justice Susan Glazebrook
9 October 2017
Supreme Court of New Zealand

CHANGING THE WORLD?

An address to the Australian Women Lawyers' Conference at the Sofitel Hotel, Melbourne, Australia on Friday 13 June 2008

Sian Elias[*]

For my secondary schooling, many years ago, I went to an old-established church school in Auckland. It was an all-female school and all of our teachers were female. Around the walls of our beautiful wooden hall were inscribed biblical texts in gold letters. One which always struck me as incongruous was "Let us now praise famous men and our fathers that begat us".

And it seemed to me for many years afterwards that famous men were all we had to praise. Indeed, for those women who studied law in the 1960s, in a climate which veered between outright hostility and amused tolerance, we heard nothing of famous women. And for the diminished group which eventually entered the profession, the heroes of legal practice were entirely male.

Nothing changed very fast. Indeed, I was greatly taken aback a few years ago to read a history of the legal profession in New Zealand which does not acknowledge the entry of women into the profession until the 1980s. The few of us who thought we were making an impact during the preceding decade were clearly invisible to the writer. And he goes on to say that the profession became duller during the 1980s. He does not, it is true, suggest strict cause and effect between the entry of women and what he calls the "greying" of the profession but the golden age he invokes is that of the boozy bar dinner reminiscences. Perhaps nostalgia for those times could only survive while the profession remained a male club.

Although the custodians of the centennial history of the New Zealand profession published in 1969[1] did not think to mention it, the long, if

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* The Right Honourable Dame Sian Elias, Chief Justice of New Zealand. This speech was delivered at the Australian Women Lawyers' Conference in Melbourne on 13 June 2008. It has not been updated for publication in this Journal.

1 Robin Cooke (ed) *Portrait of a Profession* (AH and AW Reed, Wellington, 1969).

not prominent, history of female participation in the legal profession of New Zealand should have been a matter of pride. New Zealand was one of the first countries in the Commonwealth to permit women to practise law with the enactment of the Female Law Practitioners' Act 1896.

The enactment of this legislation was just in time to allow Ethel Benjamin into the profession in 1897. Now Ethel Benjamin does not even rate a mention in the "national" section of the centennial history of the New Zealand Law Society published in 1969, dealing with notable figures of the profession. Instead, she rates two brief references in the section of the history dealing with the District of Otago, as of provincial interest only.

The entries themselves indicate the steel in this slip of a woman. Ethel Benjamin studied for her LLB with no assurance that she would be able to work in law because the legislation that allowed her to practise had not been enacted when she began her studies at Otago University. The only law library available to students in Dunedin was that maintained by the Law Society. Ms Benjamin's application to use the library is the subject of the first entry relating to her. It caused some consternation. Eventually, however, the Council resolved that she could be given a permit to read in the Judge's Chamber Room, "there being no rule applicable to her case".[2] This permit was solemnly renewed from time to time. The only other mention of Ethel Benjamin in the centennial history of the profession relates to the embarrassment caused by her insistence on participating in the procession through Dunedin to mark the opening of the Royal Courts of Justice in 1902. Despite the fact that by then she had been practising as a member of the Society for five years, no one was prepared to walk beside her in the procession. Eventually Mr JM Gallaway who, it is said, "had always been a champion of her cause", "came to the rescue and walked with her".[3] For which I think the women lawyers of New Zealand should remember Mr Gallaway with gratitude.

It would be nice to be able to report that Ethel Benjamin confounded the sceptics and had a fulfilled and honoured career in law. In fact, she was frozen out from conventional work, as from the society of her fellow practitioners. In an act of defiance that could only have been prompted by deep anger and the realisation that she was beyond further humiliation,

2 At 336.

3 At 339.

she took out advertisements for work in the Law Society newsletter. When that failed to shame the profession into some support, she threw herself in to representing women who were the victims of domestic violence or, being abandoned by men, were destitute. Her practice might charitably be described as fringe. Eventually, disheartened, she turned to other work and gave up law. She opened a restaurant. Then finally she left the country and settled in the United Kingdom where she died during World War II. Her history was largely overlooked in New Zealand until the Otago Women Lawyers took up her story in the 1980s. I did not hear of her until that time. But she remained a folk memory in Dunedin. When Silvia Cartwright (later successively Judge of the District Court, Chief Judge of that Court, the first woman Judge of the High Court and Governor-General of New Zealand) applied for jobs in Dunedin in the 1960s she encountered some reserve because of the example of Ethel Benjamin "and the trouble she caused".

One hundred and ten years on from Ethel Benjamin, how are women doing in New Zealand, both generally and in law? The report card is not so good. The Human Rights Commission of New Zealand has recently published a census of women's participation in our society.[4] The survey showed that former incremental progress has slowed or stalled. Despite New Zealand's reputation for progress in gender representation, the position on the ground gives no cause for self-congratulation:[5]

i) 14.8 per cent of editors are women;

ii) 19.2 per cent of university professors and associate professors are women;

iii) 29.2 per cent of the New Zealand Police force are women; and

iv) 25.8 per cent of judges are women.

Despite a government commitment to achieve parity between men and women in government-appointed boards by 2010, the gap is still eight per cent. The representation of women in the corporate sector remains "dismal".[6]

4 The Human Rights Commission *The New Zealand Census of Women's Participation* (2008).

5 At 11.

6 At 2.

Nor does the position in the profession give cause for satisfaction. Only 16.8 per cent of partners in larger legal firms are women.[7] Overall, they are 19.3 per cent of the partners in firms of all sizes.[8] Although women currently comprise 62 per cent of the admissions to the profession and have been above 50 per cent for more than ten years, they comprise 41.6 per cent of the legal profession.[9] Proportionately fewer women law graduates than men end up in legal practice.

Thirty-five per cent of barristers sole in New Zealand are women.[10] In a profession which is fused and in which the pattern until recently has seen the most successful practitioners emerge from firms at a comparatively late stage, usually to qualify for taking silk, the numbers of women practising at the junior bar may not be a good sign. Many have resorted to practise at the bar either because it is easier to juggle with child-rearing responsibilities (that was certainly the reason I went to the bar at an early stage), or because promotion within legal firms has not been available to them.

Few objective measurements, such as have been attempted in Australia, are available for assessing the success of women at the bar and in particular their ability to attract high quality work. Judges at all levels remark however upon the absence of women counsel and the dominance of male leaders. The impression in New Zealand has of course been demonstrated in Australia. The gender appearance survey conducted by the Victorian Bar confirms what is our experience too that women are a minority of counsel appearing before judicial officers.[11] It confirms also that the participation of women declines in the "higher end" work.

In New Zealand, of the 90 practising Queen's Counsel, 11 are women. The Human Rights Commission reports that:[12]

> At least 15 years after the free flow of women to the bar began, few are appearing in appellate matters or in big commercial cases, although the reasons for this are unclear.

7 At 11.

8 At 67.

9 At 67.

10 At 67.

11 Australian Women Lawyers *Australian Women Lawyers' Gender Appearance Survey Information* (August 2006).

12 Human Rights Commission, above n 4, at 67.

The one stand-out statistic that the Human Rights Commission publishes about women's representation in the judiciary is that 100 per cent of the Chief Justices of New Zealand are women.[13] Speaking for them all, I am very conscious that I accepted appointment to the bench in 1995 at the urging of male colleagues, whose view (based on their lack of success in recommending me for briefs) was that I would never get instructed in the cases I aspired to lead. I went on the bench to practise law.

For those in practice, my impression is that they still feel the chill that buffeted Ethel Benjamin. Only those who cannot seem to attract work know how it gnaws at self-esteem. And for many able women, those are still the conditions under which they practise. It is not surprising that women in the legal profession continue to exhibit the restlessness shown by Ethel Benjamin. Her movements in and out of the profession, her attempts to regroup and change direction, are still familiar patterns today. There are still women lawyers who, like Ethel Benjamin, operate restaurants, try unlikely specialities, set up their own firms or go to the bar with no work assured to them, and who throw themselves into poorly paid and unfashionable work because they feel invisible and undervalued by the profession and excluded from traditional practice.

Quite apart from the exclusion of women and discrimination against them, there are signs of growing disenchantment with legal and judicial work among women. Some of their concerns are shared by their male colleagues. And there is no doubt that the expectations of firms today and the mindlessness of many of the tasks they require of young lawyers are turning off a generation. But I do not think it fanciful to think that the price paid by women lawyers falls more heavily in many cases on them and is a price fewer of them are willing or able to pay. A New Zealand Law Society committee in a 2005 survey sought to identify matters which were of key concern to women practitioners.[14] Their four most significant concerns as reported were:

i) hours of work;

ii) professional support;

iii) advancement; and

iv) salary.

13 At 69.

14 New Zealand Law Society Women's Consultative Group *Women Lawyers' Survey* (August 2005).

The concern about hours of work and salary were echoed in a cohort survey of male lawyers. But all surveys in Australia and New Zealand show that it is women who lag in the salary stakes. Men too rated advancement as a concern, but it was a less acute preoccupation for them than for the women. And again, the information about how women are doing in the firms and at the bar suggests that the anxiety of women is well-founded; their prospects of advancement are more limited. Most tellingly, the men did not report similar concern with professional support. I think this may be an important finding, wrapped up with the culture of legal practice, a theme I want to explore further. It is echoed in the experiences of women judges. In the United States, Judge Patricia Wald has referred to the "peer deprivation" of being a woman judge.[15] And most of us would, I think, recognise similar deprivation in our own careers, as practitioners and on the bench. Even where peer deprivation should have receded because the numbers of men and women are more even in particular areas of practice or on specific courts, women remain apart, remarked upon as "women practitioners" or "women judges" in public estimation. They are measured against standards they do not set and may not value. In the Supreme Court of Canada, Justice Claire L'Hereux-Dubé speaking in 2001 of the "continuing struggle for equality" thought women judges remained "outsiders" at least in public perception.[16] It would be wrong to leave the impression that the inside perception of female colleagues within courts or chambers or firms is very different from the public perception.

What is more, few male colleagues are able to be entirely easy about serious attempts to redress the imbalance in gender representation in the profession and on the bench. It means that there will be fewer jobs for the boys. I do not suggest that there is any conscious or vicious self-interest at work here. But the insistence on "merit" (which is self-reflective) and the blind faith (against the evidence) that self-correction is only a matter of time and numbers must now be seen as denial.

As it is becoming clearer that the impediments to women's participation in the legal profession are not confined to those that block the door but include patterns of behaviour and work which women do not accept or cannot meet, strategies for overcoming these impediments may collide with legal culture or

15 Patricia Wald "Some Real-Life Observations about Judging" (1992) 26 Ind L Rev 173 at 179.

16 Claire L'Heureux-Dubé "Outsiders on the Bench: The Continuing Struggle for Equality" (2001) 16 Wis Women's LJ 15.

give rise to fears that women are to receive advantages. Young women with family responsibilities cannot keep up with ridiculous billing hour requirements or demonstrate commitment by working unhealthy work hours. Nor should their male colleagues, but they seem more willing to do so. And if they are, the chance for a shift in the legal culture recedes and accommodation for others is resented as favoured treatment. Those who obtain it are said to "lack commitment". Even on the bench, strategies to relieve women judges with young children of circuit responsibilities may not be well-received. And yet in the United Kingdom growing fears are being expressed that qualified women are turning down appointment to the bench because of such inflexibility.

This Association has called for a fairer and more transparent judicial appointments system. One day I will have the emotional strength to say something of my own experience at the receiving end of the unfairness of the anonymous soundings and semi-public humiliations which go with the traditional process. So I do not mean to be negative about the initiative. But I do not think it is sufficient strategy. And I think that is being demonstrated by the difficulties being encountered by the new appointments process in the United Kingdom. No one can seriously doubt the commitment to a more representative judiciary of the Commission and its impressive chairman, Baroness Prashar. It is early days. And it may be that the critics of the Commission are shedding crocodile tears when they say it is failing to deliver on the appointment of women and minorities. But perhaps the problems are more deep-seated than can be cured by good process in appointments. If we are serious about achieving a more representative judiciary perhaps we have to tackle the culture of the profession, of which the judiciary is part, and the cultural impediments women face in our societies more generally.

Should we be surprised that, nearly 40 years after women started entering the profession in numbers, their position in the profession remains ambivalent? Certainly, although I felt and was treated as something of a freak 39 years ago when I first tried to get employment with my shiny new degree, I told myself, as I developed the hide of a rhinoceros, that this was a transition. I comforted myself with the confident view that my granddaughters would find the experiences I had unbelievable. I expected to be laughing in 2008 about the way things were in 1969.

In retrospect, much was very funny. And for a time it did seem that we were in the middle of a fundamental shift in attitudes and opportunities. Many

of the more ridiculous prejudices against women in law melted away when male practitioners confronted the reality of women practitioners. Having morning tea or lunch together no longer became unthinkable. Women's voices *did* carry in court. Women *could* think like lawyers — and even out-think their male opponents. Writing in 1983, Justice Bertha Wilson, the first woman to be appointed to a final court in the Commonwealth, thought that a sure platform for the advancement of women had been created by the social and political upheavals of the 1960s and 1970s.[17] And it is true that through them we came to see that this cause was just and that equality of opportunity for women and racial minorities was a human right. But we did not see that this wave, too, would recede. We bought into the lie that the advancement of women in the legal profession was just a matter of time and numbers. And that merit would out.

The intractability of the issue of gender equality in our societies more generally and in the international community is now evident. Despite international commitment to the equal rights of men and women since the Charter to the United Nations was adopted and recommitment through the international instruments which followed it, there remains in all societies a gap between the expectations and the reality of women's lives. The manifestations of inequality may be different in affluent societies like ours, but they are real enough. The extent and effect of violation of women's rights is staggering. In employment, education, and income in all societies women come in well behind men. No country is immune from the problems of domestic violence against women. Such violence, as the United Nations Committee on the Elimination of Discrimination Against Women has recognised, is "a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men".[18] Under-reporting of such violence means that we see only the tip of the iceberg. Domestic violence is a main inhibitor to the social advancement of women, but laws and enforcement agencies have been slow to respond. What is clear is that there are cultural inhibitors to the achievement of equal protection of the law for women. Whatever the positive law statements about equality, the reality of women's lives is shaped by the culture they live within, including the legal culture. No woman is an island. We should not expect to see wealthy and educated women fully accepted in

17 Bertha Wilson "Law in Society: The Principle of Sexual Equality" (1983) 13 Manitoba LJ 221.

18 Committee on the Elimination of Discrimination Against Women General Recommendation 19 XI (1992) at 1.

the legal profession while the standing of women in the wider community languishes. That insight has implications for the scale of the struggle and for the role of an Association such as this. We need to change this world, as the suffragettes saw.

In launching this Association more than ten years ago Mary Gaudron was absolutely right to say that its formation in 1997 should be seen as an acknowledgement "perhaps belated" that women are different and are asserting their right to be different.[19] For too long we thought it was enough to break down the doors and be admitted as "honorary men". Gaudron says that what went wrong was that women "did not really dare to be different from their male colleagues, did not dare to be women lawyers". It should not have taken so long for the penny to drop. We should have remembered the example of the suffragettes. For them, the vote was not the end, but the beginning. There was no point in gaining the vote if women were not to change the world. The suffragettes aimed to make the world a better place, through practical gains for real people in our communities. In the same way, when astonished and exhausted some of us find ourselves partner, or Queen's Counsel, or Chief Justice, we have lost the plot if we think it is the end.

The first wave of women lawyers' associations provided networking to help women lawyers gain access to the profession. We looked forward to the time gender need not be on the agenda. The ambition of access was too limited. As Mary Gaudron said, the aim must not be to give women — more accurately, affluent, well-educated women — "a better share of the spoils", but to improve law and the administration of justice for all.[20] If the new horizons are the old horizons, we have failed. If the positions we achieve do not lead to changes for better justice in our societies — for all women, for men as well as women, for children as well as adults, for all races — we will have failed.

To make a difference in this way women lawyers have to be good lawyers. That is why in a conference such as this we want to talk about law and judicial method. The claims we have to equality of treatment are claims of legal entitlement under the rule of law and constitutional principle. These are themes Mary Gaudron paid special attention to as a judge. Indeed, it has been said that "non-discrimination" emerges in her judgments as an "organising

19 Mary Gaudron "Speech to Launch Australian Women Lawyers" (1997) 72 ALJ 119 at 123.

20 At 123.

principle" of the constitution.[21] And discrimination she recognises to arise as much out of the "equal treatment of unequals" as out of the unequal treatment of equals.[22]

To make a difference, women lawyers also have to understand that the experiences and perspectives they bring as women are important and valid considerations for their work. Sandra Day O'Connor[23] once said that the fact that she was a woman who gets to decide cases is more important than the fact that she decides cases as a woman.[24] I agree that the visibility of women lawyers and judges is critical in breaking down stereotypes and is important for that reason alone. I have elsewhere said that I think the assumptions about gender roles displayed by the judges when I first practised law (which led them, for example, to be hostile to matrimonial property legislation) could not have arisen had the judges had women colleagues. I think in any event that the distinct experiences and perspectives of women are critical if law is to be applied in the context of modern society. Contextual application of law is essential. What we see as discrimination, for example, is a social and ethical insight which must be made in the context of the values of the society in which the assessment is made. Richard Posner illustrated this point by reference to the Supreme Court decision in *Brown v Board of Education.*[25] The about-face from the separate but equal doctrine accepted in *Plessy v Ferguson*[26] did not come from "brooding over the text of the words 'equal protection of the laws'" but from the Court's insight that there had been a change in the nation's ethical and political climate.[27]

The judges who in my time in practice thwarted New Zealand's matrimonial property legislation because of sexual stereotyping were judges who prided themselves on scrupulous legality. They did not have the insight to see that their construction of the legislation was heavily influenced by their

21 Henrik Kalowski "Gaudron, Mary Genevieve" in Tony Blackshield, Michael Coper and George Williams (eds) *The Oxford Companion to the High Court of Australia* (Oxford University Press, Oxford, 2001) 293 at 295.

22 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 480.

23 The first woman appointed to the Supreme Court of the United States, serving on the Court from 1981 to 2006.

24 Kathryn Mickle Werdegar "Why A Woman on the Bench?" (2001) 16 Wis Women's LJ 31 at 40.

25 *Brown v Board of Education of Topeka* 347 US 483 (1954).

26 *Plessy v Ferguson* 163 US 537 (1896).

27 Richard Posner *The Problem of Jurisprudence* (Harvard University Press, Massachusetts, 1990) at 307.

personal values and that those values were out of touch with the values in society. Why would women make a difference to this sort of dissonance? I think because their life experiences have been different from those of their male colleagues. Elizabeth Evatt[28] thought that women and minority judges are more likely to realise how often claimed objectivity is marred by unconscious biases.[29] Justice Anthony Kennedy illustrates the point by reference to Justice Thurgood Marshall: "… the compassion of Thurgood Marshall is Exhibit A for the proposition that judicial reason cannot be divorced from the life experience of judges". [30]

The same thing can be said of women judges like Mary Gaudron or Brenda Hale or Beverley McLachlin. I do not think it is fanciful to see in their judgments a different take on matters: an emphasis on human dignity; a greater scrupulousness not to wound or slight; a willingness to express doubt and to revise opinions previously held; and a sense of obligation to explore underlying principle in order to lay out the full reasons for decision and clear away suggestions of an undeclared major premise. Their evident compassion, like that of Thurgood Marshall, comes from their very different experiences from their colleagues who have had more traditional careers. They too in their work are Exhibit A for the benefits of diversity in appointments and in legal practice.

Women such as these have a heightened insight into the disadvantage of those who come before the courts. This insight helps when colleagues occasionally display lack of understanding about the reality of the lives of those who appear before them, or when they act in a way that may be seen as overbearing or hurtful. The experiences of male colleagues have not generally entailed the humiliations and set backs all women practitioners will have experienced. Their practices have usually been less chaotic, more successful. The different experiences we have had shape women. They are strengths they bring to legal practice and to judging.

In New Zealand the women of my generation looked with admiration across the Tasman. I have mentioned Elizabeth Evatt and Mary Gaudron, two women lawyers we too hold in admiration and affection. But I would not

28 The first Chief Judge of the Family Court of Australia, holding that position from 1976 until 1988.

29 Sean Cooney "Gender and Judicial Selection: Should There Be More Women on The Courts?" (1993) 19 MULR 20 at 25.

30 Anthony M Kennedy "The Voice of Thurgood Marshall" (1992) Stan L Rev 1221 at 1222.

want to omit to mention the incomparable Roma Mitchell.[31] I met her at a time when I was feeling discouraged about legal practice. I was working in an area that the profession did not value, because it was all the work that came my way. That was not so bad in itself because I knew that this work was worthwhile and mattered very much. But I was beginning to feel invisible within the profession. I was asked to speak to the International Association of Women Judges which was meeting in Wellington about the work I was doing for Māori. After it, a woman I did not know swept me into a hug. It was Roma Mitchell. She said that she had never before regretted leaving practice but that, hearing of the work I was doing, she wanted to change places with me. No one had ever spoken to me like that before. I will never forget her warmth, generosity and encouragement.

I started by mentioning the praise we have given to our forefathers. We have not done enough I think to praise our foremothers, the women who gave us the opportunities we now enjoy and which they could never hope to have. They were not famous. They worked for future generations in optimism. I mentioned my old school. Despite the inscriptions on the hall walls, it was founded by independent minded women who believed in the progress of women. We were taught by inspirational teachers. I have always been amused by the difference between the mottoes of boys' and girls' schools. In Auckland the boys' schools had thrusting mottoes about reaching for the stars through hard work or through manliness. The motto of our school, founded by pioneering women educators was "to serve". I do not think that reflected a modest view of a woman's place. I think it was an understanding of where real strength lies. And through service we can change the world.

31 Australia's first female Queen's Counsel (1962), judge (1965–1983) and state governor (South Australia, 1991–1996).

STATE OF THE NATION — TAUĀKĪ O TE MOTU

Three women in the law provide their perspectives about the current issues facing women as well as what we can do in the future to improve the situation of women within and effected by the law.

The future of Māori women in the law — Hon Deputy Chief Judge Caren Fox*

I am honoured to contribute to the first issue of the Journal my thoughts on the future of Māori women in the law.

When I was a student at Victoria University in the 1980s, there was little in the core subjects that we studied that identified Māori issues in the law. There has been a sea change since then, too large in nature to canvass in this column. What I will note is that whereas in the 1980s the Waitangi Tribunal had only just gained jurisdiction to hear historical claims, as it stands the Tribunal has only three active historical district inquiries left to complete. After their completion and report production by 2020–2022, the historical claims period as we have known it since the establishment of the Waitangi Tribunal will come to an end. The courts are now well familiar with the Treaty of Waitangi, Māori customary law or tikanga and Māori issues. Thus the focus for Māori communities into the future will be on:

i) the post settlement governance entities of the tribes and their legal needs for the future;

ii) the social, health, economic and cultural issues that raise challenges for the continuing relationship between the Crown and Māori; and

iii) the thematic issues that impact on all Māori such as constitutional reform, natural resource ownership or management and Māori land

* Deputy Chief Judge of the Māori Land Court, Presiding Officer of the Waitangi Tribunal and alternate Judge of the Environment Court.

development, the role and status of Māori women, the role of the Māori language in main stream education and so on.

This legal environment will require a nimble well trained bar of lawyers who can provide advice on topics as diverse as commercial restructuring and intellectual property rights through to human rights law. Māori women lawyers need to be prepared for this shift and many already are. However, their ability to practise law is significantly affected by issues identified by the Māori Law Society, such as:

i) race barriers in the legal profession and a general failure within law firms to understand the importance of Māori culture and perspectives;

ii) adverse gender perceptions of women in the law;

iii) inflexible working arrangements and failure to accommodate motherhood;

iv) a lack of self confidence to act and/or be at the table; and

v) a lack of role models and role modelling for wāhine Māori (Māori women); the counter-factual position being that wāhine Māori in senior roles are required to be all things to all people.

Strategies are needed to overcome these issues and these include developing policies within law schools and law firms that provide for:

i) legal education on Māori issues in the law;

ii) recruitment and retention programmes;

iii) flexible work arrangements;

iv) accommodation of Māori culture and perspectives;

v) opportunities to develop a sound gender policy for promotions;

vi) career advice and allocation of work that will generate the development of skills needed in areas of the law relevant to the Māori community for the decade commencing in 2020; and

vii) mentoring programmes with appropriate senior Māori and non-Māori women members of the profession.

Such an approach would equally benefit other ethnic groups. The benefits of engaging in such developments are many and would result in a far more diverse and, in my view, innovative profession.

"Unconscious Bias" is too kind — Lady Deborah Chambers QC*

I PROGRESS AND WHY IT MATTERS

First the good news. There are more women practising than ever before. There are more women partners than ever before, more women judges, more women QCs and more women in powerful positions in the New Zealand Law Society and Government.

In areas the central government has control of, there has been real progress. We have had a series of progressive Attorney-Generals, Geoffrey Palmer QC, Margaret Wilson, Michael Cullen and Chris Finlayson QC, who have taken deliberate and positive steps to promoting women generally, and this is reflected in the judiciary and QCs. Judges are more diverse than the lawyers who appear before them. Elected governments are more responsive to fighting discrimination than the private sector.

We have come a long way baby — certainly from the days when I started work in 1983 when my employer, Butler White and Hanna, later Simpson Grierson, had a policy of 'no women partners'.

Our progress matters. Not just for us, but for women generally. Women lawyers and other professionals are at the vanguard of the significant fight for justice for equality for 51 per cent of the world's population. Senior women in the legal profession are in a position to take on some key issues that effect women so dramatically in our lives:

i) the treatment of rape survivors who still have to give evidence in front of a jury needs desperate change;

ii) domestic violence against women is a critical front in the change women seek for society;

iii) the battles to control the power of the liquor industry and the tragic effect of cheap alcohol available at all hours on women and children is another battlefront;

iv) equal pay and women's representation on company boards; and

v) the ability of women to speak out in the public eye without having

* Barrister, Bankside Chambers.

> a barrage of personal insults or questions about their reproductive capacity. Queen Victoria ruled the widest empire the earth has ever known for decades and gave birth nine times.

Neurobiologists now know there is no discernible difference between male and female brains at the point of birth. The only obstruction to women's capacity to lead is the willingness of those around them to accept their command.

II THE BAD NEWS: THE PRIVATE SECTOR IS DISMAL

The big issue for women remains the private practice of law where the trenches are still dominated by legions of penis-bearing bloviating nitwits who are elevated rapidly and far beyond their leadership capacity. The private sector has failed to treat women lawyers equally. It is the trenches in the private firms that are the frontline for women in law.

A The issues in the private sector

1 Equal pay — the most basic of criteria and our profession fails

The pay gap in New Zealand has remained static at about 12 per cent for a decade, and although recent research found women were more qualified than men in a range of fields, the gap has not narrowed. Worse still, the gender gap is about 18 per cent in the top professions and it gets more pronounced as we age. The research shows that it is driven by straight out sexism.[1]

There is no research directly on equal pay amongst employed solicitors. Partnerships routinely insist employees keep their pay rates confidential. But there is no way there is equal pay for women in the legal profession. One contributor is the fact that women take a great deal longer to reach partnership. All one has to do is regularly read the announcements of people being made partners in the Law Society magazines where it is very obvious that women only make partnership after much longer periods of service than the men who are on a gender escalator. Approvals to take partnership without the usual mandatory three years' recent practise in the law are dominated by male applicants. About 85 per cent of those applications to the New Zealand Law Society Practice Approval Committees are from young men being promoted to partnership.

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1 See the research conducted by Dr Isabelle Sin at Motu Economic and Public Policy: Susan Edmunds "Reports says women paid less even when as productive" (29 August 2017) *Stuff* <www.stuff.co.nz>.

2 Partnership

We know that women are still not being made partner at the rates men are. Close to 70 per cent of law graduates are women, yet women make up less than 30 per cent of those who are partners or directors in law firms. This is despite more women graduates in law who are performing better at law school than their male colleagues. The big firms in particular, where so many women graduates work after law school, are failing women. A prime example is Bell Gully, which has seven women partners and some 36 male partners at a time when 47 per cent of practising lawyers are female.

That's right ladies, immediately below all these fabulous men who apparently deserve partnership is a huge tier of women "senior associates" and "special counsel", no doubt often being the brains and workers behind the people with penises since we consistently outperform men at law school. Not many are men — they have all been made partners. If women do not make equity partnership where the really significant income is earned or are much slower to reach it, it is inevitable that they will earn less.

When push comes to shove, we know that a significant portion of the gender pay gap is caused by straight out discrimination. Men resist having women in leadership roles just as they still do in regard also to minorities. And what fuels that resistance to equality is the sense of entitlement men have after thousands of years of patriarchy: that deeply ingrained mono-culturalistic thinking where people promote people who are like them. They are the ones who deserve promotion. The *Lean In* survey shows a pervasive sense amongst women that they face structural disadvantages: they are less likely than men to believe that they will be able to participate in meetings, receive challenging assignments or find their contributions valued.[2] The bleakest perceptions are from minority women. I have no doubt the same applies here for women from working class backgrounds, Māori, Pacific Island, Asian, and non-Pākehā women. Those double discriminations make it even tougher.

3 Working mothers

Half a century ago Betty Friedan stated that if housewives across the western world would embark on careers instead, they would be happier and healthier,

2 *Women in the Workplace: 2017* (Lean In and McKinsey & Company, 2017).

their marriages more satisfying and their children would thrive. She was right. Repeated studies have shown that working mothers are physically healthier than their stay-at-home counterparts. Working mothers are also far less likely to feel sad or have clinical depression. We also know that working mothers spend more time with their children than housewives did in the 1950s and that household income is a bigger predictor of childhood academic development than time spent with parents.

In short, women lawyers should, like other women, not ditch their job upon having children. Yes, being a working mother is busy. Yes, you may have less leisure time than what you wish to have. But, there is no corresponding discussion about working fathers.

For lawyers and other women in high earning occupations, children are particularly damaging to their careers. Some women work less once they have children, but many do not, and employers pay them less too, seemingly because they assume they will be less committed, research shows.

The American Economic Review paper, which is the most up-to-date and thorough research in this area currently, establishes that even when mothers cut back at work, they are not paid proportionately less.[3] When their pay is calculated on an hourly basis, they are still paid less than men for the hours they do. The pay gap is larger for university graduates because their earnings are higher, and men dominate the highest paying jobs. Legal jobs, like other graduate jobs, place more value on long, inflexible hours. The bulk of the pay gap, 73 per cent according to this American research, is from women not getting pay rises and promotions at the rate of men within companies, which of course we know comes down to discrimination.[4] Seniority and experience pay off much more for men than for women.

These are not pipeline issues. I have been watching the pipeline for 34 years. There is real bias. There is no other logical explanation for the statistics. We have got to force it to change now.

Yet, many women work in companies with public commitments to diversity and clear policies against discrimination, with many men who sincerely believe they want to advance. That makes the subtler ways women

3 Erling Barth, Sari Kerr and Claudia Olivetti *The Dynamics of Gender Earnings Differentials: Evidence from Established Data* (The National Bureau of Economic Research, February 2017).

4 At 5.

encounter bias more pernicious than blatant discrimination, the Harvard Business Review meta-analysis found.

Yes, there are men who truly want women to succeed. Yes, business understands that a changing customer base means that they fail to diversify at their peril. No one wants to give in to defeatism. But the long path to the top and the loneliness at the summit are forcing a reckoning.

III WHAT CAN BE DONE?

A Firms

The gender pay gap is a reflection of women's position in the legal profession. No one is going to speak out in favour of it. Men have daughters too and fairness and equity are pretty hard to argue against.

1 Acknowledge it, get the numbers, have internal policies and address it

Law firms can tackle this. As Westpac Chief Executive Officer David McLean puts it:[5]

> Closing the gender pay gap is the same as any other business problem – and once it is seen that way people take it very seriously … We've made it one of our core business objectives. We broke the problem down, measured it, made people accountable for it, and set a three year target.

As a result of that programme, Westpac now has 51 per cent of its leadership roles occupied by women.

Some law firms are taking the same action. Russell McVeagh, for example, has a diversity project which developed, implemented and tracked the success of women within the firm in order to properly embed change. The female partnership numbers at Russell McVeagh are now up close to 30 per cent of the partnership, whereas 15 years ago this was only three per cent. Thirty per cent is still not great and still reflects discrimination, but at least this firm acknowledges the issue and is putting resources in.

Voluntary action by firms is to be commended, but progress has stalled and we certainly do not need more research. The research is all pointing to an underestimated visceral recoil against women taking leadership roles in any arena. Exhibit 1: Hilary Clinton. Women in law firms are high achievers

5 *Closing the gender pay gap: actions for employers* (Ministry for Women, 2017) at 2.

accustomed to knocking down barriers, not riding up against them. But we do.

Firms can commit to guaranteeing that junior female lawyers participate in the same number of trials, court appearances and client meetings as their male counterparts. They can ensure that every trial team has at least one woman. They can promote bright, aggressive women to leadership positions in the firm as department heads and managing partners. That will ultimately effectively serve their clients. Firms must stop paying lip service to diversity and take concrete steps to change.

There are other steps that can address the effect of motherhood on the gender pay gap and women succeeding in law other than not having children. Firms could place less priority on long hours and face time. Women lawyers need to push the Government to provide preschool care in the same way that they do for primary school and better parental leave than the current 18 weeks.

2 Quotas

For 34 years I have been talking about the issues of women in the profession, observing this, living this and experiencing it. The big answer is quotas. When you have a particular status quo, you need to create a paradigm shift which is actually going to move the dials.

It has always taken "ludicrous amounts of artificiality and intervention" to assure women's rights. As Fran O'Sullivan states:[6]

> Ridiculously, women had to chain themselves to lamp posts and create civil disturbances before they were 'given the vote' a century ago.
>
> It took a concerted campaign led by unions and women before equal pay legislation was passed in 1972.

Many countries, including Germany, France and Sweden have now imposed quotas for female representation on company boards to no obvious ill effect. Indeed, the statistics show companies with greater diversity enjoy higher returns to shareholders. And with the ranks of tertiary qualified women now outnumbering those of men, arguments about a lack of qualified females do not hold water. Indeed, if talent is evenly distributed among the genders, quotas can only improve the average performance of law firms by removing

6 Fran O'Sullivan "Women still fighting with media mindset" *The New Zealand Herald* (online ed, Auckland, 26 July 2017).

dud men and replacing them with the most qualified women.

What about the argument that quotas are an unnecessary intervention because progress towards gender equality is only a matter of time? Well, if you are arguing we are close, then surely it will not do much harm to marginally bring forward the inevitable. Governments intervene all the time to enhance efficiency. Gender quotas, like competition laws, correct an obvious market failure to produce a more efficient outcome for shareholders and society alike. The thing about quotas is that they work, and fast. Quotas need to be imposed by central Government. A weaker alternative is that Government and local bodies are directed not to give work to any firm that does not have a particular percentage of women partners. That would certainly help. But a straight out quota in regard to gender and minorities required by legislation would achieve what everyone says they want to achieve.

The legal profession is traditionally associated with human rights, fairness, justice and protecting an individual's rights against large organisations. In that context, it is particularly distressing to see that although we have made progress, we who are 47 per cent of practising lawyers are a long way from being treated equally in our own profession.

B Judges

How many times do judges see a male lawyer leading an argument having to repeatedly confer with junior lawyers whilst on his feet because she knew the case and he did not. Judges can suggest that the lawyer who wrote the submissions or prepared the witnesses should be the one to argue. Often it is a woman. Judges should bear some responsibility to ensure that the lawyers who speak in court are as diverse as the bench.

C Clients

Corporate clients particularly can demand that their legal teams be diverse. They should recognise that diversity is now an asset in our courtrooms. Judges and juries now reflect the community. Facebook, Oracle and Hewlett-Packard have demanded that firms representing them field a diverse team of leaders. New Zealand corporations need to follow. Banks and other industries who are so conscious of gender equity within their businesses need to consider engaging

only women lawyers to address the issues in the legal profession, which must stand out like dogs balls to them as well.

D We, the women

Women need to talk to their male colleagues about their salary levels. That is the only way women are going to find out whether they are being underpaid. Women should ignore their employers' requests that they do not talk about their wages. Those requests for secrecy are only there, sisters, to cloak discrimination.

Make sure your partner steps up at home in regard to the division of labour so that it is equal. We must insist on equality in the home as well if we are to achieve equality at work.

To achieve real gender diversity, women in the legal profession need to speak up and not hesitate to confront the very real problems. And when they do, we need to support them doing it. We need to stand together.

Women lawyers' associations need to be there to speak out when employees cannot. They need to be far more vocal for those women publicly. Public embarrassment and actually naming names is a valuable weapon.

Women need to boycott firms that on statistics do not promote women. Check out their partnership gender balance before you accept a job offer. It is the only way to change them and, frankly, why would you work your butt off in a firm that is simply going to discriminate against you when you reach a certain level of seniority. There is no point working there sisters, go to a more progressive firm. Better still, apply for a job there and when it is offered, reject it and tell them why. They need us and if they carry on as they are, they will fail on more fronts than just diversity.

Progress for women has been elusive. The barriers to real change have been more daunting than I expected. I do believe that together, working with our progressive male colleagues, we have the power to make it happen. The road map to change is clear. We need to win this battle. It is time we stepped up and got more radical. It is time, like the Suffragettes, that we started chaining ourselves to the foyer in the Vero Centre and letting out our barely suppressed fury.

It is not optional: diversity and inclusion are critical to the success and sustainability of the legal profession — Kathryn Beck*

I THE ISSUE

The business case for having more women on boards and executive positions is well established. Studies have shown that teams of mixed gender can lead to improved decision-making and ultimately lead to increased productivity and profitability. We have spent too long arguing about this and we now need to act.

Diversity and inclusion in the legal profession and the judiciary is essential. Lawyers have the privileged position of being an integral part of a democracy. We have a role in supporting the rule of law and the administration of justice. Without lawyers, the justice system would not work. The profession is a central player in the development of our laws and society — to maintain that position and our credibility we must ensure the profession, including the leadership of the profession, is as diverse as the society it serves.

The last couple of years have seen some notable milestones for women lawyers. On 13 June 2017 the Supreme Court sat with a majority of women on the bench for the first time. In July 2017, on the other side of the world, Lady Hale was appointed President of the Supreme Court of the United Kingdom. And, of course, this year marks the 120th anniversary of Ethel Benjamin's admission to the bar in 1897. She became the first woman admitted in New Zealand and the first woman lawyer to appear in a court in the British Empire.

Nearly 100 years later, in 1993, half of all law graduates were women. And in recent years women have made up close to 70 per cent of law degree graduates. As at 1 October 2017, New Zealand had 6,362 practising female lawyers and 6,454 male lawyers — tantalisingly close to a perfect gender balance. In any group of 10 lawyers you will find a gender-age difference. Our female lawyers are younger — 20 per cent are currently in their 50s, while 50 per cent of our male lawyers are in their 50s and older.

Yet women are severely underrepresented in leadership roles. Women comprise 31 per cent of judges across all courts. And, while women make up

* President, New Zealand Law Society; and Partner, SBM Legal.

47 per cent of lawyers who work in law firms with more than one practitioner, they make up less than 27 per cent of partners or directors in those firms. Although 61 per cent of in-house lawyers are women, that proportion is not reflected in leadership roles in corporate and government legal teams. A paltry 26 out of 110 Queen's Counsel appointed since 2002 are women barristers.

The hourly charge out rate for women is lower than males by an average of seven to 10 per cent. The annual New Zealand Law Society & Hays Legal Salary Guide does not break down salary figures for lawyers by gender. However, the highest-paid lawyers are partners in law firms and Queen's Counsel, and the numbers of women occupying both those positions in New Zealand remain very low. While an equal number of male and female lawyers earn $100,000–$150,000, only 15 per cent of female lawyers earn above $150,000 compared with 41 per cent of males.

II FOSTERING POSITIVE CHANGE

The New Zealand Law Society's Women's Advisory Panel was charged with coming up with practical solutions to support the retention and advancement of women in the legal profession. It is chaired by my predecessor, Immediate Past President Chris Moore. The Panel is made up of a cross section of lawyers at different stages of their careers from different areas and types of practice. And not just influential female lawyers but also male lawyers, all leading the way together.

A Recognising and challenging our unconscious bias

The Women's Advisory Panel recommended that unconscious bias training should be embedded at key stages of legal careers. Unconscious bias refers to unconscious beliefs and attitudes — often based on stereotypes — that can affect behaviour, and is increasingly recognised as a barrier to a diverse and inclusive professional culture.

As a result of the Panel's work, the Law Society commissioned NZLS CLE Ltd to develop a free webinar on unconscious bias for lawyers. The live webinar was held on 28 February 2017 and attracted an audience of over 1100. It is still available to view on the NZLS CLE Ltd website.[7] This webinar and the accompanying course materials are now a compulsory part of Stepping Up

7 "Unconscious Bias in the Workplace" (February 2017) NZLS CLE Ltd <http://www.lawyerseducation.co.nz/Courses/Free+Recordings.html>.

— the course that all lawyers wishing to practise on their own account must complete.

The Law Society is also exploring how unconscious bias training can be embedded in law degrees. In March 2017, we collaborated with Victoria's Law School to include unconscious bias sessions as part of the Ethics and the Law course, which is compulsory for students wishing to qualify for admission to the bar.

B Charter to accelerate the progress of and retain women in law

One of the significant pieces of work that the Women's Advisory Panel has been engaged in is developing a Gender Equality Charter for the profession. In developing the charter, the Panel has considered developments overseas and in other professions. We have also consulted widely with the legal profession and, specifically, with key groups in the profession to ensure that the charter targets the areas that will make a real difference to the retention and advancement of women in the law.

The proposed charter is voluntary but requires organisations and in-house teams that sign up to:

i) *Lead from the top* by assigning responsibility for meeting charter commitments to a named, senior level individual within an organisation/in-house legal team.

ii) *Make a plan and take action*, specifically in the areas of unconscious bias training, conducting gender pay audits, encouraging and supporting flexible working for all lawyers, not just women, and reviewing areas of business with a diversity and inclusion lens (such as recruitment, retention and promotion practices, tenders for new work, publications, speakers at seminars etc).

iii) *Measure progress* by collecting and sharing with the New Zealand Law Society information on practical strategies that make a real difference, as well as data that enables the Law Society to track overall progress. The Law Society plans to publish a report every two years on the overall progress of the profession in improving gender diversity and inclusion.

The Law Society is also developing free tools and resources that will be made available online to support the profession in driving change and meeting the charter requirements.

Many have asked why the focus is on women, instead of diversity more broadly. We continue to tackle the wider issues. And we do expect that the work done to promote gender diversity will flow through to other areas. However, for the moment we are focusing on the glaring problem of the retention and advancement of women, and making it easier for those women who do want to progress in the law to do so.

III ON THE HORIZON

A Equitable instructions and briefing

We see ensuring equitable instructions and briefing of women lawyers both at the bar and in law firms as an important step to changing the culture of the profession and ensuring that our best women are retained and advanced within the profession. Men still significantly outnumber women at the bar and as partners in the civil litigation area. We know that unconscious bias can play a part in our selection of lawyers we want to run our large litigation cases. Indeed, sometimes we continue to brief the same people simply out of habit and familiarity with what we know and are comfortable with. This leads to a continuation of the status quo. We know that there are many able and talented women litigators. Clients should have the best lawyers available to them, whether they are male or female.

When our young women lawyers see males dominating the higher ranks of the profession they are daunted. Without senior women role models many then opt out. They need to be able to see the pathways to achieving their goals. We want our young women lawyers to have the best opportunities for advancement and be able to go where their skills and aspirations take them. This means encouraging those in power to look again at who they are instructing and to show them the benefits of taking diversity into account when instructing lawyers.

As part of the charter commitments, signatories will be required to adopt equitable briefing and instruction practices. The charter and accompanying guidance will make it clear that this can be achieved in a number of different ways. We are currently looking at the good work being done in this area by the New Zealand Bar Association and some large firms. It is likely that this work will form part of the resources available to support the charter commitments.

B Queen's Counsel — are there structural barriers for women lawyers?

We need to examine whether there are some structures that are still blocking promotion of women, particularly for Queen's Counsel. Only 548 women practise as barristers and most of those may not have the typical level of experience to be considered for appointment. The average length of service of a QC at appointment is 27 years — many women who have that service who might qualify are already on the bench. Are there unintended consequences of women lawyers being appointed to the judiciary at a younger age? In addition, many women lawyers who have the expertise to qualify for the rank of QC are ineligible for appointment because they work in firms and are not barristers. The appointment criteria may not be suited to modern practice. Some consideration might need to be given to whether it is the criteria that inhibits some of our best women from being appointed. The reality is, we cannot simply continue to do things as we have always done them. What that change looks like is a matter for informed discussion but we know something needs to be different.

IV WALKING THE TALK

The New Zealand Law Society has to walk the talk. So we are also actively ensuring there is more gender diversity throughout the Law Society, for instance, on our committees. We have just completed the biennial appointment round of lawyers to our specialist law reform committees, and 43 per cent of the members are women. Seven of the 16 convenors are women. This is a major increase from the membership of the 2015–2017 committees. With equality of numbers, why should there not be equality of input and involvement in all things lawyers do — including reform of the law?

V THE LONG-TERM SUSTAINABILITY AND SUCCESS OF THE PROFESSION

These issues are not unique to the legal profession and in some ways we are ahead of other professions. We do at least have women entering the profession in large numbers. The retention and advancement of women in the workplace is relevant to New Zealand society more generally. These issues are complex and multi-faceted. It is fair to say that there are different views within our

profession; some still say it is only a matter of time, while others are calling for quotas and regulation to ensure women progress in the law.

Retaining and advancing our women lawyers involves taking a good look at our culture and the traditions of our profession. Perhaps we need to look at some of our sacred cows. This includes examining the myth that lawyers need to be in the office or on call at all hours for clients. Promoting more flexible working practices and better use of technology can make a big difference to those who are juggling other commitments. We may also need to look at how we value and charge for our work. Is time costing still relevant? As good employers, colleagues and clients we need to think about how we practise and the way this impacts on those around us. We should examine our practices with a diversity lens and see where we can make changes. We aim, as a profession, to continuously improve what we do and how we do it. This area should be part of that process.

While a lot is being done there is so much more that we can all do to encourage diversity and inclusion within our profession. Progress has been made but it is too slow. The legal profession has a real opportunity right now to harness the "diversity dividend" and support each other in driving cultural change. Let's not waste it.

KEI HEA NGĀ WĀHINE TOA? CHALLENGES FOR WOMEN AND TIKANGA MĀORI[1]

Tunisia Napia*

Where are the wāhine toa? — strong women who fight in the face of immense societal challenges? Are women's roles in a tikanga Māori framework still becoming of strong women? This article examines women's roles in tikanga over time through case studies from Māori mythology, the pre/early-European contact and post-colonisation periods as well as interviews with Māori women in the legal profession today. It argues that traditionally tikanga demonstrated value and respect for women. However, limits to the applicability of tikanga and breakdowns in Māori society over time have led to serious challenges for women performing tikanga roles. It concludes that strong women are here still, all around us, and for the most part, women's tikanga roles are becoming of strong women. However, to some extent, women roles in tikanga should change to better support women's aspirations, in accordance with traditional Māori values that recognise women's worth.

I INTRODUCTION

It is time to ponder the extent to which tikanga demonstrates respect and support for women. In times past, Māori women fought alongside men in battle "and there were some veritable amazons among them."[2] Women were wāhine toa: warrior women, women of strength. As iwi are no longer at war, their women are no longer warriors (in the traditional sense). Do women still perform roles becoming of strong women? How can tikanga as a practical, cultural and spiritual body of customs, laws and norms conceptualise and support strong women?

This article explores the meaning of tikanga, surveys women's roles in tikanga over time, and considers how tikanga might be varied to better support

* BA/LLB(Hons) student, (BA double-major in Ancient History and Māori Studies). Nō Ngāpuhi me Ngāti Whātua.

1 Where are the warrior women? Challenges for women and tikanga Māori.

2 Elsdon Best *Notes on the Art of War: As conducted by the Māori of New Zealand, with accounts of various customs, rites, superstitions, &c., pertaining to war, as practised and believed in by the ancient Māori* (Reed, Auckland, 2001) at 68.

modern-day wāhine toa. This article also incorporates interviews with Māori women in the legal profession, for several reasons:[3]

> An author can only explain her culture to another in terms of what her cultural "institutions, customs, mores and traditions" mean to her.[4] So it is appropriate to seek out others' thoughts and experiences in order to present a wider perspective;
>
> A Māori approach to research involves gathering histories[5] and recognising that people's stories are toanga (valuable treasures) to be respected;[6]
>
> 'Māori lawyers' are not so much lawyers who happen to be Māori, as Māori who happen to have law degrees and Māori experiences may be very different from the experiences of others within the legal profession;[7]
>
> Lawyers who identify as women are often expected to attempt to gain recognition and protection for tikanga-based rights in New Zealand domestic law;[8] and
>
> Māori academics are often challenged to advocate on behalf of Māori development or explain Māori issues.[9]

The objective of this article is threefold:

i) To canvas a variety of women's roles in tikanga and consider some ways in which they reflect women's value and strength.

ii) To traverse past and present contexts to highlight some of the challenges that women and tikanga face today.

iii) To confront hard questions such as: where are the wāhine toa (those who fight in the face of challenges); and how can they be valued and respected in a tikanga framework?

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3 I am grateful to those who have allowed me to speak with them and incorporate their thoughts and experiences in this article — tēnā koutou.

4 Māori Marsden "God, Man and Universe: A Māori View" (1975) in Michael King (ed) *Te Ao Hurihuri – The world moves on: aspects of Māoritanga* (Reed, Auckland, 1992) 191 at 191.

5 Cherryl Smith "Becoming a Kaupapa Māori Researcher" in Donna M Mertens, Fiona Cram and Bagele Chilisa (eds) *Indigenous Pathways into Social Research: voices of a new generation* (Left Coast Press, California, 2013) 89 at 94.

6 At 96.

7 Annette Sykes "Te Miina o Papatūānuku – Te Mana o te Wahine" (Hui-a-Tau Conference 2015 — Te Hunga Roia Māori o Aotearoa, Waitangi, 4 September 2015).

8 Sykes, above n 7.

9 Fiona Te Momo "Whakanekeneke Rangatira: Evolving leadership" (2011) 2 MAI Review 1 at 3.

II TIKANGA

Consider whether the following statement (or parts thereof) fairly reflects the nature of New Zealand's common law legal system:[10]

> …[B]orn of a great intellectual tradition to regulate and guide the lives of the [people] … [A] philosophical, spiritual, moral and ethical framework, derived from a set of values and [practices] that in a very real sense underpin[s] a functioning, practical legal system … [K]nown and lived across the whole land as a vibrant ethos about what ought to be, complete with sanctions and redress for infringement.

Would it surprise the reader to know that this statement was actually Moana Jackson's description of the nature of tikanga prior to 1840? Today tikanga is a minority legal system, but it is still more than Māori customary law. The word tikanga is derived from 'tika' meaning straight, keeping a direct course, just, fair, right, correct.[11] However, the following collection of thoughts demonstrates tikanga has many meanings.

> Tikanga is the fundamental principles of the first law of Aotearoa and it can extend from particular practices and sort of positive laws to prohibitions or rāhui, to broader central principles like utu [reciprocity] or whanaungatanga [kinship] or aroha [love]. Principles, practices, norms and rules.
>
> — Dr Claire Charters, Ngāti Whakaue, Tūwharetoa, Ngāpuhi and Tainui[12]
>
> For me, tikanga is an amorphous concept that is all about understanding justice in terms of the connections that are still strong in te ao Māori [the Māori world], — being, relationships between people, the land, and the spiritual realm.
>
> — Aria Newfield, Waikato-Tainui[13]
>
> For me it is my connection to my Māori heritage, which I think for a lot of my generation and probably my parents' generation, can be quite fraught

10 Moana Jackson "Introduction" in Ani Mikaere and Jessica Hutchings (compilers) *Kei Tua o te Pai Hui Proceedings: Changing Worlds, Changing Tikanga – Educating History and the Future* (Te Wānanga o Raukawa and New Zealand Council for Educational Research, Wellington, 2013) 9 at 9.

11 Herbert W Williams *A Dictionary of the Maori Language* (7th ed, Government Printer, Wellington, 1985) at 416.

12 Interview with Dr Claire Charters, Associate Professor, University of Auckland (Tunisia Napia, Auckland, 14 August 2017).

13 Interview with Aria Newfield, Solicitor, Russell McVeagh (Tunisia Napia, Auckland, 17 August 2017).

> because a lot of people have their turangawaewae (where they are from) and did not actually grow up in that area. My grand uncle who is kaumatua of our hapū really impressed upon me that everything within Māoridom comes back to whakapapa [genealogy] and whanaungatanga and making those connections not only with people, but with the land.
>
> — Pagen Plaizier, Ngāpuhi[14]
>
> For me tikanga is more of an inherent heritage, something I almost need to vocalise because I am quite pale-skinned Māori and I do not have that much to do with my marae. It is a relationship that I feel like I have to work at because it is not really in the system that I live in. It is also something that I feel inherently proud of. It is something that is a part of me that I am also a little bit disconnected from.
>
> — Nicole Browne, nō Mangawhai[15]
>
> My understanding of tikanga is it is the things that you do as a person to make sure that you follow good process so you keep yourself and others safe. That can be on a marae — making sure that you are being respectful to people; but it is also an everyday life thing — making sure that you are being courteous to the people around you and not overstepping any boundaries.
>
> — Rachel Robilliard, Ngai Tahu, Ngāi Te Ruahikihiki[16]

I view tikanga as a holistic way of life, that is, values, practices and systems that tie together the entirety of Māori culture itself. Given the breadth of meanings of tikanga, we should proceed from the premise that a review of women's roles in tikanga needs to include reflection about women's roles in Māori society as a whole.

III WOMEN'S ROLES

Women have had many roles in tikanga over time. This section will identify women's tikanga roles in Māori mythology, and the pre/early-European contact and post-colonisation periods. It will explain the spiritual and practical significance of these roles to Māori society and demonstrate changes for

14 Interview with Pagen Plaizier, Graduate Experience Manager, Xero (Tunisia Napia, Auckland, 9 August 2017).

15 Interview with Nicole Browne, Graduate, Russell McVeagh (Tunisia Napia, Auckland, 9 August 2017).

16 Interview with Rachel Robilliard, Solicitor, Russell McVeagh (Tunisia Napia, Auckland 9 August 2017).

women and tikanga over time. I argue that tikanga roles traditionally reflected value and respect for women. However, over time, limits to the applicability of tikanga and breakdowns in Māori society have led to serious challenges for women performing tikanga roles.

A Mythology

Myths are a traditional medium for conveying meaning and fundamental values through symbolism. Myths provide us with some understanding of how tikanga and women's roles were conceived in the earliest times.

The women of the Māori creation story (a story explaining the whakapapa (genealogy) of all things) were seen as the bringers of life. Before the world existed, the Supreme Being, Iō-Matua-Kore, organised Te Kore (the realm of potential being and primal, elemental energy)[17] into the realm of Te Pō. Te Pō had childbearing powers, like women. Te Pō was the womb in which all things gestated and from which all things proceeded.[18] Te Pō begat Te Aō Mārama (the realm of enlightenment, the natural world, that is our world). From thence:

i) Te Ao Mārama begat Ranginui (Sky-father) and Papatūānuku (Earth-mother).[19]

ii) Ranginui and Papatūānuku begat Tāne (God of the Forest) ('tāne' is also the Māori word for male).

iii) Papatūānuku instructed Tāne to go to her pubic area and form Hineahuone (the earth-maiden) from the elements of the earth.[20]

iv) Tāne and Hineahuone begat Hinetītama.

v) Tāne and Hinetītama begat humankind.

vi) When Hinetītama learned that Tāne was her father, she was ashamed because of their cohabitation and went down into rarohenga (the underworld) where she became Hinenuitepō (Goddess of the Underworld):[21] the portal between the realms of life and death.[22]

17 Marsden, above n 4, at 216.

18 At 216.

19 Cleve Barlow *Tikanga Whakaaro: Key Concepts in Māori Culture* (OUP, Auckland, 1994) at 173.

20 Robyn Kahukiwa and Patricia Grace *Wahine Toa: Women of Maori Myth* (Viking Pacific, Auckland, 1991) at 28.

21 Barlow, above n 19, at 147.

22 See Hōne Sadler *Ko Tautoro, Te Pito o Tōku Ao: A Ngāpuhi Narrative* (Auckland University Press, Auckland, 2014) at 63.

This whakapapa affirms all things proceed from women, who are the portals to life. I suggest the myth nevertheless affirms that both women and men have responsibilities towards all living things because life was said to proceed after the partnership of both childbearing (feminine) and seeding (masculine) elements.

Women in Māori myths were also responsible for helping humankind to flourish. They were particularly nurturing in three key ways. First, they cared for their children. Author Patricia Grace's words capture Papatūānuku's motherly sentiments towards all earthly things:[23]

> [Ranginui] directs the warmth and light that nourish seeding, towards and into the earthiness that I am, while I remain the nursing parent, clutching to my belly our trembling … child …

Hinenuitepō's role as the portal between the realms of life and death means that she has a perpetual obligation to care for her children, that is, us for all eternity. Grace's words capture the role thus:[24]

> I will go on to the dark world … where I will welcome our children when their earthly life is ended. I will go in order to prepare an afterlife for them, where once again I can be a loving mother.

Second, women in myth cared for all living things. For example, when Māui (the nanakia (trickster) of Polynesian myth) sought the ability to make fire to sustain life, Mahuika (Goddess of Fire) freely handed over all of her fire-making power because of her kinship (and accompanying obligations) to Māui and the earth.[25]

Third, women in myth passed on knowledge intergenerationally. When Māui asked Muriranga-whenua (his ancestress) for her jawbone of knowledge, she gave it freely. Muriranga-whenua's sentiments were captured thus:[26]

> Because you [are] a descendant of mine you will be safe … I will not harm you … [The jawbone] will assist you in the earthly tasks you undertake … Take it on your journey … It is my gift to you … and through you it is my gift to the people of the earthly land.

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23 Robyn Kahukiwa and Patricia Grace *Wahine Toa – Women of Maori Myth*, above n 20, at 22.

24 At 34.

25 At 46.

26 At 52.

Overall, this section illustrates that women had two valuable roles in myth: to bring forth; and to nurture.

B Pre/Early-European contact

In the pre/early-European contact period, gender did not necessarily inhibit women's ability to engage in many aspects of social life. This can be inferred from the following five examples.

First, traits in te reo Māori point towards a view that before European contact, men and women were seen as equals in tikanga.[27] The personal pronoun 'ia' (meaning 's/he') and the possessive personal pronouns including 'tāna' and 'tōna' (meaning 'his/her') are gender-neutral.[28] Moreover, the possessive pronoun 'tāna', not 'tōna', is used in the clauses 'tāna wahine' (meaning 'his wife') and 'tāna tāne' (meaning 'her husband'). 'Ā', as opposed to 'ō', appears in the possessive particle where the possessor (in the example, his/her) has control or is in a dominant position over the possessed (in the example, wife/husband). The use of 'ā' affirms that husband and wife were equally dominant over one another, or in other words, partnerships were equal, neither person being subordinate to the other.

Second, women, not just men, could wear tā moko (tattoos) (although the typical placement of the tattoos often differed between the sexes).[29] For women, tā moko was about blood, pain and life, just like childbirth.[30] However it was also about fashion and beauty.[31]

Third, women were the primary composers of mōteatea (ancient songs). Only women were able to compose pātere: mōteatea which responded to slander in order to restore mana and exact utu (reciprocal vengeance).[32] Through mōteatea, women were able to express feelings and restore balance without necessarily having their iwi engage in war (although many mōteatea literally

27 Annie Mikaere "Māori Women: Caught in the Contradictions of a Colonised Reality" (1994) 2 Wai L Rev 125 at 126.

28 At 126.

29 Ngahuia Te Awekotuku and others *Mau Moko: The World of Māori Tattoo* (Penguin Viking, Auckland, 2007) at 77.

30 At 76.

31 At 83, 86 and 89.

32 Bruce Biggs "The Oral Literature of the Polynesians" (1964) 49 Te Ao Hou 23 at 46.

or metaphorically expressed "a desire to slay, cook and eat the persons named therein").[33] Further, as mōteatea were commentaries on life, compositions transferred knowledge from one generation to the next.[34]

Fourth, many women were leaders. Leaders emerged irrespective of gender. The naming of hapū (subtribes) after women shows the significance of female leaders.[35] The collectivist lifestyle of Māori fostered female leadership as it was the extended whānau, not just the nuclear family, who raised children, enabling busy mothers to take on wider community roles.[36]

Fifth, this collectivist lifestyle also ensured that women were well cared for by their whanau during their "time of power", that is, menstruation.[37] In honour of the continuity of life, menstruation was set apart as a time of rest and nurturance.[38] Whānau talked openly about menstruation, men prepared special food for menstruating women and menstruating women were excused from community responsibilities such as working in the gardens, gathering and preparing food and weaving.[39] Menstruating women were considered sacred and powerful.[40]

These roles and the respectful attitudes behind them demonstrate that women were deeply valued in the pre/early-European contact period.

C Post-colonisation

The application of tikanga to life is now, post-colonisation, severely limited. This is observed in the three following respects.

First, tikanga's incorporation into domestic law is arguably deficient. Expert reports released in 2005 and 2010 under the United Nations Special Rapporteur on the rights of indigenous peoples (a United Nations human

33 Mervyn McLean and Margaret Orbell *Traditional Songs of the Māori* (Auckland University Press, Auckland, 1975) at 52.

34 At 28.

35 Mikaere, above n 27, at 128.

36 At 128.

37 Ngāhuia Murphy "Te awa atua: The river of life! Menstruation in pre-colonial times" in Ani Mikaere and Jessica Hutchings (compilers) *Kei Tua o te Pai Proceedings: Changing Worlds, Changing Tikanga – Educating History and the Future* (Te Wānanga o Raukawa and New Zealand Council for Educational Research, Wellington, 2013) 36 at 42.

38 At 40.

39 At 40.

40 At 36.

rights reporting mandate to investigate alleged violations of Indigenous peoples' human rights) have recommended that the New Zealand government:[41]

i) give greater consideration to Māori land and resource rights;

ii) provide more equitable and inclusive Treaty of Waitangi settlement processes;

iii) protect rights to culture including Māori medium education; and

iv) incorporate indigenous rights security in domestic legislation.

These recommendations show more could be done to legitimate tikanga as a source of law in New Zealand. I argue that this would be a positive change, leading to a more culturally sensitive and inclusive body of domestic law.

Second, domestic law can restrict tikanga-based rights because of parliamentary sovereignty. Notably, in 2005 the Committee on the Elimination of Racial Discrimination determined that New Zealand legislation extinguishing Māori property rights in the foreshore and seabed was discriminatory.[42] Section 6 of the New Zealand Bill of Rights Act 1990 provides that "wherever an enactment can be given a meaning that is consistent with the rights … contained in this Bill of Rights, that meaning shall be preferred to any other meaning". However, there is no reference to Māori or the Treaty of Waitangi in the 1990 Act.[43] Several other statutes do reference Treaty of Waitangi or tikanga principles.[44] However, because the meaning of such principles is left ambiguous,[45] the force of their applicability is doubtful. Thus, tikanga-based rights are insufficiently protected in New Zealand law.

Third, tikanga has been largely relegated to serving a mere ceremonial function. Moana Jackson stated:[46]

> … it has been "confined" physically to the marae where to all intents and purposes it can be an esoteric subject of debate rather than an everyday

41 Fleur Adcock "The UN Special Rapporteur on the Rights of Indigenous Peoples and New Zealand: A Study in Compliance Ritualism" (2012) 10 NZYIL 97 at 100.

42 Committee on the Elimination of Racial Discrimination (CERD) *Decision 1 (66): New Zealand Foreshore and Seabed Act 2004* CERD/C/66/NZL/Dec.1 (2005); see Adcock, above n 41, at 99.

43 At 106.

44 See, for example, the Resource Management Act 1991, ss 7(a) and 8.

45 See, for example, the definitions of kaitiakitanga, tangata whenua, tikanga Māori, mana whenua, and Treaty of Waitangi in s 2 of the Resource Management Act 1991.

46 Jackson "Introduction", above n 10, at 10.

> code for living that might inspire and govern the people's relationships way beyond the borders of the marae.

I acknowledge that the modern-day leash that ties tikanga to the marae is slackened by the occasional inclusion of pōhiri (welcome) and poroporoaki (farewell) ceremonies in some school, workplace and public settings. However, I regard this as an artificial and unspoken social agreement to pay ceremonial homage to Māori culture when it suits. In 1993, the Ministry of Women's affairs reported:[47]

> Being responsive to Maori does not mean that an organisation correctly adheres to powhiri practice … or appoints a few Maori advisers or takes all staff on an annual marae visit. This is not to say that these things are not important – they alone are just not enough.

I argue that observing tikanga practices as mere ceremonial niceties undervalues the significance of tikanga and people's roles in tikanga. Since, for now, the general public's main exposure to tikanga may be through pōhiri, marae visits etc., the roles of women on the marae should be discussed.

1 Women on the marae

Nowadays, women continue to act symbolically as the portals between worlds, like their mythological ancestresses. Kaikaranga (women whose role it is to perform karanga (welcome calls)) welcome visitors from outside the marae gate (or wherever the ceremony is being held) (symbolically, Te Kore), onto the marae (or venue) (symbolically, Te Ao Mārama).[48] Kaikaranga may welcome both the visitors and the spirits of their ancestors, so that as the living meet, so too may the dead.[49] Additionally, women sit beside the deceased at tangi (funeral ceremonies).[50] Symbolically, they are accompanying the deceased as portals from our world to different realm of existence. These roles are tapu, and women, for their ability to carry out these duties are tapu.

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47 Ministry of Women's Affairs *He Kaupapa … He Hanga Tikanga: A Foundation … Shaping a Way – Responsiveness to Maori Plan of the Ministry of Women's Affairs* (Ministry of Women's Affairs, Wellington, 1993) at 4.

48 Sadler, above n 22, at 63.

49 Hiwi Tauroa and Pat Tauroa *Te Marae: A Guide to Customs and Protocol (*Penguin, Auckland, 2009) at 49 and 53.

50 Sadler, above n 22, at 63.

At pōhiri and poroporoaki, women sit behind men and, in many hapū,[51] are not kaikōrero (speakers). According to tikanga, those protocols are intended to protect women from potential physical and spiritual threat posed by visitors. This includes verbal attack, which kaikōrero may face.[52] As kaikōrero can be aggressive and provocative, marae have been referred to as the "umu pokapoka a Tūmatauenga" (fiery ovens of the God of War).[53] Insults may be fair game.[54] The desirability of protecting women from such threats is tied to a great respect for women as the whare tangata (literally, house of people): those who, by bearing children, carry with them the legacy of the hapū.[55]

These protocols are somewhat controversial. On Waitangi day in 1999, the then Opposition Leader, Helen Clark, was reduced to tears after being invited to sit on the paepae (an area reserved in most hapū for male kaikōrero) and then being openly chastised by Titiwhai Harawira, a Ngāpuhi woman, who challenged her right as a woman to speak.[56] In 2004, a high profile complaint in came from Pākehā probation officer, Josie Bullock, who refused to sit behind the men in a poroporoaki at a Corrections Department facility and then compared the seating arrangement to racial segregation laws requiring African-Americans to sit at the back of the bus.[57] In 2006, National MPs Anne Tolley and Judith Collins (Collins having vowed to "do a 'Josie Bullock"') refused to sit behind the men in a pōhiri at a Child Youth and Family facility.[58] Collins said "women are treated as second-class citizens".[59]

On the one hand, these protocols may be seen as problematic. For example, it is arguably dissatisfactory that even though Pākehā men have at times been allowed to assume the right to speak without seeking permission

51 Tikanga practices vary between iwi, hapū, whanau and marae.

52 See Katherine Curchin "Pākehā Women and Māori Protocol: The Politics of Criticising Other Cultures" (2011) 46(3) Australian Journal of Political Science 375 at 377.

53 John C Moorfield "umu pokapoka a Tūmatauenga" (2017) Māori Dictionary <www.maoridictionary.co.nz>.

54 Turoa and Turoa, above n 49, at 59.

55 See generally Curchin, above n 52, at 377; Kerensa Johnston "Māori Women Confront Discrimination: Using International Human Rights Law to Challenge Discriminatory Practices" (2005) 4 Indigenous Law Journal 19 at 34.

56 Johnston, above n 55, at 22; Curchin, above n 52, at 22.

57 See Curchin, above n 52, at 381.

58 At 377.

59 At 378.

and following protocol, many Māori women are not allowed speak on their own marae.[60] In Dame Mira Szászy's view:[61]

> … our *marae* is a patriarchal institution, 'pervaded by assumptions of male domination' … The custom which disallows women from speaking on that forum with the assertion that men and women have complementary roles is, in fact 'a denial of equality, as such roles are certainly not equal'.

On the other hand, it is arguable that men's and women's roles are equally influential.[62] This is for a number of reasons. First, even if people do not understand the karanga, the wailing and solemnity of the process alerts the senses to the fact that something significant is happening.[63] Second, women, as the primary kaiwaiata (singers), have the power to cut unsatisfactory speeches short by singing over the top of the speakers, forcing them to stop talking.[64] Third, women often occupy leadership roles, including on many marae committees, managing marae and hapū affairs.[65] Fourth, it could be said that women are the ones who are really "running the show" behind the scenes[66] and still have a say in everything the men say and do.[67] As Anne Salmond said, "whenever a man oversteps the bounds of marae protocol, it is nearly always the women who carry out corrective action".[68] Fifth, women are the primary ringawera (workers in the kitchen and on the marae) — "on them depends the mana of their marae". [69] Ringawera share the aroha of the iwi with everyone on the marae. Tūwharetoa kuia, Haneta Rota-Brown said:[70]

60 Johnston, above n 55, at 36.

61 See Curchin, above n 52, at 382.

62 At 380.

63 See generally Tauroa and Tauroa, above n 49, at 53.

64 Interview with Amokura Kawharu, Associate Professor, University of Auckland (Tunisia Napia, Auckland, 29 August 2017); Interview with Dr Fleur Te Aho, Ngāti Mutunga ki Taranaki, Lecturer, University of Auckland (Tunisia Napia, Auckland, 15 August 2017); and Curchin, above n 52, at 380.

65 Interview with Amokura Kawharu, above n 64.

66 Interview with Pagen Plaizier, above n 14; Interview with Rachel Robilliard, above n 16; Interview with Aria Newfield, above n 13.

67 Interview with Pagen Plaizier, above n 14.

68 See Curchin, above n 52, at 380.

69 Tauroa and Tauroa, above n 49, at 40.

70 Haneta Rota-Brown "Mana Wahine, Mana o te Kuia" in Shelley Hoani and Rangimarie Hunia (eds) *Toroa-te-Nukuroa Volume IV: Māreikura* (online ed, Te Wānanga o Aotearoa, 2009) 79 at 79.

> As an extension of manaakitanga (caring), aroha is the concept of love in its widest sense. It can mean respect, concern, hospitality, and the process of giving. Thus every person is concerned for, and respects the rights of others. Aroha is given freely; it does not take account of personal cost but considers only what is beneficial to others. Aroha is reflected in the way that the tangata whenua provide hospitality; in the way that the manuhiri [visitors] become part of the tangata whenua and share in their normal duties of th[e] day …

The aroha and influence of women goes beyond the marae, including into schools and homes. Women provide critical guidance for Māori communities.[71] As Rota-Brown stated:[72]

> Māori women play a significant role in developing and sustaining the cultural, social and economic lives of our Māori communities … Maōri women are the driving force behind the formation of our Kohanga Reo [Māori kindergartens], Kura Kaupapa Māori [Māori schools] and maintaining the well-being of all Māori families …

2 *Socio-economic concerns*

Maintaining the welfare of Māori families has been a constant goal. In 1951, the Māori Women's Welfare League was established to respond to the social problems faced by Māori attempting to adapt their lifestyles to Pākehā culture, including: racism; adapting to the cash economy; housing and sanitation issues; poor health; diseases; high infant mortality; mental health concerns; increased alcohol consumption; and domestic violence.[73]

Nowadays, Māori continue to battle persisting socio-economic inequalities between Māori and non-Māori.[74] Many people have linked such socio-economic problems to the impact of colonisation.[75] I argue that colonisation broke down traditional Māori society. Colonialism, including the introduction and sudden strict enforcement of British laws and political systems, land alienation, World Wars I and II, industrialism, alcohol and foreign values, tore

71 Although, this recognition is not intended to detract from men's input.

72 Rotao-Brown, above n 70, at 81.

73 Dame Mira Szászy *Te Timatanga Tātau Tātau: Early Stories from Founding Members of the Māori Women's Welfare League* (Bridget Williams, Wellington, 1993) at xii, xiv, xvi and xvii.

74 Adcock, above n 41, at 99.

75 Mikaere, above n 27, at 146.

apart the traditional Māori way of life. As a consequence of post-colonisation issues such as land confiscation and post-war migration to the cities, whānau became separated from each other and their homelands (tūrangawaewae, papakāinga). Loss of culture, relationships and resources ultimately led to the marginalisation of Māori.

Dr Fleur Te Aho considers that the particular problem of the high percentage of Māori in New Zealand prison systems is a reflection of horrific dysfunction in our society. This has been seized upon by many international human rights monitoring bodies as reflecting institutional discrimination.[76] Te Aho has said:[77]

> There is no criminal gene in Māori that makes them go into prisons. It is reflective of our social structures and history of colonialism and all the social problems and spiritual and psychological trauma that goes along with those experiences.

After working in family violence for nearly 30 years, Mereana Pitman wrote about the link between colonisation and family violence in particular, stating:[78]

> … what I figured out is that when Māori men have no mana outside the home—when they don't have a job, … when there's nothing out there that reflects who they are, … or where they have come from—then … it's going to get violent at home … because that's the only place where you're somebody. Even if you're a creep … you're somebody's father, somebody's son, somebody's tāne … You have power and control in that little space … They [the settlers] split the links to the land, to each other, and to those things that had fed and nurtured us for years … I realise that the more colonisation impacted on our people, the more pain became internalised, the more self-hatred there was, and the more we turned on each other. That's the thing about invasion and colonisation, it is an invasion of the mind, of the body, of the soul and the spirit, and it spreads itself across generations.

76 Interview with Dr Fleur Te Aho, above n 64.

77 Interview with Dr Fleur Te Aho, above n 64.

78 Mereana Pitman "Violence and the distortion of tikanga" in Ani Mikaere and Jessica Hutchings (compilers) *Kei Tua o te Pai Proceedings: Changing Worlds, Changing Tikanga – Educating History and the Future* (Te Wānanga o Raukawa Ōtaki and New Zealand Council for Educational Research, Wellington, 2013) 44 at 45.

In the summer of 1977–1978, Ngahuia Te Awekotuku reflected on discussions held in a Māori women's conference, stating:[79]

> There was a long, and extremely painful, exchange and sharing of experience of violence in the home, and police apathy … It was becoming obvious that most of the policy-making world, even the Maori members, are hopelessly out of touch with the horror of Maori women's reality.

So, it is evidence that women and tikanga now operate in environments that present serious societal challenges.

IV WĀHINE TOA IN TIKANGA MĀORI

Against this backdrop of immense challenges to tikanga, women and Māori society, I ask "kei hea ngā wāhine toa? — where are the women who fight for themselves and their people?" It is suggested that they are right here, all around us.

All of the women interviewed for this article believe that we still have wāhine toa in modern times. They are not always the ones in the conspicuous public roles (although some absolutely are).[80] They are: raising families;[81] leading marae communities;[82] being stroppy, bossy,[83] and maybe even aggressive, to get good work done.[84] They provide wraparound support to help everyone get further.[85] Generally speaking, rather than compete with one another to achieve individual glory, they protect one another and pursue collective welfare goals.[86] Amongst Māori women, "there is not this idea that there is only a pinnacle, it is like we can all stand on the mountain".[87]

It takes strong women to nurture, care, support, teach as well as lead compassionately and with respect for others. These are the roles of the warrior women. Modern-day wāhine toa perform all of these roles, even in the face

79 Ngahuia Te Awekotuku *Mana Wahine Maori: Selected Writings on Maori Women's Art, Culture and Politics* (New Zealand Women's Press, Auckland, 1991) at 57–58.

80 Interviews with Amokura Kawharu and Dr Fleur Te Aho, above n 64.

81 Interviews with Amokura Kawharu and Dr Fleur Te Aho, above n 64.

82 Interview with Rachel Robilliard, above n 16; Interview with Aria Newfield, above n 13.

83 Interview with Aria Newfield, above n 13.

84 Interview with Pagen Plaizier, above n 14.

85 Interview with Pagen Plaizier, above n 14.

86 Interview with Nicole Browne, above n 15.

87 Interview with Pagen Plaizier, above n 14.

of the marginalisation of tikanga, Māori and women. Wāhine toa need to be supported.

A Changing tikanga

It is time to consider whether tikanga could change to better support and respect women. I acknowledge that tikanga is largely unchanging, as customs have been in usage since time immemorial. It is not at all like New Zealand domestic law, which regularly changes with the times and governments. Yet tikanga is flexible — customs can change to fit the circumstances.

Tikanga is by no means codified so individuals and groups are free to adopt differing aspects of it as desired. As Pagen Plaizier said:[88]

> I can be respectful of a number of concepts that I do not understand or do not necessarily agree with and I can cherry pick the ones that are really important to me and have had a real influence on my life, the ones that I take forward to teach my children and the people around me.

Therefore, I argue that women who aspire to be kaikōrero should be allowed to take on this role. This is because there are no doubt skilled women out there who would be appropriate kaikōrero, but for their gender. Spiritual beliefs are varied and some women may value being engaged in adversarial speech. To them, the concept of needing to protect women from spiritual attack by aggressive speech may be irrelevant.

Additionally, if people (Māori or non-Māori; male, female or non-binary) are uncomfortable with seating arrangements in Māori ceremonies, we ought to discuss their concerns more openly and determine case-by-case whether the seating arrangements should continue.

Now, as Hoskins acknowledged:[89]

> … it is not easy to speak critically about aspects of your culture … without providing ammunition to a racist and fearful society, or risking personal attack or exclusion.

Indeed, when I first considered writing this article, I was wary about my need to be careful not to alienate myself from my own people. However, I decided that might not be a good enough reason to not think critically about sensitive

88 Interview with Pagen Plaizier, above n 14.

89 See Curchin, above n 52, at 383.

topics like women's roles. I have argued that tikanga should change *if* people want to change it.

Changing tikanga is not a radical new idea. Changes to tikanga for the betterment of women have occurred in the past, even on a globalised scale.

An example of this is the cessation of haehae. Haehae was the practice of lacerating the body as an expression of longing and mourning for deceased, to cause permanent scarification and blood flow (although in the extreme it could cause deep injury or death).[90] As women are the principal mourners in tikanga, they used to vigorously performed haehae.[91] An early sketch by G F Angas depicts Mihi, wife of Ngāti Maniapoto chief To Nga Porutu, bearing haehae scars on her face.[92] Haehae was said to be a tohu aroha (sign of love), marking courage and endurance, and providing extreme relief and release, but it could be seen as violent self-mutilation.[93] A mōteatea says:[94]

> Homai he mata kia haehae ua e,
>
> Kia kotia te kiri …

The former tikanga practice of haehae did not support women because it was harmful. Thus its cessation demonstrates that tikanga can go through positive changes to better respect the value of women.

Before I lay down the taki and retreat,[95] let me refer back to ancient knowledge in order to leave you with some final thoughts about traditional principles and the value of people.

Firstly, myths affirm that all people are children of gods (with lineage to Iō), and earth (with lineage to Papatūānuku and Hineahuone). Therefore, we all have *whanaungatanga* (kinship) ties to each other and the land. With whaungatanga comes obligations to demonstrate *kaitikitanga* (guardianship over and care for natural resources), *manaakitia* (hospitality, care, respect

90 Te Awekotuku and others, above n 29, at 80.

91 At 80.

92 DR Simmons *Ta Moko: The Art of Maori Tattoo* (Reed, Singapore, 2006) at 108.

93 See Te Awekotuku and others, above n 29, at 80.

94 At 80. Hand me then the sharpened obsidian to lacerate myself / Cutting deeply into this body …

95 This is a reference to were — a challenge to distinguished manuhiri in which the challenger (usually a male) places a taki (an object) before the manuhiri and then retreats — the purpose of which is to ascertain by the response whether the manuhiri came in peace or in war. Tauroa and Tauroa, above n 49, at 44.

and generosity towards others) and *arohaina* (love, compassion). Arguably all tikanga roles (irrespective of gender) should be focussed around fulfilling such obligations.

Secondly, mythological whakapapa affirms that everyone has divine worth. This concept may be empowering irrespective of whether one believes in literal divine heritage (that is, descent from god(s)). As such, women have mana wahine. Traditionally, mana was said to be spiritual power and authority which came from atua (gods).[96] Today many New Zealanders may recognise mana as being a kind of power and authority identifiable in charismatic persons. I tautoko (support) Māori artist Paerau Corneal's assertion:[97]

> Mana Wahine is inherent in all women. It needs to be nurtured, supported and acknowledged. It is not limited to whakapapa, being highly educated or not, whether you've done great deeds or not, but I think mana Wahine exists in every women [sic] and it needs to be looked after.

I leave you with these thoughts in the hope that when battling life's challenges, more people might understand that according to traditional tikanga principles, people have mana and inalienable worth. Roles in tikanga, and women's roles in particular, should reflect this.

V CONCLUSION

This article has canvassed women's roles in tikanga and offered some reflections on women's value and strength; traversed past and present contexts, highlighted current challenges to tikanga and women; and dared to ponder the extent to which tikanga demonstrates, or ought to demonstrate, respect and support for women.

In accordance with traditional wisdom, tikanga roles should foster the whanaungatanga that exists between all of us and reflect the worth that each of us has. For the most part, women's tikanga roles are becoming of wāhine toa. However, tikanga should change to further support women's aspirations. In particular, women should be allowed to be kaikōrero if they so desire.

Of the warrior women of old, Best observed:[98]

96 Marsden, above n 4, at 193.

97 Brigitte Te Awe Awe-Bevan "Mana Wāhine" in Shelley Hoani and Rangimarie Hunia (eds) *Toroa-te-Nukuroa Volume IV: Māreikura* (online ed, Te Wānanga o Aotearoa, 2009) 53 at 53.

98 Best, above n 2, at 69.

> During the long marches … throughout the fighting, the hurried retreats, the privations, hunger, cold, and disasters, the women ever marched … no matter what sufferings had to be endured.

Many wāhine toa today do the same, as they perform many tikanga roles all whilst battling serious societal challenges.

REFLECTIONS FROM A YOUNG WOMAN ENTERING THE PROFESSION
— *Would a female partner quota address gender inequality within the New Zealand legal profession?*

Louise Grey*

Although New Zealand has traditionally pioneered women's rights, the current leadership makeup of the legal profession is disappointing. The proportion of female lawyers in partnership and judicial roles has not increased as one might expect in recent years. Inspired by the popular European model of gender diversity quota targets for corporate board membership in publicly listed companies, this article poses the question: would a female partnership quota affect this desired change within the context of New Zealand law firms? The article canvases New Zealand's history of gender relations, both generally and with reference to the legal sector. It briefly explains the recent shift towards the use of formal quotas across Europe. It goes on to weigh up potential advantages and disadvantages that could result from the implementation of a quota. In doing so, it discusses some of the key reasons why I believe gender diversity has proved difficult to attain within law firm management. Ultimately, I argue that quotas would constitute a significant step towards achieving gender diversity within law firm leadership, whilst also acknowledging the limitations and difficulties with this approach.

I INTRODUCTION

Female lawyers are a relatively new phenomenon; it is not so long ago that "women were considered unfit for law, or law unfit for women".[1] The relationship between women and the law has certainly progressed since then, but gender diversity within the profession has not developed to the equitable

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1 Deborah L Rhode *The Unfinished Agenda: Women and the Legal Profession* (American Bar Association Commission on Women in the Profession, 2001) at 13.

level which one may have hoped. Global statistics regarding the proportion of women in high-ranking positions within legal institutions are, on the whole, woefully disappointing. This disparity is particularly problematic given the profession's central role in promoting the rule of law, a discourse that mandates equality for all. The issue of gender diversity has been addressed differently across various jurisdictions. Arguably the most controversial policy in this area, yet also the most "successful" so far (however that may be defined), is the implementation of mandatory gender quotas for corporate board membership across many European countries. In contrast, New Zealand has relied solely on "soft law" measures to encourage publicly listed companies to increase their number of female directors.

This article questions whether a mandatory quota system would be effective and appropriate in the specific context of the New Zealand law firm structure. It first discusses the current situation regarding diversity within New Zealand and its law firms, before explaining the format and adoption of quota systems in Europe. Secondly, it explores the potential benefits and challenges of such a scheme in the New Zealand legal climate. This article questions whether a mandatory quota would resolve the current gender imbalance, or whether other policies geared towards cultural change might be better suited. I argue that a mandatory quota system is not a 'silver bullet' for change, despite its merits and evident potential to produce statistical results. Nonetheless, it would constitute a useful stepping stone towards diversity and equality within law firms in New Zealand. As such, this should be further debated and explored by policymakers and the profession.[2]

II NEW ZEALAND, WOMEN AND THE LAW

New Zealand has a proud history of female civic engagement. In 1893, we became the first self-governing country to grant women the right to vote.[3] This was achieved thanks to the tireless efforts of Suffragettes such as Kate Sheppard, who currently appears on the $10 note as a testament to her courage and persistence in pursuing equality.[4] More recently, our country has seen various

2 This article is limited to a discussion of the appropriateness and potential value of a gender quota in New Zealand law firms. The question of how such a quota might be implemented in practice is outside the scope of this article.

3 Fiona Barker "New Zealand identity – politics: Kate Sheppard on the $10 note" (20 June 2012) Te Ara – the Encyclopedia of New Zealand <www.teara.govt.nz>.

4 Barker, above n 3.

talented women take up prominent positions of power within its political and legal spheres.[5] New Zealand has been governed by three female Prime Ministers;[6] had three female Governor-Generals;[7] one female Chief Justice of the Supreme Court;[8] and one female Speaker of the House of Representatives.[9] As of 22 July 2016, New Zealand became the first common law jurisdiction to appoint an equally balanced bench of Supreme Court justices, with Rt Hon Chief Justice Sian Elias, Hon Justice Susan Glazebrook and Hon Justice Ellen France serving alongside their three male colleagues.[10] Our country therefore has much to be proud of with regards to gender diversity across prominent social roles. However, there is a long way to go before equality can realistically be said to exist.

Given this history, one might expect the gender balance within the New Zealand legal profession to be neutral or, at the very least, to have substantially improved over time. This is unfortunately not the case. Radio New Zealand reported last year that, for the first time, statistics indicated there were an equal number of men and women practising law.[11] While a noteworthy achievement, this balance took a surprisingly long time given that more females than males have graduated from law schools over the past decade.[12] Further, 60 per cent of law firm workers are female, yet, as of 2015, only 26 per cent of law firm partners and directors and 29 per cent of the judiciary were female.[13] As Hannah Brenner notes, this disparity between women in the profession and

5 Susan Glazebrook "Gender Equality in the Workforce: A Work in Progress" (speech delivered at the Annual Professional Women's dinner organised by the Canterbury Women's Legal Association, 22 October 2009) at 3.

6 The Right Honourable Dame Jenny Shipley, the Right Honourable Helen Clark and, currently in office, the Right Honourable Jacinda Ardern.

7 The Honourable Dame Catherine Tizard, the Honourable Dame Silvia Cartwright and currently the Right Honourable Dame Patsy Reddy.

8 The current Chief Justice of the Supreme Court is the Right Honourable Chief Justice Dame Sian Elias.

9 Margaret Wilson.

10 New Zealand Law Society "New judicial appointments welcomed" *LawTalk: New Zealand Law Society* (online ed, 13 July 2016).

11 Max Towle "Equal number of female, male lawyers for first time" (2 February 2016) Radio New Zealand <www.radionz.co.nz>.

12 Towle, above n 11.

13 Sasha Borissenko "Women and the legal profession" *LawTalk* (online ed, 5 November 2015) at 6. As of 2016, 27.6 per cent of law firm partners were female: see Geoff Adlam "Snapshot of the Profession 2016" *LawTalk: New Zealand Law Society* (online ed, 11 March 2016) at 24.

women in high-ranking leadership positions is not unique to New Zealand — this trend has been observed throughout the world.[14] There is also a gender split according to different areas of practice, with women making up 70 per cent of family lawyers and 63 per cent of health lawyers, and men making up 70 per cent of banking and finance lawyers and 65 per cent of civil litigation, commercial and company lawyers.[15] Although women are entering the law in much greater numbers than ever before, subtle bias appears to be shifting them towards more traditionally "feminine" spheres of practice that echo discourses of motherhood and caring. Men continue to dominate practice areas associated with power and money. This gendered allocation of work also functions to prevent women from entering more "masculine" areas of the law that relate more to business. Viewed holistically, these figures strongly suggest the continuation of gender inequality within the New Zealand legal profession. It is also concerning that the percentages do not significantly change from year to year. Existing reforms and policies appear to have resulted in stagnation with regards to female advancement and gender diversity within the profession.

In addition to the data itself, qualitative evidence from female lawyers in New Zealand indicates that gender biases, assumptions and stereotypes persist within the profession. When interviewing for a job upon returning to New Zealand from a Wall Street firm, Stacey Shortall, a partner at MinterEllisonRuddWatts, was shocked at being asked how she intended to manage the competing demands of partnership and two young children.[16] She observed, quite rightly, that the same question would not have been raised were she a male lawyer with young children.[17] It is also telling that the human resources manager at Simpson Grierson believes that they will have "succeeded when [Simpson Grierson] can appoint people to roles without having to describe them as a 'female partner' or a 'part-time partner'".[18] It must be borne in mind that obtaining equal numbers of male and female lawyers is only part of the story; equality on a practical and realistic basis within the legal

14 Hannah Brenner "Expanding the Pathways to Gender Equality in the Legal Profession" (2014) 17 Legal Ethics 261 at 261.

15 Borissenko, above n 13, at 8.

16 Stacey Shortall "Turning the tide to make more women law firm partners in New Zealand" in New Zealand Law Society *Working towards gender diversity in New Zealand law firms: Four practical approaches to achieving change* (NZLS CLE, 2016) 30 at 34.

17 Shortall, above n 16, at 34.

18 Borissenko, above n 13.

workplace is also an important goal — if not the most important. Again, this subtle bias is pervasive within many jurisdictions. Baroness Hale of Richmond, the President and sole female currently sitting on the Supreme Court of the United Kingdom, recently criticised the 'unconscious' sexism inherent in the United Kingdom's legal profession.[19] Further, a 2016 survey indicated that 62 per cent of female lawyers in the United Kingdom felt that their gender had hindered their career trajectory, compared to only 16 per cent of male lawyers.[20] The legal profession may have opened its doors to women but there remain significant gaps, both formative and substantive, in its treatment of gender diversity.

The extent of these gaps and the ways in which they might best be addressed, is currently a hotly debated topic in New Zealand. Regrettably, there is no shortage of instances where gender prejudices or disparities surface and are discussed in the media. In 2011, the chief executive of the Employers and Manufacturers Association (Northern) lost his job after a radio interview in which he complained about the number of extra sick days women allegedly take due to monthly menstruation.[21] Earlier this year, following litigation that had been ongoing since 2012, the Government entered into a pay equity settlement with rest home caregiver Kristine Bartlett, which widely increased workers' salaries across the female-dominated residential care sector.[22] At an international level, New Zealand's failure to address the lack of women on corporate boards through meaningful reform has been heavily criticised by the United Nations Committee on the Elimination of Discrimination Against Women.[23] Currently, New Zealand has only implemented a 10 per cent target for women's representation in corporate governance, and the Government has taken no further action to promote boardroom equality.[24] Thus, the time is arguably ripe for radical legal and social change with respect to gender equality.

19 Will Gant "Law profession can't handle talented women, says Baroness Hale" *The Independent* (online ed, United Kingdom, 14 March 2013).

20 "62% of women lawyers say gender hinders career progress" *NZ Lawyer Magazine* (online ed, New Zealand, 15 June 2016).

21 New Zealand Human Rights Commission *New Zealand Census of Women's Participation* (Wellington, November 2012) at 12.

22 Sandra Conchie "Historic pay equity settlement lauded as massive victory" *The New Zealand Herald* (online ed, 19 April 2017); and see Care and Suport Workers (Pay Equity) Settlement Act 2017, which came into force on 1 July 2017.

23 Human Rights Commission, above n 21, at 3.

24 At 3.

III MANDATORY QUOTAS FOR PUBLICLY LISTED CORPORATE BOARDS IN EUROPE

Since the lack of gender diversity in boardrooms and firms is a global issue, a comparative analysis of remedies applied by different nations is useful. The major distinction between jurisdictions in respect of corporate boards lies in the decision to implement either "hard" law quota measures or "soft" law voluntary guidelines. Many European states have opted for the former, whilst Anglo-Saxon countries have tended towards the latter.[25] Legislative gender quotas usually operate by requiring a certain class of entities to satisfy a minimum ratio of females to males in high-ranking positions after a grace period of several years.[26] In European countries such as France, Norway, Spain and the Netherlands, that target is currently set at 40 per cent for female boards of directors managing publicly listed companies.[27] The implementation of board gender quotas is a relatively recent policy decision that faced significant backlash across the European Union.

Although a number of Member States have their own quotas in place, the European Union's proposed Directive in 2012 has not yet received Council approval due to the inability of Member States to agree upon a workable approach.[28] The proposed Directive would apply to large publicly listed companies within the European Union. It is likely to only mandate that, where two candidates of equal standing are being considered for board appointments, where one is female and the other male, the female's application must be preferred.[29] The current draft also envisages a 40 per cent target for female directors to be attained by 2020 for publicly listed companies, however, this provision lacks 'teeth' as there are currently no substantive penalties in place for non-compliance.[30]

25 Michael Adams "Board Diversity: More Than a Gender Issue?" (2015) 20 Deakin Law Review 123 at 150.

26 Paul Lansing and Sitara Chandra "Quota systems as a Means to Promote Women into Corporate Boardrooms" (2012) 38(3) Employee Relations Law Journal 3 at 3; and Siri Terjesen, Ruth V Aguilera and Ruth Lorenz "Legislating a Woman's Seat on the Board: Institutional Factors Driving Gender Quotas for Boards of Directors" (2015) 128 J Bus Ethics 233 at 234.

27 Adams, above n 25, at 141.

28 European Commission "Proposal for Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures" (Brussels, 14 November 2012, COM(2012) 614) <http://ec.europa.eu>.

29 Danielle Myles "Will Europe's women on boards quota work?" *International Financial Law Review* (online ed, 15 November 2012).

30 European Commission, above n 28, at 5; European Commission "Gender balance on corporate boards:

Although not universally accepted, quotas have quickly become an established policy mechanism within the arsenal of democratic states in respect of publicly listed companies. Moreover, Susan Franceschet and Jennifer Piscopo have recently argued that the scope of quotas is both broadening (covering a more extensive range of social activities) and deepening (expecting a higher statistical degree of equality).[31] Since it appears that quotas are becoming increasingly popular as a means of securing diversity, it is worth weighing up their merits and asking whether New Zealand — which has not yet engaged with the use of gender quotas — should consider doing so. This question is considered below in the context of law firms.

IV MANDATORY QUOTAS FOR LAW FIRMS IN NEW ZEALAND?

Quotas have an important advantage in comparison to 'soft law' reforms in the context of law firms:[32] by design, a gender quota would have the effect of increasing the number of female partners in New Zealand law firms within a relatively short period of time. Quotas are frequently criticised for being "drastic"[33] and "blunt",[34] but their statistical impact as a 'fast track' towards equality cannot be discounted.[35] Peta Spender theorises that quotas have a positive impact upon women's representation in the workplace in three ways — descriptive (empirical), substantive (greater voice regarding policy direction) and symbolic (role modelling).[36] Quotas are therefore valuable as a tool to address empirical inequalities by accounting for social disadvantages. In addition to their ability to achieve results, quotas may also enhance the functioning and effectiveness of the entities they are applied to. Scholarship

Europe is cracking the glass ceiling" (Brussels, July 2016) <http://ec.europa.eu>; Vanessa Knapp "EU directive would not impose mandatory gender quotas" *Financial Times* (online ed, United Kingdom, 16 January 2014).

31 Susan Franceschet and Jennifer M Piscopo "Equality, Democracy, and the Broadening and Deepening of Gender Quotas" (2013) 9 Politics & Gender 310.

32 For example, by way of training initiatives, more extensive mentoring programmes and voluntary diversity targets.

33 Adams, above n 25, at 139.

34 Lansing and Chandra, above n 26, at 4.

35 Éléonore Lépinard "For Women Only? Gender Quotes and Intersectionality in France" (2013) 9 Politics & Gender 276 at 276.

36 Peta Spender "Gender Quotas on Boards – Is It Time for Australia to Lean In?" (2015) 20 Deakin Law Review 95 at 112–113.

relating to this link is mixed; some studies indicate positive trends in economic performance following the implementation of the European board quotas,[37] while others suggest a more neutral, or even negative, correlation.[38] Recent research appears to highlight a certain proportion of board gender diversity, approximately one-third, at which company performance improves at a measurable rate.[39] While this should not be the primary consideration by which the appropriateness of a quota is judged, it is relevant given that corporations and firms are profit-driven, private entities with obligations to their stakeholders. The financial implications associated with a rapid change in leadership diversity are therefore important.

At the same time, a gender quota in the context of law firms will have limitations. Statistical equality between female and male partners would be a significant step towards gender equality amongst law firm leadership. However, one does not necessarily lead to the other. Quotas carry the risk of tokenism and cannot address persisting social assumptions that affect equality in a more subtle manner. Providing the keys to the castle may well be of limited practical effect; Judith Resnik concludes, "women are women and are seen as women, no matter what their formal or actual powers".[40] Put another way, merely addressing empirical disparities between women and men only skims the surface of gender stereotypes and resulting inequalities. It does not question the deeply rooted social norms that have shaped firm and board membership into male-dominated spheres of private activity. The lack of female representation in these areas is no accident, but is rather a consequence of socially constructed ideas of femininity. Female lawyers face a catch-22: either they are "too feminine" and are dismissed as weak and ineffective, or they are "not feminine enough" and are disparaged for being bossy and aggressive.[41] The underlying discrimination

37 Adams, above n 25, at 131 and 133.

38 Lansing and Chandra, above n 26, at 4; Human Rights Commission, above n 21, at 7.

39 See for example, Miriam Schwartz-Ziv "Are All Welcome A-Board: Does the Gender of Directors Matter?" (paper presented to The Hebrew University of Jerusalem and Harvard University, 2011); and Jasmin Joecks, Kerstin Pull and Karin Vetter "Gender Diversity in the Boardroom and Firm Performance: What Exactly Constitutes a 'Critical Mass'?" (2013) 118 J Bus Ethics 61. Note, however, that there is limited consensus as to the extent of the impact of gender diversity on firm output: for a different perspective, see Lissa Lamkin Broome, John M Conley and Kimberly D Krawiec "Does Critical Mass Matter? Views from the Boardroom" (2011) 34 Seattle University Law Review 1049.

40 Judith Resnik "Asking about Gender in Courts" (1996) 21 SIGNS 952 at 972.

41 Deborah L Rhode "From Platitudes to Priorities: Diversity and Gender Equity in Law Firms" (2011) 24 The Georgetown Journal of Legal Ethics 1041 at 1051.

women face in corporate workplaces may explain the negative results of a recent survey carried out in the United Kingdom, in which 47 per cent of participants did not believe quotas would effectively address gender imbalances within Magic and Silver Circle firms.[42] While a statistical movement towards equal representation provides a better starting point, gender reform must go deeper and tackle the underlying social inequalities that deter women from attaining leadership positions in New Zealand law firms.

The key issue preventing women from seeking partnership at the same rate and age as men can be traced back to a clash between the inflexible, fast-paced nature of corporate law firms and New Zealand's social attitude towards the role of women as mothers and primary caregivers. Law firms traditionally foster a culture of "workaholism"[43] that involves long days at the office, on-call capacity in the evenings and weekends, and a proliferation of social functions to maintain client relationships. As one of the oldest professions, the legal profession has been resistant to contemporary changes to the nature of work, thus flexible, part-time working arrangements are less common than in other sectors in New Zealand. The need for the profession to shift in this regard is evidenced by the fact that the desire for flexible working arrangements was one of the major findings of Natalya King's recent survey of approximately 300 New Zealand lawyers.[44] Further, in Sarah Taylor's recent Law Society-funded report, Taylor identifies a "pool of untapped talent" made up of legal professionals in New Zealand who are able to contribute through an alternative practice model but lack gateways to making this a reality.[45] This "work/work" culture is damaging in and of itself.[46] However, it becomes even more so when coupled with a problematic set of social assumptions regarding the freedom of choice for women. There is a strong discourse operating within New Zealand culture that designates decisions regarding work/life balance

42 *NZ Lawyer Magazine*, above n 20.

43 Margaret Thornton and Joanne Bagust "The Gender Trap: Flexible Work in Corporate Legal Practice" (2007) 45 Osgoode Hall Law Journal 773 at 801. This culture has been enhanced by the noticeable movement towards running law firms as profit-driven businesses, since the corporate world is similarly difficult for women to take up leadership positions within.

44 Natalya King *Raising the Bar: Women in Law and Business* (Thomson Reuters, 2014) at 112.

45 Sarah Taylor *Valuing Our Lawyers: The untapped potential of flexible working in the New Zealand legal profession* (New Zealand Law Society, 2017) at 7.

46 Thornton and Bagust, above n 43, at 778.

as the responsibility of individual women.[47] This rhetoric carries with it the implication that stay-at-home mothers have consciously chosen to leave work to raise their children. It is problematic to endow women with this 'freedom of choice' mantra, given that women leaving the legal profession to pursue motherhood are also influenced by gendered conditioning, favourable maternal leave legislation, gender pay inequity, biological imperatives of childbirth and intersectionality challenges.[48] Responsibility for this underlying issue should not be placed upon individual women themselves. As this contributes to the low ratio of female to male partners, the onus should be placed upon law firms and the state to correct the underlying issue through positive change. There is also an associated 'maternal wall' which disadvantages women regardless of their 'choice', since even their childbearing potential is likely to affect recruitment and promotion decisions.[49] While a quota would increase female visibility in high-ranking legal positions, this avenue for reform alone cannot address the multitude of fundamental gender norms driving inequality within the profession.

Some would argue that specific considerations arise in the New Zealand context which render the concept of a gender leadership quota questionable. One of the main objections to mandatory quotas is the issue of merit. Judith Resnik notes that suddenly, when converted from an informal hiring practice into a legal requirement, American public opinion shifts and gender quotas become controversial.[50] A similar attitude has been identified in Australia[51] and in the United Kingdom, where the Lord Chief Justice, Lord Judge, recently dismissed the possibility of using affirmative action to appoint a greater number of female judges to the bench as "insulting" to women.[52] This stigma around quotas is also very much a part of New Zealand culture, as evidenced by the public stances of even the most politically influential Kiwi women. Speaking extra-judicially, Justice Glazebrook prefaced her call for gender reform in

47 See for example, Andrew Stevenson "You can't force women to be the CEO" (9 August 2016) Stuff <www.stuff.co.nz>.

48 For example, cultural expectations and the inability to pay for childcare.

49 Shortall, above n 16, at 33.

50 Resnik, above n 40, at 970.

51 Adams, above n 25, at 124.

52 Louisa Peacock "Law firms have 'unconscious bias' that stops women from getting promoted, says senior City lawyer" *The Telegraph* (online ed, United Kingdom, 24 May 2013).

the legal profession by assuring her audience that: "I am not to be taken as advocating quotas but there should be a commitment on the part of everyone to try and increase participation."[53] In 2015, the then-Minister for Women, Louise Upston, commented: "I do not believe in quotas … we require a change of culture, where women are promoted and paid based on merit, not gender."[54] These examples are symptomatic of a deeply rooted belief within New Zealand society — described by the Human Rights Commission as "one of the nation's most cherished myths"[55] — that everyone deserves a "fair go",[56] meaning an equal opportunity regardless of differing backgrounds. Succeeding solely on the basis of merit is highly respected and praised by New Zealanders, whilst affirmative action is considered to create inequality by bestowing an unfair advantage upon a particular social group. It is therefore almost certain that the imposition of a gender quota in any sector of the New Zealand workforce would be highly polarising.[57]

The argument that affirmative action undermines the abilities of women and minority groups because it does not promote individuals on the basis of merit does not withstand closer scrutiny. As Dr Ana Gilling explains, the concern is that quota-based recruitment decisions would send New Zealand women the message that, "[y]ou are just there because you have breasts, not because of merit".[58] Without discounting this negative potential impact, she goes on to warn that 'merit' is not in itself a neutral term. In the context of the legal profession, merit goes hand in hand with the notion of the "ideal lawyer" who is traditionally male and not the primary caregiver.[59] In her view, quotas address this existing gender imbalance and merely place women on an equal footing with men, who have an existing social advantage. Traditionally, men have a dominant social standing and are not burdened with caregiving duties. In the legal profession, men are advantaged by both of these traits, as well as the existence of old boys' networks which favour candidates known

53 Glazebrook, above n 5, at 9.

54 Borissenko, above n 13, at 11.

55 Human Rights Commission, above n 21, at 7.

56 At 7.

57 For a recent analysis of the pros, cons and (low) likelihood of the business sector adopting a quota system, see: Annick Masselot and Timothy Brand "Diversity, Quotas and Compromise in the Boardroom: Tackling Gender Imbalance in Economic Decision-Making" (2015) 26 NZULR 535.

58 Borissenko, above n 13, at 11.

59 At 11.

to them and who are most similar to them.[60] The prevalence of shoulder-tapping is particularly pronounced in New Zealand due to its relatively small size, which gives rise to an unusually high level of interconnectivity within the legal profession.[61] Additionally, Emilio Castilla's research points towards a correlation between performance-based incentive schemes and higher pay inequities between advantaged and disadvantaged groups.[62] Castilla's business case studies suggest that employers' reliance on the notion of merit may, in fact, negatively affect diversity within firm leadership and management. The merit argument therefore should not constitute an insurmountable barrier to the existence of a gender quota for New Zealand law firms. What is needed for such a measure to meet with social acceptance is a shift in mindset towards a view of quotas not as offering women a special advantage, but as merely mitigating men's traditional advantages to place both genders on a level playing field in terms of "merit".

Clearly, it is overly simplistic and artificial to imagine a direct link between gender quotas and diversity within law firms. Diversity does not begin and end with one's gender. Rather, it encompasses a wide range of life experiences and characteristics such as class, ethnicity, nationality, disability and age. A major limitation of quotas is that they cannot sufficiently take intersectionality into account. Judith Resnik points out this tension by noting, although we "cannot assume that all women or men share the same experiences", change via legal reform requires a certain level of simplicity and categorisation.[63] This may render individuals facing multiple grounds of disadvantage too complicated to address,[64] and is a pertinent concern in the New Zealand legal landscape, particularly at present. Other dimensions of diversity, in particular age, ethnicity and nationality, all pose significant challenges for the professional advancement of individuals in the New Zealand legal profession. Therefore, the achievement

60 Rhode, above n 41, at 1053; and Spender, above n 36, at 102.

61 For an example of the interconnectedness of the New Zealand legal profession, see *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2009] NZSC 72, [2010] 1 NZLR 35. This is a landmark judicial review case involving apparent bias.

62 Emilio J Castilla "Gender, Race and Meritocracy in Organizational Careers" (2008) 113 AJS 1479; Emilio J Castilla and Stephen Benard "The Paradox of Meritocracy in Organizations" (2010) 55 ASQ 543; and Emilio J Castilla "Gender, Race, and the New (Merit-Based) Employment Relationship" (2012) 51 Industrial Relations 528.

63 Judith Resnik "'Naturally' Without Gender: Women, Jurisdiction, and the Federal Courts" (1991) 66 NYU L Rev 1682 at 1694.

64 Resnik "Asking about Gender in Courts", above n 40, at 976.

of women's equal representation within law firms does not correlate to the achievement of diverse representation. Éléonore Lépinard reflects upon the impact of the French boardroom gender quota and concludes that the reform has noticeably favoured wealthy, white women and has not assisted those with multiple grounds of social disadvantage.[65] While it is difficult for quotas to promote the cause of intersectional disadvantaged groups, a female leadership quota could be one aspect of a broader policy addressing diversity in the legal profession to avoid the promotion of one group at the expense of another.[66]

Another critique of gender quotas as a tool for the promotion of diversity is that these targets may perpetuate and reinforce traditional stereotypes. The argument is that the implementation of a quota to achieve a certain ratio of female to male partners in law firms is somewhat dangerous in that it defines gender diversity according to the orthodox binary framework of male and female. As Donald Nicolson aptly puts it, quotas "use the very categories that anti-discrimination campaigns seek to render socially irrelevant".[67] By extension, quotas only advantage those who identify with, and perform the appearance and behaviour associated with, the female gender. They exclude another severely underrepresented group from the higher echelons of the law: individuals who identify as gender variant.

Quota systems have their limitations and cannot hope to address the vast inequalities apparent within legal institutions. On balance, however, taking a substantial step towards remedying the imbalance of male to female partners within New Zealand law firms is certainly more desirable than continuing to rely on "soft" measures, which do not appear to be stimulating meaningful short term or long term change.

V CONCLUSION

It is disappointing that gender equality has not yet been attained within New Zealand law firms, especially given our history as a pioneer in the advancement of women's suffrage. This article has explored several key reasons

65 Lépinard, above n 35, at 283–284.

66 A less divisive middle ground might be to specify a 1:1 gender ratio for firm leadership, the model favoured by some firms because it does not act to 'disadvantage' men but merely to promote equal leadership.

67 Donald Nicolson "Affirmative Action in the Legal Profession" (2006) 33 Journal of Law and Society 109 at 120.

which have contributed to this lack of progress. While there are a number of 'soft law' options for attempting to remedy this position, this article has focused on mandatory gender quotas due to this policy's empirical results across European corporate boards. I have argued that quotas, though not a fully comprehensive solution, have real potential to effect significant change. Much as it would be desirable for meaningful reform to come from within the profession and via less radical means, it is undeniable that current 'soft law' measures in this area do not go far enough and have not brought about the extent of change we might have anticipated. While not a 'silver bullet' or a perfect solution, the implementation of gender quotas within law firm leadership would constitute a significant and meaningful step towards equality. Those who make, argue, interpret and enforce the law have the unique ability to significantly influence the future direction of our country. Therefore, it is of vital importance to ensure that, going forward, New Zealand has a diverse range of legal thinkers at its helm. As a young woman entering the profession, I want very much to see the achievement of gender equality and gender diversity during my career. My article is not intended to provide an easy answer as to how we might get there — but my hope is that it will spark and encourage much needed discussion in this area.

WHAT IS THE BEST PAID PARENTAL LEAVE ARRANGEMENT *to promote gender-balanced caregiving in the home, and gender equality in the workplace in New Zealand?*

Joy Guo*

Parental leave-taking behaviour after a child is born sets a precedent for the division of childcare labour in the long-term. In New Zealand, mothers take significantly more parental leave than fathers. Being the primary caregiver is negatively correlated with workforce participation, earnings and promotion opportunities. This article examines how New Zealand's paid parental leave policy shapes a gendered division of childcare labour by deeming mothers as the primary caregiver, and reinforces gender inequality in the home and workplace. This article critiques notions of equality that promote either women-specific schemes or gender-neutral treatments, both of which fail to address male caregiving behaviour. A new vision of equality that focuses on incentivising male leave-taking is needed in order to disrupt traditional gender norms in relation to care-giving. Through examining international experience, this article argues that father-specific bonuses, which give families benefits when fathers take their share of the leave, have the potential to significantly re-balance the current division of child-care labour, and advance gender equality in both the home and workplace.

I INTRODUCTION

Gender inequality in the home contributes to gender inequality in the workplace. In New Zealand, over 90 per cent of mothers take paid parental leave to care for a newborn.[1] This article examines how New Zealand's paid parental leave scheme shapes a gendered division of childcare labour, and

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1 See Ministry of Business, Innovation & Employment *Regulatory Impact Statement: Modernising Parental Leave* (2 March 2015) at 4.

thereby contributes to gender inequality in the home and workplace. The article will explore policy options that facilitate more gender-balanced caregiving and provide lessons from overseas experiences. Ultimately, this article advocates the implementation of fatherhood bonuses: a model of substantive equality that incentivises male caregiving. Central to this article is the view that promoting male caregiving and shared-leave arrangements is key to advancing the goal of gender equality in both the home and workplace.

A Gender inequality and paid parental leave

Gender inequality in the home and workplace are interdependent. After decades of formal equality, women still lag behind men in workforce participation, earnings and leadership positions.[2] This is partly due to the disproportionate amount of time that women care for children compared to men. Research shows that one in four mothers aged 25 to 44 are not in work, and women's average work hours are substantially below full-time.[3] By contrast, most men forego parental leave and fulfil familial obligations by providing for the household.[4] Being the primary caregiver means that, in general, women participate less in the labour force than men and, in doing so, they forego skill development crucial to their market position.[5] After women have children, the pay gap between men and women becomes dramatically wider, and increases with each child.[6] This reality further justifies family decisions for women to continue to be primary caregivers. Moreover, the gendered division of care penalises all women in the workplace. Women (including those who do not have children) experience 'maternal profiling' or statistical discrimination due to their employers' perception that women (and not men) will reduce their workplace commitment because of the children they have or will eventually bear.[7] For these reasons, re-balancing childcare work between women and men

2 Sheryl Sandberg *Lean In: Women, Work, and the Will to Lead (*Alfred A Knopf, New York, 2013) at 2.

3 Joan C Williams *Unbending Gender: Why Family and Work Conflict and What to Do About It* (Oxford University Press, New York, 2000) at 2 as cited in Joan C Williams "Jumpstarting the Stalled Gender Revolution: Justice Ginsburg and Reconstructive Feminism" (2012) 63 Hastings LJ 1267 at 1283.

4 Williams, above n 3, at 1285.

5 Martha Albertson Fineman "Fatherhood, Feminism and Family Law" (2001) 32 McGeorge L Rev 1031 at 1041.

6 Michelle Budig and Paula England "The Wage Penalty for Motherhood" (2001) 66 American Sociological Review 204 as cited in Stephen Benard, In Paik and Shelley J Correll "Cognitive Bias and the Motherhood Penalty" (2008) 59 Hastings LJ 1359 at 1359.

7 Rangita de Silva de Alwis "Examining Gender Stereotypes in New Work/Family Reconciliation

is crucial to also reducing gender inequality in the workplace.

It is important to acknowledge that not all women desire or aspire to workplace participation, equal earning power and leadership roles. Some women actively choose to forego career opportunities in order to be primary caregivers, and feel empowered in this role. This article does not suggest that paid employment is a more valuable social or personal pursuit than child caregiving. Rather, it observes that caregiving responsibilities significantly shape workplace participation. Therefore, gender inequality in the workplace cannot be isolated from the consequences of paid parental leave policy, and vice versa.

II CRITIQUE OF THE NEW ZEALAND PAID PARENTAL LEAVE POLICY

The paid parental leave policy shapes the distribution of caregiving responsibilities between parents both when a child is born and in the long-term. Initial divisions of labour morph into long term patterns both for families and wider society.[8] Research shows that fathers who take parental or paternity leave are more likely to perform childcare tasks and stay more involved as children grow up.[9]

New Zealand's paid parental leave scheme provides eligible mothers and other primary carers paid leave for 18 weeks.[10] Fathers (or spouses/partners who are not fathers) are allocated one to two weeks' unpaid leave and can get up to 18 weeks of paid parental leave if it is transferred by the mother and both the father (or spouse/partner) and mother qualify for paid parental leave.[11] This means that fathers (or spouses/partners) do not have a separate entitlement to leave unless it is transferred to them. However, there is a low uptake of paternity leave and paid parental leave by fathers. In heterosexual parenting relationships, around four per cent of fathers take paternity leave,[12] and paid

Policies: The Creation of a New Paradigm for Egalitarian Legislation" (2011) 18 Duke J Gender L & Pol'y 305 at 312–313.

8 *CEDAW General Recommendation No 23: Political and Public Life* A/52/38 (1997) as cited in de Silva de Alwis, above n 7, at 315.

9 Laura Addati, Naomi Cassirer and Katherine Gilchrist *Maternity and paternity at work: Law and practice across the world* (International Labour Office, 2014) at 61–62.

10 Parental Leave and Employment Protection Act 1987, ss 71DA and 71J.

11 Section 71E.

12 Amanda Reilly *Paid paternity leave and recognition of the importance of fathers* (Centre for Labour, Employment and Work, October 2015) at 2.

parental leave is transferred to the father in less than one per cent of cases in practice.[13] This means that although mothers can transfer part (or all) of their entitlement, this does not occur frequently in practice.

New Zealand's paid parental leave policy reinforces traditional gender roles. Although paid parental leave purports to be available to women and men, it deems the mother as the default primary caregiver. Fathers, on the other hand, are only entitled to leave if it is transferred to them. In this way, the policy normatively reinforces the traditional caregiver/breadwinner dichotomy by defining the fatherhood role as the 'economic' provider, and the motherhood role as the 'carer'. It therefore sanctions male absence from childcare, whilst simultaneously maintaining the structural supports from which men derive their economic and social power.[14]

Further, some parents are excluded from obtaining benefits from the scheme. The restrictive eligibility criteria based on work experience[15] excludes the poorest families who struggle to be consistently employed, and who need the most financial support. Although these families may still be entitled to the Parental Tax Credit, this only offers minimal financial support.[16] The lack of separate entitlement of paid parental leave to fathers means that, if the mother does not qualify for paid leave, the father does not qualify either. In low-income, solo-earner families, the father will often be forced to remain at work. In addition, the policy denies the option of alternative caring arrangements. In tikanga Māori, it is the role of relatives and grandparents to share caregiving work.[17] The current policy forces Māori families to adhere to the nuclear family model and discard a communal model which could uphold the working role of women.

In the context of increasing fluidity of family formations, mothers may also not have partners male or otherwise. Nonetheless, the policy, in being primarily designed for heterosexual, two-parent families, still plays a vital role in shaping normative gender constructions, and thereby defines gendered leave-taking responsibilities in heterosexual parenting families in New Zealand.

13 Ministry of Business, Innovation & Employment *Regulatory Impact Statement: Modernising Parental Leave* (2 March 2015) at [18].

14 Fineman, above n 5, at 1041.

15 Parental Leave and Employment Protection Act 1987, ss 71CA, 71CB, 2BA(4).

16 Income Tax Act 2007, s MD11; and Parental Leave and Employment Protection Act 1987, s 71G.

17 Cindy Kiro "Ngā Matua – Māori parenting – Types of parenting" (5 May 2011) Te Ara Encyclopaedia of New Zealand <www.teara.govt.nz> at 5.

Changing the paid parental leave structure is therefore necessary to facilitate the participation of women in the workplace. Although liberal feminists may argue that families should have freedom from state interference,[18] the subjugation of women to the private sphere hinders their access to the public domain.[19] It is therefore necessary to recognise that the government, market factors and the family are interdependent forces in shaping gender equality and the crucial role of policy in reducing gender inequality within the family.

III PAID PARENTAL LEAVE REFORM OPTIONS

A policy that promotes equality is usually underpinned by a formal equality or substantive equality framework. Formal equality advocates equal treatment between men and women, and challenges gender-based laws as violations of equal protection.[20] Substantive equality views differential treatment of genders as necessary to achieve equal outcomes. The position of this article is that neither framework is workable in the context of paid parental leave in New Zealand.

A Increasing paid parental leave entitlement and protection for mothers

Some advocates of substantive equality, such as cultural feminists,[21] may argue in favour of increasing access to and benefits of paid parental leave for mothers, such as through extra pay or length of parental leave. This would account for the costs that women disproportionately bear due to pregnancy and caregiving. This approach was reflected in Labour MP Sue Moroney's 2015 Member's Bill to extend paid parental leave from 18 to 26 weeks.[22] The Bill attempted to create more flexible work options without losing paid parental leave entitlement. However, it did not attempt to create a separate entitlement

18 See Katherine O'Donovan "With Sense, Consent, Or Just a Con? Legal Subjects in the Discourse of Autonomy" in Ngaire Naffine and Rosemary J Owens (eds) *Sexing the subject of law* (LBC Information Services, North Ryde, 1997) 47.

19 *CEDAW General Recommendation No 23: Political and Public Life* A/52/38 (1997) at [9] as cited in de Silva de Alwis, above n 7, at 315.

20 See generally O'Donovan, above n 18, at 47–64.

21 See Carol Gilligan *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press, Cambridge (Mass), 1982) at 24–33.

22 Parental Leave and Employment Protection (6 Months' Paid Leave and Work Contact Hours) Amendment Bill 2015 (51–2).

to paid parental leave for men, and was not intended to change the distribution of leave-taking between mothers and fathers. Given that mothers typically take up paid parental leave, the Bill's effect would have been to extend leave protections for mothers only.[23]

There is no doubt that women do bear greater costs in relation to pregnancy and childbirth, which should be appropriately recognised by maternity leave. However, extensive 'special treatment' for women in relation to paid parental leave both incentivises and justifies women assuming a primary caregiving role. It does not promote shared care. It normatively sanctions a gendered division of childcare labour, and reinforces the conception of women as costlier workers than men. This approach may inadvertently reinforce maternal profiling in the workplace, and reconstitute gender inequality.

B Making leave equally available to both sexes

Proponents of formal equality (such as liberal feminists) may advocate for a gender-neutral approach to paid parental leave.[24] This may involve making parental leave equally available to mothers and fathers, through equal pay (or non-payment) length and eligibility requirements.

However, the rationale that equal accessibility equates to equal uptake and division of care is flawed. When men and women have socially constructed differences and entrenched behavioural patterns, "sex-neutral solutions … can yield sex-skewed results".[25] Although formal equality removes direct barriers, it does not alter cultural norms, which act to reproduce a gendered division of labour. Therefore, even if parental leave is equally available to men, this may not significantly increase its uptake by men. In the United States, for example, unpaid parental leave is equally available to both sexes.[26] While intending to promote gender parity, mothers in practice take nearly two months more leave than fathers.[27] This shows that the policy has done little to break longstanding sex-based patterns of care in the United States.

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23 (16 September 2015) 708 NZPD 6743–6744; and Ministry of Business, Innovation & Employment, above n 13, at [18].

24 See O'Donovan, above n 18.

25 Keith Cunningham-Parmeter "(Un)Equal Protection: Why Gender Equality Depends on Discrimination" (2015) 109 Nw U L Rev 1 at 5.

26 Family and Medical Leave Act 29 USC § 2601.

27 Naomi Gerstel and Amy Armenia "Giving and Taking Family Leaves: Right or Privilege?" (2009) 21 Yale JL & Feminism 161 at 167 as cited in Cunningham-Parmeter, above n 25, at 12.

In addition, non-transferable leave penalises: solo-mothers who cannot use a father's or spouse's leave; families who cannot afford both parents to take leave; and mothers or fathers who want to be the sole primary caregiver. The danger of a formal equality approach is that any resulting inequality is hidden behind the rhetoric of equal opportunity and is, ostensibly, unchallengeable.

C Critique of current reform options

Increasing the male share of caregiving is essential to changing the reality and expectation of parental leave being a 'women's issue' for which all women are penalised in the marketplace. Both approaches fail to address the specific factors that hold men back from caregiving. A new form of substantive equality that focuses on changing male behaviour could radically disrupt this dynamic.[28] Governmental imprimatur that specifically encourages male caregiving is vital if the aim is to promote shared care. Research suggests that more equal leave-taking behaviour by women and men will reduce maternal profiling and increase the employment and promotion opportunities for women of childbearing age.[29]

Research conducted by the Organisation for Economic Co-operation and Development (OECD) shows that men's leave-taking behaviour is significantly influenced by gender norms and a fear of negative career implications.[30] While women are expected to assume a greater share of the child caring role, men fear the career and social consequences of taking leave. For example, when Sweden first offered fathers paid parental leave, society applied the label 'velvet dads' to men who took leave, and men came to believe that 'velvet dads' were committing career suicide.[31] As a result, less than 10 per cent of fathers took up leave. This demonstrates that the socialisation and behavioural patterns of women and men are interdependent, and mutually reinforcing. Targeting the cultural socialisation of men therefore, is essential to encourage male leave-taking.

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28 Cunningham-Parmeter, above n 25, at 8.

29 Organisation for Economic Co-operation and Development *Policy Brief: Parental leave: Where are the fathers?* (OECD Publishing, March 2016) at 1.

30 OECD, above n 29.

31 Katrin Bennhold "In Sweden, Men Can Have It All" *The New York Times* (online ed, New York, 9 June 2010).

1 *Masculinities theory*

It may be helpful to examine the gender socialisation of men by drawing from aspects of masculinities theory, which attempts to explain how gender norms limit the boundaries of appropriate male behaviour. According to this theory, men are socialised to constantly try to establish their manhood status by displaying attributes of hegemonic masculinity and a rejection of conduct associated with femininity.[32] For example, boys are taught from a young age to hide their emotions and that "boys don't cry".[33] Given the "feminised" nature of caregiving, masculinity norms discourage co-equal forms of parenting.

There are limitations to this theory. As argued by Richard Collier, the concept of "masculinity", and in particular, "hegemonic masculinity", is problematic in itself.[34] It is an essentialist account of the male experience, and "distils the aggregation of activity of men in the social world into one neat word."[35] As such, it may inadvertently reinforce the gender norms that it attempts to dismantle. It fails to acknowledge the variable nature of masculinity between different intersecting identities, such as race, class, sexuality, culture and age. For example, in Māori culture, child caregiving is a shared responsibility between female and male whānau members.[36] Additionally, it diminishes the importance of other compounding factors that entrench the gender divide, such as inflexible workplace policies and the gender income gap. Furthermore, there are varying displays of masculinity by reference to each person's lived practices and complex every-day experiences.[37] Finally, gender norms should not become a justification or excuse for male behaviour.

32 Frank Rudy Cooper "Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity, Performance, and Hierarchy" (2006) 39 UC Davis L Rev 853 at 898–899; Keith Cunningham-Parmeter "Men at work, Fathers at Home: Uncovering the Masculine Face of Caregiver Discrimination" (2013) 24 Colum J Gender & L 253 at 271–274.

33 Michael Kimmel *Guyland: The Perilous World Where Boys Become Men* (Harper Collins, New York, 2008) at 45 as cited in John M Kang "The Burdens of Manliness" (2010) 33 Harv JL & Gender 477 at 490.

34 Richard Collier "Masculinities, Law and Personal Life: Towards a New Framework for Understanding Men, Law, and Gender" (2010) 33 Harvard Journal of Law & Gender 431 at 458–459 and 473–474.

35 Jeff Hearn "Is Masculinity Dead? A Critique of the concept of masculinity/masculinities" in Máirtín Mac an Ghaill (ed) *Understanding Masculinities: Social Relations and Cultural Arenas* (Open University Press, Buckingham, 1996) 202 at 202.

36 See Dr Will Edwards and Dr Mihi Ratima *Engaging Māori fathers, A literature review – father involvement, Māori parenting and engaging Māori fathers in parenting* (Mana Ririki, Brainwave Trust Aotearoa and Great Fathers, August 2014) at 15.

37 Collier, above n 34, at 452.

Removing individual agency is counter-productive to encouraging individual leave-taking behaviour.

However, the diversity of men's lives can be accounted for while simultaneously recognising the existence of a culturally and socially exalted form of masculinity. As all policies are based on trends and population characteristics, generalisations cannot be avoided. Masculinities theory is still largely reflective of the New Zealand male "rugby culture", which socialises men to be tough, unemotional and stoic. Particularly in rural New Zealand, anything contrary to being a "man" is frowned upon.[38]

The lack of paid paternity leave in New Zealand is an exception in the OECD; three-quarters of countries provide at least a few days of father-specific paid leave, while 12 countries provide father-specific leave for two months or more.[39] New Zealand's paid parental leave policy reinforces the socialisation process that signals to men that their primary role is to work, not care. This suggests that our society judges men predominantly by their professional success, not their personal achievements. In this way, men's disengagement from domestic work frees them to pursue market work without being critiqued for their domestic absence. Acceptance of men's reduced caregiving role therefore results in a loss of social power and workplace privileges for women.

The social construction of the male role, in turn, shapes workplace expectations. Research shows that employees who use parental leave often face penalties ranging from substantial pay-cuts to lost promotions or marginalisation.[40] However, men often pay an even higher price. When male employees take family-related leave, they can face negative consequences that range from receiving lower performance ratings to reducing their chance for a raise or promotion.[41] Gender-specific expectations remain self-fulfilling. The belief that mothers are more committed to family life than their jobs penalises women more generally because employers assume that they will be less dedicated to their work. The reverse expectation applies to men, who are expected to

38 See Katherine Dolan "New Zealand is no paradise, it is brutal" (14 September 2016) *Stuff* <www.stuff.co.nz>.

39 OECD, above n 29, at 2.

40 Debora Spar "Why Do Successful Women Feel So Guilty?" *The Atlantic* (online ed, 28 June 2012).

41 Adam B Butler and Arnie Skattebo "What is Acceptable for Women May Not Be for Men: The Effect of Family Conflicts with Work on Job-Performance Ratings" (2004) 77 Journal of Occupation and Organization Psychology 553 at 553–564.

prioritise their professional careers.[42] Further, fathers who devote themselves to full-time child care can face negative social pressure and feel isolated.[43]

Therefore, it is necessary to change male gender norms to incentivise male caregiving and reorient workplace expectations to support parental leave-taking. Because cultural change depends on structural support, paid parental leave must involve father-specific governmental signalling.[44] Policies can signal to both men and their workplaces the social desirability of leave-taking by men. As long as parental leave remains de facto 'maternity leave', maternal profiling will prevail and men will be expected to take less leave to fulfil their childcare duties. It is therefore necessary to loosen the current gender-based structures surrounding paid parental leave. Social norms shape patterns of behaviour, and behaviour in turn reinforces social norms. If men take more leave, this behaviour becomes normal, and eventually, normative.

Those who advocate for radical change may argue for an inversion of the current paid parental leave structure, in an attempt to reconceptualise masculinity and femininity.[45] This may involve giving men the same paid parental leave benefits that mothers currently have, while reducing paid parental leave entitlement to mothers. However once a policy becomes coercive, resistance mounts. Further, such a policy would not promote shared care in circumstances where it would disentitle those women who choose to be the primary caregiver. It may also create an absolute right for all men to be involved in equal co-parenting, which may be harmful for the child or mother in certain circumstances.

Instead, paid parental leave policy should expand the concept of masculinity to include caregiving, and reorient both workplace and societal expectations so that it becomes increasing acceptable (and eventually expected) for men to take childcare leave. Instead of being coercive, policy should incentivise and reward male caregiving and shared care. This creates buy-in and ownership by men, and facilitates behavioural change.

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42 Sandberg, above n 2, at 62.

43 At 61–62.

44 See generally Jane Waldfogel *What Children Need* (Harvard University Press, Cambridge, 2006).

45 Such advocates for radical change include Catherine A MacKinnon *Feminism Unmodified* (Harvard University Press, Cambridge (Mass), 1987) at 32.

D Father-specific parental leave and fatherhood bonuses

Merely offering fathers paid paternity leave may be insufficient to effect a meaningful change in male behaviour. For example, as previously mentioned, when Sweden first offered men paid parental leave, society applied the label 'velvet dads' to men who took leave. This resulted in a gender-norm reinforcement whereby less than 10 per cent of fathers took paternity leave.[46]

It was not until Sweden introduced fatherhood bonuses in 1995 that men's use of leave significantly increased. The bonus allowed families to receive an additional month of leave if fathers utilised 30 days of paid, non-transferrable leave.[47] Women were entitled to the same period of non-transferable leave, but with no added bonus if the leave was taken.[48]

As a result, the proportion of men who took leave during the child's first two years increased from 40 per cent to 75 per cent.[49] Women's earnings increased by seven per cent for every month of parental leave that fathers took. Men who took longer leave engaged in a greater share of caregiving tasks.[50] Similar trends are seen in Germany, a country with a similar legal and social system to New Zealand. Under the 2007 *Elterngeld* (parental benefit) system, families receive two extra months of paid parental leave when fathers take two months' leave.[51] Six years after Germany implemented this policy, the proportion of German fathers taking leave increased from 3.3 per cent to 27.8 per cent.[52]

In other jurisdictions that have enacted father-specific leave policies, such as Quebec and Norway, women spend more time in paid work and earn

46 Cunningham-Parmeter, above n 25, at 14.

47 Föräldraledighetslag (1995:584) (translation: Parental Leave Act (1995:584)) (Sweden).

48 The leave for each parent has since increased to three months. A remaining 300 days of paid leave is available between the parents, who receive a SEK50 tax-free incentive if leave is shared equally.

49 Ann-Zofie Duvander and Mats Johansson "What Are the Effects of Reforms Promoting Father's Parental Leave Use? (2012) 22 J Eur Soc Pol'y 319 at 325.

50 Linda Haas and C Philip Hwang "The Impact of Taking Parental Leave on Fathers' Participation in Childcare and Relationships with Children: Lessons from Sweden" (2008) 11 Community, Work & Fam 85 at 99, as cited in Cunningham-Parmeter, above n 25, at 16.

51 Bundeselterngeld und Elternzeitgesetz – BEEG (translation: Parental Allowances and Parental Leave Act (BGBI IS 2748)) 2006 (Germany).

52 Peter Moss (ed) *International Review of Leave Policies and Related Research* (International Network of Leave Policies and Research, 2013) at 36 (reporting that this increase occurred in the third quarter of 2011).

higher wages than they did previously.[53] Leave-taking men perform a greater share of childcare work long after their parental leave ends.[54] Although these outcomes are correlative and not necessarily causative, the improved equality outcomes in all jurisdictions indicate that it is likely that these policies played an important role in reducing gender inequality.

These examples indicate that the way in which parental leave policies allocate benefits between mothers and fathers largely determines whether such policies challenge gender inequalities or simply reinforce or reconstitute them.[55] Policy is a social engineering tool. In order to reorient cultural norms of caretaking, New Zealand should move towards a new model of substantive equality that targets men. Father-specific quotas and fatherhood bonuses loosen the association between parental leave and femininity. It signals the social acceptability (and desirability) of male caregiving to men, their workplaces and society. It helps to reduce maternal profiling, while simultaneously increasing the acceptability of leave-taking by men in the workplace. Further, it expands the norm of the 'primary caregiver' to shared caregiving.

1 *Application of father-specific parental leave and fatherhood bonuses to New Zealand*

Currently, the total length of paid parental leave that a family can receive (shared between the mother and father/partner) in New Zealand is 18 weeks.[56] Fundamental differences in cultural, social and governmental systems between New Zealand and Sweden mean that it is unrealistic to replicate the Swedish model. New Zealand relies less on government-funded benefits; has a smaller budget allocation for paid parental leave; and places more emphasis on individual autonomy than state-funded benefits. However, there is scope to change the paid parental leave model and extend the total length of paid parental leave in New Zealand. For example, although (then Finance Minister) Rt Hon Bill English vetoed Moroney's Bill to extend paid parental leave to 26

53 Elly-Ann Johansson *The Effect of Own and Spousal Parental Leave on Earnings* (Institute for Labour Market Policy Evaluation, Working Paper No 2010:4 2010) at 1–29 (finding that father's use of paternity leave positively correlated with maternal earnings).

54 See Nevena Zhelyazkova *Fathers' Use of Parental Leave What Do We Know?* (Maastricht Economics and Social Research Institute on Innovation and Technology Working Paper No 2013-022, 2013) at 26.

55 Cunningham-Parmeter, above n 25, at 19.

56 Parental Leave and Employment Protection Act 1987, s 71E.

weeks, the possibility of extending leave in the future has not been ruled out.[57] Public support or demand may reinstate the debate.

This article proposes that in order to increase the feasibility of a new paid parental leave model in New Zealand coming into effect, the current leave entitlement for each parent should be retained. However, the model should incorporate the system of father-specific parental leave and fatherhood bonuses, with the total period of paid leave entitlement extended to 26 weeks. This model incentivises shared leave and explicitly signals the desirability of father-specific leave.

An example of this model is to have around eight weeks of non-transferable leave available to each parent, and six weeks of sharable leave available between parents. A further four weeks of sharable leave should be available as a bonus if the father takes the father-specific leave. Additionally, parents who share leave should receive a tax-free bonus for each day that they use the leave equally. Further, each parent should qualify separately for paid parental leave.

This policy does not decrease a parent's current paid parental leave entitlement; 18 weeks of paid parental leave can still be taken by mothers or fathers who choose to take the whole period of the available shared leave. This feature maximises the political attractiveness of the policy, while encouraging male caregiving. The scheme transforms paid parental leave from an 'election system' between the parents to a 'shared care' system. Unlike the Swedish model (which does not pay either parent if they do not take the requisite individual leave), parents would be paid for any leave that is taken. Further, under this policy, families where the father is the solo earner have equal access to paid parental leave. This scheme therefore allows flexibility in family arrangements and reserves autonomy, while incentivising fathers to share leave-taking arrangements. It therefore legitimises the diversity of women and men's choices and experiences, while promoting gender equality.

It is important that paid parental leave should be inclusive for all. Enabling the father-specific leave to be transferred to other nominated caregivers or a partner of the same sex allows for alternative and culturally appropriate childcare arrangements (such as for Māori families). Allowing solo-parents to take as much leave as a couple is entitled to ensures that solo-parents are not

57 Bill English and Michael Woodhouse "Government vetoes paid parental leave bill" (press release, 16 June 2016).

disadvantaged. Further, the leave should be well paid to limit the financial cost of taking leave. Moreover, ensuring that leave arrangements have flexibility in allowing parents to resume part-time work during the parental leave period without losing paid parental leave entitlement assists job continuity, and helps partners to "shift-share" leave and work commitments. Finally, making financial support available for those who do not qualify for paid parental leave ensures that support is available to those who need it most.

IV THE NECESSITY OF AN INTEGRATIVE, MULTI-AGENCY APPROACH

The mutually reinforcing nature of gender inequality in the home and workplace, however, means that changing the structure alone may not ensure equal uptake of the leave. Nor would it solve gender inequality in the workplace. An integrative approach, which places responsibility on workplaces to enact family-friendly and equality policies, is crucial to transforming gender equality in the private and public spheres.

Policy must go further than normalising male caregiving. First, a gender-balanced division of caregiving should go beyond the period of leave-taking, but involve a balancing of the nature and type of caregiving tasks. Second, if leave-taking still attracts a career penalty, parents (especially fathers) may not truly be encouraged to take leave. Our government should therefore incentivise a workplace culture where employees (men and women) are encouraged, not penalised, for taking parental leave. To do so, the government needs to better articulate the corporate benefits of having and retaining employees who have enriched family lives. This helps to change the conception of the 'ideal worker' as one that is dually responsible for family and work. Further, unlike in Portugal,[58] for example, employees in New Zealand do not have an entitlement to flexible working hours, but merely a right to request this option from their employer.[59] Requiring employers to make flexible work options available to employees would greatly facilitate the sharing of childcare between parents.[60]

58 Peter Moss (ed) *11th International Review of Leave Policies and Related Research* (International Network of Leave Policies and Research, London, 2015) at 262.

59 Employment Relations Act 2000, pt 6AA.

60 OECD, above n 29, at 2.

Finally, reducing the gender wage gap is essential for facilitating an equal division of labour at home; women will still take more leave than men if men earn more.[61] The current gender pay gap further entrenches traditional gender roles in the home by incentivising the male breadwinner model, and justifying a gendered division of childcare labour in the home. Addressing the gender pay gap is an essential and mutually reinforcing goal to equalising paid parental leave policy between women and men. It is necessary therefore to break the barriers between family, state and market and realise that all are inextricably important for facilitating gender equality in the home and workplace.

V CONCLUSION

A gendered division of caregiving in the home shapes a gendered division of workplace benefits. Underpinning this double inequality is New Zealand's paid parental leave policy. This article shows how policy plays a pivotal role in the reproduction of structural and systemic norms and inequalities. The current parental leave entitlement reinforces traditional gender norms by deeming women as caregivers and men as breadwinners.

Notions of equality promoting either women-specific schemes or gender-neutral treatments fail to target the underlying factors that discourage male caregiving behaviour: masculine gender norms and caregiving-associated career penalties. A new vision of equality that focuses on changing male leave-taking behaviour is necessary: one that expands male gender norms and re-orients workplace expectations to support leave-taking. Father-specific parental leave and fatherhood bonuses address these underlying factors by signalling to men, society and the workplace, the desirability and normativity of male leave-taking. It also changes the concept of primary caregiving to one of shared care. It thereby encourages men to take more parental leave, while making it more acceptable in the workplace. In this way, equalising parental leave-taking between men and women may decrease maternal profiling and caregiving-related discrimination that women may face in the workplace. A father-specific paid parental leave policy therefore has the potential to significantly advance gender equality in both the home and workplace.

61 At 2.

ABSENT FROM THE TOP
— A critical analysis of women's underrepresentation in New Zealand's legal profession

Nicole Ashby*

The underrepresentation of women in the senior levels of New Zealand's legal profession is a reality that cannot be justified by choice or time. This article considers: the underrepresentation of women within the framework of women's structural disadvantage and subordination; the fusion of male dominance with political and corporate models; the role of the law and its realm of 'truth' and the overrepresentation and dominance of New Zealand Europeans in the legal profession. A deeper understanding of the ongoing subordination of women is obtained by considering the issue within this framework. This article applies that understanding to the judiciary to support the need for diversity on the bench and the centralisation of equity and fairness.

I INTRODUCTION

The story of Ethel Benjamin is as relevant today as it was in 1897.[1] She was the first woman to attend law school in New Zealand and the first to be admitted to the legal profession. She broke barriers, fought for women who were disadvantaged by male-dominated ideologies and proved to be an able, intelligent and determined woman. But her road to success was beset with difficulty and the opposition to women's entrance into the legal profession did not cease.[2] Some argued against women appearing in court in the same

* LLB(Hons). Solicitor, Simpson Grierson. The author would like to thank Grant de Lisle for all of his support over the years as well as Sirron and Tehya for their patience. Also a big thank you to Julia Tolmie, Khylee Quince and Taylor Gray.

1 Janet November *In the Footsteps of Ethel Benjamin: New Zealand's First Woman Lawyer* (Victoria University Press, Wellington, 2009).

2 At 55; Female Law Practitioners Act 1896, s 2 provided: "Notwithstanding anything to the contrary contained in 'The Law Practitioners Act, 1882,' and the Acts amending the same, any woman of the age of twenty-one years and upwards may be enrolled as a barrister or solicitor on passing the examinations required to be passed by males, and on payment of the fees and compliance with the law in that

attire as men, as practising without bonnets "was hardly fair and would ensure pitying glances from 'the other ladies' in court".[3] The Otago District Law Society allowed Ethel to use the law library but she was to read in the Judge's Chamber Room to protect male members of the profession from "unnecessary and distressing contact with a woman".[4] Other law societies failed to extend invites to Ethel,[5] and took issue with advertising her services.[6] Even when Ethel diversified her career portfolio beyond the law, through property management and investment, the barriers to her progression continued.[7]

Over 100 years later, the relevance of Ethel Benjamin's story is surprising. Only 20 years ago, female law students continued to be excluded from legal events,[8] and courtroom attire and vocal presentation posed a real threat to the practice of law for some female lawyers. One lawyer, for example, was not spoken to or acknowledged by a Judge because she was not wearing a skirt.[9] More recent forms of this problem present themselves in less obvious ways such as the pay gap, charge-out rates and seniority within legal practice.[10]

This article analyses the position of women in the legal profession and the reasons why women struggle to reach its senior levels. The statistics are dismal. The number of women entering the profession does not flow through to senior positions. Further, those women who do reach partnership or the judiciary continue to experience gendered treatment. To complicate things

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behalf."

3 November, above n 1, at 64.

4 MJ Cullen *Lawfully Occupied* (Otago District Law Society, Dunedin, 1979) as cited in November, above n 1, at 57.

5 At 68.

6 At 69.

7 November, above n 1, at chapters 8–11.

8 Elizabeth Chan "Women Trailblazers in the Law: The New Zealand Women Judges Oral Histories Project" (2014) 45 VUWLR 407 at 421 where Goddard J recalled gender discrimination in the annual law school dinner to which women were not invited: "There was a law school dinner every year, which was a black tie affair, and women just were not invited to it. So in my second or third year the female students were there, Margaret Wilson, Sian Elias and myself, we went along to the dinner."

9 Personal conversation with Khylee Quince, Associate Head of School, School of Law, AUT (in or about May 2013). In 1997, Khylee appeared as counsel in the High Court of Auckland. The Judge refused to acknowledge her. A senior counsel pulled Khylee aside and informed her that that particular Judge did not speak to female counsel who were not wearing a skirt — Khylee was wearing trousers. See also Chan, above n 8, at 424 where the importance of female courtroom attire is discussed. In other personal conversations I have had with practising female lawyers, the importance of "sounding like a man with a deep voice" and "not coming across as a nagging wife" were stressed.

10 Geoff Adlam "Charge-out rates information released" *LawTalk* (online ed, 28 July 2016).

further, there is the persistent view that there is no problem at all. Common misconceptions here include the view that women do not rise in the profession because they choose to leave the profession to have children or that the nature of the profession is simply unsuited for them. This article dismisses such misconceptions and embarks upon a deeper analysis into the structural inequities inherent within the legal profession.

It must be remembered that it is not only the legal profession in which women struggle to progress. This is an important point and one that suggests there is a need to place any gendered discussion within the context of the historical position of women and their progression in a world that was formerly controlled by men. When the position of women today is considered against this social framework, a nuanced understanding of the source of women's subordination becomes apparent.

In crafting a solution to the problems faced by women in legal practice, there are two vital considerations; institutionality and intersectionality. Throughout history, the placement of women within society has been shaped around male priority. Law today remains heavily influenced by historically determined social ethos and it would be futile to attempt to reach gender equity in the legal profession without addressing this reality. Further, the prospects of resolution would be limited if intersectional factors are ignored.

II THE ABSENCE OF WOMEN FROM SENIOR POSITIONS

Since the 1980s, the number of women entering the legal profession has consistently increased and, since 1993, women have outnumbered men being admitted to the profession.[11] In 2015, 61 per cent of barristers and solicitors admitted to the legal profession were women.[12] Recent statistics from the University of Auckland Faculty of Law also show that women consistently outnumber men as Honours graduates.[13] With great prospects of success at

11 Geoff Adlam "Snapshot of the Profession 2016" *LawTalk* (online ed, 10 March 2016) [2016 Snapshot] at 21.

12 At 21.

13 Statistics received from The University of Auckland, Faculty of Law on 14 December 2015. In 2013, 173 females graduated with Honours compared to 142 males. In 2014, 182 females graduated with Honours compared to 141 males. In 2015, 169 females graduated with Honours compared to 145 males. See also Frank Neill "Women face variety of challenges" (30 June 2016) New Zealand Law Society <www.lawsociety.org.nz>.

one end of the legal profession, it needs to be questioned why the position of women is reversed at the other. For instance, only 27.6 per cent of partners or directors of law firms in New Zealand and, since 1907, only 27 out of the 282 Queen's Counsel appointees have been female.[14]

While the Supreme Court bench sat with a majority of women for the first time in 2017 (and continues to sit with a majority of women),[15] the visibility of women within the judiciary as a whole is no different to the position of women in the legal profession generally. A lower proportion of New Zealand's judges are women when compared to other common law jurisdictions.[16] Today, women make up less than a third of New Zealand's judiciary.[17] The homogenous nature of New Zealand's judiciary has been criticised as "predominantly white, male and middle-class".[18] This concern has also been shared internationally.[19] This is not to say that the visibility of women on the Supreme Court bench is not significant or that it is not beneficial. For the reasons outlined in this article, the visibility of women on the bench is one step towards improvement.

But it is a mistake to think criticisms surrounding the judiciary are confined to the numbers. Female judges have described their treatment on the bench in a manner not dissimilar to women at lower levels of the profession. Former Canadian Supreme Court Judge, Justice L'Heureux-Dubé, has noted:[20]

> I believe that women and members of minority groups who beat the odds and attain an appointment to the bench in our countries are still very much treated as "outsiders," interlopers in a white, male-dominated judiciary. The working image of a judge continues to be that of an upper middle class white man.

14 2016 Snapshot, above n 11, at 24.

15 "New Zealand Supreme Court makes history" (13 June 2017) New Zealand Law Society <www.lawsociety.org.nz>.

16 Geoff Adlam "New Zealand's Judiciary and Gender" (11 November 2015) New Zealand Law Society <www.lawsociety.org.nz>.

17 Emile Donovan "Law's glass ceiling exposed by numbers" (15 September 2017) Radio New Zealand <www.radionz.co.nz>

18 David A R Williams "The Judicial Appointment Process" [2004] NZ L Rev 39 at 48; and Adlam "Judiciary and Gender", above n 16.

19 Lord Chancellor's Department, The Commission for Judicial Appointments *Annual Report 2002* at [6.10] as cited in Williams, above n 18, at 48; and see also Senate Standing Committee on Legal and Constitutional Affairs *Gender Bias and the Judiciary* (The Parliament of the Commonwealth of Australia, May 1994).

20 Claire L'Heureux-Dubé "Outsiders on the Bench: The Continuing Struggle for Equality" (2001) 16 Wis Women's LJ 15 at 21 (footnotes omitted).

The notion of women as 'outsiders' on the bench has been consistently expressed in the literature and by other female judges.[21] Commentary from Australia refers to the consequences of 'tokenism', or the idea that women on the bench are only there to embody the presence of an equal bench.[22] Thus, aside from the barriers women face in reaching the senior levels of legal practice, those levels once reached can become a bittersweet accomplishment.

A Denial and justification for the absence of women

Despite extensive research documenting women's absence in senior positions of the legal profession, there is no consensus that a problem exists. The denial of women's continued subordination is a popular response, whereby both men and women demonstrate little interest in the topic before dismissing it completely. Eli Wald calls this the "no-problem" problem.[23] According to Wald, advocates of the "no-problem" theory do not question the findings of empirical evidence; rather they rely on three interrelated arguments to challenge the existence and the seriousness of the problem.[24] The first of these arguments is that it is just a matter of time before numbers equalise (the "trickle-up" theory). The second argument is that women *choose* to leave law, and the third concedes to the problem in theory but denies it exists in particular instances.[25]

Justice Glazebrook, in a paper presented in 2013, tackled the arguments behind this "no-problem" theory.[26] Her Honour quickly dismissed the "it is just a matter of time" idea by reference to the numbers:[27]

> Given that over 40 per cent of lawyers entering the profession since 1990 have been women (ie for over 20 years), one would have expected more movement in the figures than has been seen to date, or, at very least, that the rate of female appointments to senior positions over the last five to ten years would be starting to be evenly balanced.

21 See, for example, Patricia Easteal *Less Than Equal* (Butterworths, Chatswood, 2001) at 210; and Sian Elias, Chief Justice of New Zealand "Changing our World" (address given to the International Association of Women Judges' Conference, Sydney, 4 May 2006).

22 Easteal, above n 21, at 224.

23 Eli Wald "Glass Ceilings and Dead Ends: Professional Ideologies, Gender Stereotypes, and the Future of Women Lawyers at Large Law Firms" (2010) 78 Fordham L Rev 2245 at 2246.

24 At 2253.

25 At 2254.

26 Susan Glazebrook, Judge of the Supreme Court of New Zealand "It is just a matter of time and other myths – the gender gap" (paper presented at Get up and Speak, Wellington, August 2013).

27 At 5.

Wald also provides the following example in demonstrating how much time would be needed in order for equality to be achieved:[28]

> Suppose Law Firm has 100 male partners and no female partners. Suppose further that Law Firm hires every year forty first-year associates, that it eight years later promotes four associates to partnerships, and that one partner retires every year. Assume that Law Firm begins to hire women associates at the same rate as male associates and promotes them equally. That is, every year Law Firm promotes two male and two female associates to partnership. Finally, assume that the retiring partner is always a male partner. In this simplified example, it will take Law Firm one hundred years to achieve equality within its partnership ranks!

Yet even in the face of such evidence of the difficulties in maintaining the trickle-up theory, advocates of the "no-problem" problem then maintain that women either *choose* to leave law or *choose not* to seek partnership or judicial appointment. This particular argument is used not only as a stand-alone justification for women's positioning in the legal profession, but also to mitigate the evidence that dismisses the trickle-up theory. In response to Wald's 100-year estimate, for instance, it is argued that women choose to leave the legal profession and therefore it will, of course, take longer.[29]

This perception of choice is particularly pernicious as it is both true and false: true to the extent that women are not overtly excluded as a gender from the law and its senior positions (and the choice can therefore be individualised) but false because such 'choices' are not made so simply. It is possible to conclude that women choose to leave the law, or leave behind the prospect of promotion, because the circumstances in which they tend to operate are unsuited to a career within the law. For instance, as women "are the sex which can bear children and who tend to shoulder most of the childcare responsibilities", there is the view that women have the opportunity to leave the law and are therefore more likely to take up that opportunity.[30] It has been stated "[i]t is easier for women socially to leave for a smaller role or stop working to care for children, than it is for men".[31] This view is popular amongst both men and

28 Wald, above n 23, at 2253 (footnotes omitted).

29 At 2255.

30 Judith Pringle and others *Women's career progression in Auckland law firms: Views from the top, views from below* (AUT University, Auckland, 2014) at 34 [GDRG study].

31 At 33.

women. Here, the culture of legal practice as well as the realities of pregnancy and parenthood are perceived as naturally existing in opposing domains. But, as will be discussed, the dangers attached to this view vastly outweigh any truths behind the argument.

III STRUCTURAL INEQUITIES: WOMEN BEAR THE BIOLOGICAL AND STRUCTURAL BURDEN OF REPRODUCTION

The Auckland Women Lawyers' Association contracted the Gender and Diversity Research Group (GDRG) to explore the reasons for the scarcity of women at senior levels in large law firms.[32]

This research involved voluntary participants from non-partner to partner level but, like other studies, contained limitations. For instance, the sample size was 144 respondents from large Auckland law firms only. Further, female respondents were overrepresented in the sample.[33] The overrepresentation of New Zealand Europeans is unsurprising, however, when compared to the legal profession as a whole.[34] This overrepresentation will be discussed further later. Notwithstanding such limitations, GDRG's findings provide insight into the views of both men and women who are employed in large law firms in New Zealand.

A Motherhood versus career progression

A key finding of the GDRG study was the perception by many women who were not partners that having children constituted a significant, if not fatal, barrier to becoming a partner, despite perceiving adequate levels of career support within their respective firms.[35] One of the study participants stated "[i]t is unadvisable to breed if you have partnership aspirations".[36]

32 GDRG study, above n 30.

33 As at the 2013 Census, New Zealand Europeans comprised 71.6 per cent of the New Zealand population whereas the percentage rate of the New Zealand European respondents in the study was 95 per cent. The study was therefore not representative of the New Zealand population around the time it was conducted.

34 For instance, 80.4 per cent of New Zealand lawyers were New Zealand European as were 85.4 per cent of New Zealand's judiciary as at the 2013 Census.

35 At 30.

36 At 30.

Two issues arise here. The first is the accommodation of the need for part-time and flexible working arrangements that often accompanies parenthood. It is said that the hypercompetitive nature of the legal profession demands excellence, commitment, dedication, availability to clients and instant responsiveness.[37] As one participant in GDRG's study stated:[38]

> Performance is often measured as a function of hours worked not actual productivity, with the result that lawyers with commitments outside of work (principally women with childcare commitments) are disadvantaged.

Legal scholars have concluded that legal careers are largely shaped by men with families but who are able to commit to the workplace and sacrifice family life when needed.[39] Even in an age where flexible working arrangements are statutorily recognised,[40] the hypercompetitive nature of the legal profession fundamentally ignores the value attached to the arrangements. Instead they are considered to be counterproductive to the legal profession's objective. Consequently, the value attached to motherhood (and its requirements around part-time and flexible working arrangements) is accorded a lesser status, with the consequence that women are perceived as lacking commitment and a desire to progress.[41]

The second issue is that women are generally seen to pose a higher risk of leaving the firm several years down the track, given their biological ability to reproduce. As a consequence, women lawyers are deemed less deserving of investment in mentorship and training than their male counterparts,[42] resulting in less opportunity and further subordination. Here, women are stereotyped and disadvantaged by virtue of their womanhood. This particular issue affects women regardless of their familial prospects and sees all women essentialised, marginalised and structurally subordinated.

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37 Wald, above n 23, at 2283.

38 GDRG study, above n 30, at 32.

39 Holly English *Gender on Trial: Sexual Stereotypes and Work/Life Balance in the Legal Workplace* (ALM Media, 2003) at 230 as cited in Wald, above n 23, at 2283; Nancer H Ballard *Equal Engagement: Observations on Career Success and Meaning in the Lives of Women Lawyers* (Center for Research on Women, Working Paper No 292, 1998) at 22–26 as cited in Wald, above n 23, at 2283; and Joan C Williams "The Social Psychology of Stereotyping: Using Social Science to Litigate Gender Discrimination Cases and Defang the 'Cluelessness' Defense" (2003) 7 Empl Rts & Emp Poly J 401 at 412–48 as cited in Wald, above n 23, at 2283.

40 Employment Relations Act 2000, pt 6AA.

41 See generally GDRG study, above n 30, at 9, 31 and 101.

42 Wald, above n 23, at 2275.

B Family responsibility

The position of female partners in GDRG's study was similar to those of non-partner women regarding the issue of children and alternative working arrangements. A crucial element for success, according to female partners, was the need for a supportive partner and/or home help. Supportive wider networks were considered to be crucial to both reaching and maintaining partnership status. Interestingly, virtually none of the female partners argued that it was the responsibility of the law firm to assist partners with dependents in order to manage work-life competition.[43] One respondent alluded that many male partners had housewives and additional in-home support such that they were not exposed to many of the household responsibilities to which many female partners remained bound.[44]

Wider support networks, although allowing some women the ability to reach and maintain partnership, require women to mitigate their life circumstances to alleviate what would otherwise be a significant barrier to partnership. This is commonly described as a choice or individual responsibility. There is the perception that the mitigation of life circumstances that are commonly experienced by women are rightly required to be individualised because they are choices that were made at the expense of other, more career-focussed, outcomes. It is here that some women could feel that because they have not experienced overt gendered discrimination, they are instead supported in their career. This view generates individualised responses that stop short of questioning deeper organisational structures. In other words, the fact that women tend to feel supported in their careers by virtue of the fact that gendered discrimination is not identified ameliorates the reality that the law and its practice is fundamentally structured upon male values.

It is evident that the road to partnership structurally favours men because the legal profession is based on the male life-path.[45] Partnership is most likely to occur within the mid-30s, which poses a clash of life stages for women; one

43 GDRG study, above n 30, at 74.

44 At 74, where the respondent stated, "these males' partners - the wives are at home. They're running the household … So the guys just don't have an appreciation at all, as to the real world. They don't have to deal with anything. They don't cook. They can go out and drink with the boys or with the clients. That's the real difference".

45 GDRG study, above n 30, at 10 and 69.

based on a biological determinant, the other on a professional norm.[46] These stages are not mutually exclusive and overlap almost completely,[47] posing an institutionalised and structural inequity for women that is absorbed and mitigated on an individual level.

C Networking

The legal profession is hierarchical in nature; law graduates start at the bottom and work their way up. Networking becomes an integral part of this journey. There was widespread agreement in GDRG's study that networking was key not only to promotions but also for business.[48] And, of course, bringing in business favours a promotion. Lawyers yet to reach partnership, whether male or female, are equally dependent upon the ability to network in order to progress for promotion. This often involves another individual advocating for the advancement of their junior.[49] But, as will become evident, networking is a fickle enterprise.

1 Diversity deficiency

One respondent in GDRG's study stated, "there is nobody in a leadership role who has to balance children and work and I think that's really telling of how they treat mothers".[50]

Women who are not partners not only struggle to find female mentors generally, but more specifically, female mentors who can relate to their realities. Instead, women who are yet to reach partnership are faced with some female partners whose life circumstances tend to resemble those of men, in that their parental and home-based responsibilities have been alleviated through external sources. "Queen Bee" syndrome is yet another barrier that non-partner women face, where women who have reached partnership advocate the "no-problem" theory, taking the firm view that they have progressed without the need for any assistance.[51]

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46 At 10.

47 At 69.

48 At 52.

49 Nancy M Carter and Christine Silva *Mentoring: Necessary but Insufficient for Advancement* (Catalyst, 2010) at 1 as cited in Glazebrook, above n 26, at 8.

50 GDRG study, above n 30, at 53 (citation omitted).

51 At 53.

As Natalya King suggests, the challenge becomes the ability "for businesses to create an environment where female-dominated skills are also valued".[52] Until such skills are valued, the trickle-down effects of a uniformed and one-dimensional senior level will continue to benefit men to the detriment of women.

2 *Modern nepotism crafting the concept of value*

The displacement of nepotism by meritocracy is a common point of discussion. Galanter and Roberts, for example, describe this movement as from "kinship to magic circle" whereby the practices of large law firms in London shifted from nepotistic promotions and elite families, to a more egalitarian project.[53] In the 21st century, it is said that the legal profession runs on a "hypercompetitive meritocracy" where the financial bottom line, rainmaking, long hours and client-focused representation are dominant features.[54] Regardless of the perceived changes to underlying ideologies, the fact remains that the profession sits within a pyramid whereby those at the apex retain excessive power and influence. Fragments of preference and privilege continue to influence the profession.

The endurance of class privileges and other social conditions affixed to the senior levels of the legal profession perpetuates the struggle of women to access powerful mentors or sponsors to advocate on their behalf. But this is not a one-way problem. Research suggests that those in higher positions prefer to mentor juniors with socio-economic and cultural characteristics similar to their own.[55] Factors such as wealth, education, influential connections and social standing, for example, create a unique perception of the world. Consequently, this paradox distorts the concept of 'value'. What is and is not accorded value depends on the standards by which value is calculated. As those standards are determined by those who tend to gravitate towards others who are "alike", the value-calculus becomes narrowly constructed and narrowly applied. This could be described as an impenetrable barrier for women because it distorts

52 Natalya King *Raising the Bar: Women in law and business* (Thomson Reuters, Wellington, 2014) at 181.

53 Marc Galanter and Simon Roberts "From kinship to magic circle: the London commercial law firm in the twentieth century" (2008) 15(3) International Journal of the Legal Profession 143 at 145 and 167.

54 Wald, above n 23, at 2273.

55 David B Wilkins and G Mitu Gulati "Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Markets of Elite Law Firms" (1998) 84 Va L Rev 1581 at 1608–1613 as cited in Wald, above n 23, at 2276.

the perception of what is and is not to be accorded value, what is not confined to white middle-class men nor kinship, and is unable to be displaced by merit alone. The lack of value attached to women's work and life circumstances renders the equation used to calculate merit unbalanced and biased towards a narrow and one-dimensional set of values.

IV BROADER CRITIQUES OF THE BARRIERS PRESENTED BY GENDER

This article has discussed the popular justifications that arise in response to the lack of progression of women within the law. Through that examination, structural inequities, as opposed to individualised deficiencies, became evident. Those structural inequities must now be placed within their historical contexts to grasp the extent of women's subordination.

It is prudent to consider the absence of women in the senior levels of the legal profession in conjunction with the wider contexts in which women operate (given that the subordination of women is not a problem confined to the law).[56] This is because the progression of women in a space that was once only open to men bears direct relevance to the experience of women today more generally.

A Male dominance

Catherine MacKinnon argues that male dominance produces women's subordination and institutional structures maintain gendered power relations.[57] Mackinnon states:[58]

> [Feminism's] project is to uncover and claim as valid the experience of women, the major content of which is the devalidation of women's experience.
>
> This defines our task not only because male dominance is perhaps the most pervasive and tenacious system of power in history, but because it is metaphysically nearly perfect.

56 Human Rights Commission *New Zealand Census of Women's Participation 2012* (Wellington, November 2012) at 14.

57 Vanessa E Munro *Law and Politics at the Perimeter: Re-Evaluating Key Debates in Feminist Theory* (Hart Publishing, Oxford, 2007) at 87.

58 Catherine A MacKinnon "Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence" (1983) 8 Signs 635 at 638 (footnote omitted).

Labelled as "radical" and "deterministic", MacKinnon's dominance thesis rests on the patriarchal power and privilege men exercise over women.[59] More fundamentally, MacKinnon alludes to the idea that as a result of patriarchal logic, institutional structures in which we organise our lives are infused with male dominance, which prevents women from achieving true equality.

Despite its "impetus for feminist political activism and reform", MacKinnon's radicalist approach has been heavily criticised.[60] It has been said that MacKinnon's theory engages in the worst form of essentialism as it presupposes an essential experience for all men and women.[61] Following from this is the criticism that MacKinnon's view ignores intersectional categories and disparities within and between men and women.[62]

Another criticism of MacKinnon is that "this reification of an ethos of disempowerment makes it difficult to see how women, individually or collectively, can bring about change in the dominant structure".[63] This criticism holds force. It is true that if male dominance is infused in every conceptual aspect of modern life it may be impossible to bring about change in any realistic sense. But that cannot and should not discourage discussion of the issue.

1 The development of the conceptual structure in the legal profession

Modern political and corporate models guide their respective ventures through pre-determined norms and standards. The conceptual structure of the legal profession is a fundamental player in the ongoing subordination of its female participants.

Men have held positions of political and legal power for far longer than women in most parts of the world. It was not until 1902 that women in Australia were granted the right to vote and seek election to political office.[64] The same rights were granted to women in Canada from around 1919.[65] In

59 Munro, above n 57, at 28.

60 At 30.

61 At 30.

62 Kimberle Crenshaw "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color" (1991) 43 Stan L Rev 1241, as cited in Munro, above n 57, at 33.

63 Munro, above n 57, at 88.

64 See "Australian Women in Politics" (21 September 2011) Australian Government <www.australia.gov.au>.

65 William Dunn and Linda West "Women get the vote 1916-1919" (2011) Canada: a Country by Consent <www.canadahistoryproject.ca>.

New Zealand, although women were granted the right to vote in 1893, they were not permitted to enter Parliament until 1919.[66] Further, it was not until 1933 that New Zealand had its first female politician. But the fact that women have been formally provided with the same rights and opportunities as men does not mitigate the effect of the circumstances on women before such formal equality.

Before women were able to enter the workforce, they were confined to domestic and private duties. Men generally reserved for themselves the ability to govern countries, run businesses and practise law. Naturally, the factors that implicated men's operations did not necessarily incorporate the factors that women's operations require today. For instance, the need to include children's requirements and routines were not something men had to undertake, as this task was reserved solely for women. Consequently, political and corporate models were developed based on the experiences and values of men. Even when women were able to enter the workforce, the models, values and powers that were embedded into that sphere did not recognise the factors that were not specific to men.

Hence, the formal equality provided to women amounted to a somewhat empty victory because women still faced inherent disadvantages when compared to their male counterparts. Women had to strive to succeed in a competitive male dominated world, whilst also managing the significant responsibilities that attached to mothering — a burden that the men they were competing with did not have.

MacKinnon tends to articulate this domination of men as one deriving from a man's desire to sexually dominate a woman. According to her, the "liberal state coercively and authoritatively constitutes the social order in the interests of men … It achieves this through embodying and ensuring male control over women's sexuality".[67] Many feminist writers disagree on this point. Although agreeing with MacKinnon to the extent that male domination lies at the heart of the current problems women face, the argument put forward here is that such domination arises not out of sexuality and eroticisation, but as a natural and evolutionary development of the historical position of both men and women because of their familial roles.

66 See "Past politicians" New Zealand Parliament <www.parliament.nz>.

67 MacKinnon, above n 58, at 644.

2 *Consequences for Māori women*

The fusion of male dominance and corporate models is fundamentally disadvantageous for women for the reasons discussed above. This fusion poses an enhanced form of disadvantage to women to whom it is culturally unnatural. The above discussion was centred on the historical development of conceptual structures for New Zealand Europeans. But this cannot be mistaken for the experience of all women in New Zealand. For Māori women, the imposition of patriarchy and male domination was, and still is, catastrophic. Christianity and the 'nuclear family' destroyed the harmonious relationship that had previously existed between Māori men and women.[68] Entrenched in political and corporate models, therefore, is an amplified facet of disadvantage for Māori women that must be considered.

Pre-colonial New Zealand offered Māori women a place in society that was well respected and highly valued. Because of their reproductive ability, women were considered essential to the linkage between the past and the future.[69] Whānau dynamics ensured that women were respected by their husbands and that child-rearing remained a collectively performed task. This allowed Māori women to engage in a wide range of roles, including leadership.[70] The colonisers, however, did not approve of this 'wonder woman' status,[71] and sought to remould Māori women into a nuclear family arrangement. Here, "the husband/father was head of household and thus in control; women and children were chattels to be used and abused by the paterfamilias as he chose".[72] The consequences for Māori women were colossal. Gender-specific roles were introduced, as was the domination/subordination divide. Māori collectivism and social structures were undermined. Following land loss and a decrease in population, Māori women were forced into urbanisation, became dependent on their husbands as

68 Annie Mikaere "Māori Women: Caught in the Contradictions of a Colonised Reality" (1994) 2 Wai L Rev 125 at 133.

69 Ani Mikaere "Cultural Invasion Continued: The Ongoing Colonisation of Tikanga Maori" (2005) 8 Yearbook of New Zealand Jurisprudence 134 at 141.

70 At 141.

71 K Jenkins "Working paper on Māori women and social policy" written for the Royal Commission of Social Policy and quoted in the Report of the Royal Commission on Social Policy (1988) Vol III 161 as cited in Mikaere "Cultural Invasion Continued", above n 69, at 143.

72 Jocelyn A Scutt *Even in the best of homes: violence in the family* (Penguin Books, Victoria, 1983) at 11 as cited in Mikaere "Cultural Invasion Continued", above n 69, at 150.

breadwinners and increasingly isolated.[73] The concept of women as leaders was beyond the comprehension of the settlers.[74] Consequently, the strength, respect and value that attached to Māori women dissipated. Māori women had their mana torn away; replaced by inferiority and conflict.

The legacy of colonisation is directly felt today. Māori women remain worse off when compared to not only New Zealand European women and men, but also Māori men. Māori women have lower incomes, less education, poorer health and are more likely to have sole charge of dependent children.[75] Māori women experience higher levels of victimisation, particularly within the context of intimate partner violence.[76]

B The role of the law

If it is accepted that the present conceptual structure of the legal profession is based upon male-dominant experiences and values, the law can be seen to carry these further into its realm of 'truth'. As Carol Smart notes:[77]

> … the judge does not remove his wig when he passes comment … He retains the authority drawn from legal scholarship and the 'truth' of law, but he applies it to non-legal discourses … He combines the Truth claimed by socio-biology with the Truth claimed by law …

In this light, the law "extends itself beyond uttering the truth of law, to making such claims about other areas of social life".[78] The law retains the power to extract a social-norm or concept from non-legal structures and subsequently grant it an authoritative meaning. Ideologies such as the role and status of women can thus become a powerful source of 'truth' that then continues to be imposed upon women. By way of example, Smart cites a statement in Lord Denning's 1980 book *The Due Process of Law*:[79]

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73 Mikaere "Cultural Invasion Continued", above n 69, at 152–153.

74 Mikaere "Māori Women: Caught", above n 68, at 132.

75 Khylee Quince "Maori and the criminal justice system in New Zealand" in Julia Tolmie and Warren Brookbanks *Criminal Justice in New Zealand* (LexisNexis, Wellington, 2007) 333 at 349.

76 Ministry of Justice *Strengthening New Zealand's Legislative Response to Family Violence: A public discussion document* (2015) at 5.

77 Carol Smart *Feminism and the Power of Law* (Routledge, London, 1989) at 13.

78 At 13.

79 Lord Denning *The Due Process of Law* (Butterworths, London, 1980) at 194 as cited in Smart, above n 77, at 13.

> No matter how you may dispute and argue, you cannot alter the fact that women are quite different from men. The principal task in the life of women is to bear and rear children: … He is physically the stronger and she the weaker. He is temperamentally the more aggressive and she the more submissive. It is he who takes the initiative and she who responds. These diversities of function and temperament lead to differences of outlook which cannot be ignored. But they are, none of them, any reason for putting women under the subjection of men.

As Smart states, "[i]n this passage both law and biological determinism are affirmed, whilst law accredits itself with doing good".[80] The detrimental effects of such judicial statements upon women are significant.

Even in the 21st century, women remain bound by the same connotations, particularly where motherhood is involved. For instance, it has been observed that it is mothers who are primarily charged under failing to protect and failing to provide provisions.[81] In addition, the "glorification of motherhood" is a prominent justification for the punitive treatment of women who fail to fulfil the socially constructed, yet legally affirmed, requirements attached to motherhood.[82] Furthermore, traditional views regarding the role and sexuality of women continue to pose significant difficulty for women in areas of law including the offence of sexual violation,[83] family proceedings,[84] and domestic violence.[85]

Despite the connotations attached to womanhood manifesting in more subtle forms, 21st century law remains burdened with historical truths. Although it is tempting to consider the issue of women in the legal profession within the confines of the profession, doing so fails to recognise the contextual realities that inform the profession. It also fails to address the source of women's

80 At 13.

81 Crimes Act 1961, ss 151 and 195A; and Julia Tolmie "Criminalising failure to protect" [2011] NZLJ 375.

82 Jonathan Herring "Familial Homicide, Failure to Protect and Domestic Violence: Who's the Victim?" [2007] Crim LR 923 at 932.

83 See Wendy Larcombe "The 'Ideal' Victim v Successful Rape Complainants: Not What You Might Expect (2002) 10 Feminist Legal Studies 131; and Stuart Taylor Jr and KC Johnson *Until Proven Innocent: Political Correctness and the Shameful Injustices of the Duke Lacrosse Rape Case* (Thomas Dunne Books, New York, 2007).

84 See Julia Tolmie, Vivienne Elizabeth and Nicola Gavey "Imposing Gender Neutral Standards on a Gendered World: Parenting Arrangements in Family Law Post-separation" (2010) 16 Canta LR 302.

85 See Elizabeth Sheehy, Julie Stubbs and Julia Tolmie "Securing Fair Outcomes for Battered Women Charged with Homicide: Analysing Defence Lawyering in *R v Falls*" (2014) 38 MULR 666.

subordination, which consequently limits the ability to effectively cure the position of women generally; be it professionally or otherwise. Recognising the relationship between the role of the law and gender is critical in crafting a solution to the issues which women in the law face.

V DE-CENTERING THE EXPERIENCES OF THE PRIVILEGED

Uniformity heightens in the senior levels of the legal profession. As at 2015, 93 per cent of New Zealand's judiciary were New Zealand European,[86] as were 90 per cent of partners at large law firms.[87] Both numbers are over-representative of the New Zealand European population. Although the homogeneity of the senior levels of the legal profession is a well-known complaint usually made with reference to white middle-to-upper class males, it is also true for women. In GDRG's study, for instance, all female participants at partnership level, apart from one, identified as New Zealand European.[88] Statistics also show that over 90 per cent of New Zealand's female judges are also New Zealand European.[89]

Two issues fall for discussion here. The first is the centrality of white female experiences in gender discourse and the second is the structural barriers that are created as a result of the centrality of white privilege.

A White privilege and centrality

The intersection of class and race upon a single-axis framework is a particularly important aspect of the current discussion. The tendency to treat race and gender as mutually exclusive categories of experience distorts the experiences of those for who these categories intersect.[90] Further, these different systems of oppression tend to be based around the experiences of the dominant group

86 Geoff Adlam "Snapshot of the Profession 2015" *LawTalk* (online ed, 27 February 2015) [2015 Snapshot] at 18. I note that there are no more recent statistics available on this.

87 Statistics in relation to New Zealand Europeans at partnership level retrieved via information held by the New Zealand Law Society on 14 January 2016.

88 GDRG study, above n 30, at 61.

89 2013 Census information compiled by Geoff Adlam for the author, New Zealand Law Society (13 January 2016). The author notes that there is a lack of collection of statistics relating to ethnicity in the New Zealand legal profession. The statistics referred to were obtained directly from the New Zealand Law Society.

90 Kimberlé Williams Crenshaw "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics" in Adrien Katherine Wing (ed) *Critical Race Feminism: A Reader* (2nd ed, New York University Press, New York, 2003) 23.

— notably, white middle-to-upper class men and women. Without exploring the impact of race and class in conjunction with gender, those who are disadvantaged by the former become theoretically absorbed, and consequently erased, within discourses based upon the latter.

The concept of white privilege in New Zealand can only be defined within wider social and historical contexts. The conflict inherent in the transformation of New Zealand into a British colony was not limited to confrontation between Māori and Pākehā parties. Class and sex conflicts were also imported conditions that continued to pose further tensions upon an already strained encounter. These conflicts were closely associated with access to and ownership of land, as "[l]and provided the means of survival … formed the productive basis of the migrant household and structured relations between the sexes".[91] A major preoccupation of the British was the problem of determining individuals' appropriate status with reference to property, skills and occupation.[92] Whilst Māori were concerned with collectivism and balance, the British operated upon individualism, hierarchy and divide.[93]

Ani Mikaere comments that colonisation is not a finite process: it "is not simply part of our recent past, nor does it merely inform our present. Colonisation *is* our present."[94] Modern New Zealand culture is fundamentally grounded in experiences of dominance, assimilation and subordination. Thus, when defining white privilege within the New Zealand context, the complex entanglement of assimilationist concepts, inherent within imported hierarchical social structures, and the continued domination of non-colonising groups become vital considerations. That is the context in which New Zealand is shaped: domination of the colonised by the colonisers. Today the effects of this domination continue to be felt, not only by Māori, but also by other ethnic minority groups such as Pacific peoples. Both of these groups are located within multiple systems of oppression (such as racism and financial hardship) resulting in high rates of imprisonment and unemployment, poor health and other related outcomes.[95] For women who benefit from white

91 Bev James and Kay Saville-Smith *Gender, Culture, and Power* (Oxford University Press, Auckland, 1989) at 16.

92 At 16–31.

93 See generally Mikaere "Cultural Invasion Continued", above n 69.

94 Mikaere "Cultural Invasion Continued", above n 69, at 142 (emphasis in the original).

95 See Naomi Simmonds "Mana wahine: Decolonising politics" (2011) 25 Women's Studies Journal 11 at

privilege, their experiences as women in the law are mitigated through their race and class privileges. Yet women who experience racism and financial disadvantage experience their gender in a materially different sense that results in qualitatively and quantitatively different outcomes.

B Structural outcomes of white privilege

White privilege is a significant platform to the senior positions within the legal profession. It is also structurally absorbed into the conceptual make-up of the law and its practice. The cumulative effects of male domination and white privilege produce results that are visible today — the underrepresentation of women in senior positions and the overrepresentation of New Zealand Europeans.

Kimberlé Crenshaw discusses the structurally absorbed consequence of white privilege within the context of *Moore v Hughes Helicopters Inc,* an unsuccessful sex discrimination case brought by a black female plaintiff in the United States:[96]

> Discrimination against a white female is thus the standard sex discrimination claim; claims that diverge from this standard appear to present some form of hybrid claim. More significantly, because Black females' claims are seen as hybrid, they sometimes cannot represent those who may have "pure" claims of sex discrimination. The effect of this approach is that even though a challenged policy or practice may clearly discriminate against all females, the fact that it has particularly harsh consequences for Black females places Black female plaintiffs at odds with white females.

In this case, the plaintiff claimed that her employer discriminated on the grounds of both sex and race in promotional practices. The plaintiff was a black employee and adduced evidence demonstrating a significant disparity between the advancement of black females in the workplace. According to the Court, however, the plaintiff's claim as a black female "raised serious doubts as to [her] ability to adequately represent white female employees".[97] Crenshaw stated:[98]

13; and Family Violence Death Review Committee *Fifth Report: January 2014 to December 2015* (Health Quality & Safety Commission, February 2016) at 43–44.

96 *Moore v Hughes Helicopters Inc* 708 F 2d 475 (9th Cir 1983) as cited in Crenshaw, above n 90, at 26.

97 *Moore*, above n 96, at 480.

98 Crenshaw, above n 90, at 26.

> The court rejected Moore's bid to represent all females apparently because her attempt to specify her race was seen as being at odds with the standard allegation that the employer simply discriminated "against females."

This case demonstrates the centralisation of white experience. The anti-discrimination doctrine could only be claimed for discrimination against women *or* discrimination against black people. But in *Moore*, those actions were not maintainable nor were they at issue. The evidence demonstrated discriminative practices against *black women* — not women generally and not black people generally. As a result the "hybrid" claim was rejected.[99]

At a fundamental level, *Moore* demonstrates the reality that powerful institutions, such as the law, are structurally centred upon white experience and privilege. In the context of the legal profession, this has two outcomes: the advancement of those who the profession structurally favours and the subordination of those who present as structurally incompatible.

The white centralised ideology that is structurally inherent in the legal profession is achieved and perpetuated through a causal nexus. We can see this perpetuated in two key ways. First, the conceptual understanding of 'value' is moulded according to white-centralised conceptions of good and bad. Such conceptions include a good education and connections in influential positions and familial success. Thus, the profession becomes structurally biased towards those who are 'valued', and structurally biased against those who are not. As a result, those who benefit from white privilege are filtered into and bolstered upwards in the legal profession. This is not to say that those who occupy the senior levels of legal practice have not earned their positions. I argue that the conceptual structure of the profession is fundamentally favoured towards those who present as compatible so that those individuals find themselves swimming with the tide rather than against it; their experiences, work and achievements are recognised by the profession as valuable.

Secondly, hiring and promotional practices become pervaded by implicit biases. Research shows that, in the employment context, people are persuaded by implicit biases and stereotypes.[100] These persuasions are often associated with commonalities that are held by both the employer and employee, with

99 At 145.

100 Linda Hamilton Krieger and Susan T Fiske "Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment" (2006) 94 CLR 997.

the employer being more likely to hire or promote someone who is more like themselves. Here, hiring and promotional practices become influenced by unspoken behavioural and contextual correlations.[101] In a profession where the concept of value is narrowly defined, implicit biases and stereotypes become the medium through which white ideology and privilege is structurally centralised and perpetuated.

C Equality is not enough

Equality is often the term used when talking about the rise of women. In a LawTalk article, for instance, then Minister for Women, Louise Upston MP, promoted the need for equal rights, opportunities and choices for women.[102] Worldwide movements also look to equality as the solution for women's uprise from multiple forms of subordination.[103] Although equality has been advocated for historically, the continued subordination of women in the 21st century deserves re-examination.

The concept of equality is misleading. On the one hand, equality can be used in the formal sense to mean that the same opportunities are granted to all individuals regardless of the fact that people are differently and unequally placed. On the other hand, equality can be used in the substantive sense to mean that people are treated differently to arrive at the same outcome. As Justice L'Heureux-Dubé has stated, "true equality requires substantive change and accommodation rather than simple formalistic egalitarian treatment".[104] The danger of failing to recognise this distinction is that women's subordination can quickly become reduced to a mere triviality when equality is understood in a formal sense. Here, for instance, advocates of the "no-problem" problem hold that opportunities are equally available to women as they are for men, before proceeding to use one of the arguments mentioned earlier to justify women's absence in the legal profession. The concept of substantive equality is also limited in nature, despite its attractive appearance.

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101 At 1049.

102 Sasha Borissenko "Women & the Legal Profession" *LawTalk* (online ed, 5 November 2015) at 11.

103 See the HeForShe Solidarity movement for gender equality as initiated by the United Nations: HeForShe <www.heforshe.org>.

104 L'Heureux-Dubé, above n 20, at 20; and Claire L'Heureux-Dubé "Conversations on Equality" (1998) 26 Man LJ 273 at 276.

The historical development of the Canadian Charter of Rights and Freedoms (the Charter) is a useful comparison of the different interpretations of equality.[105] Prior to the Charter, the Canadian Bill of Rights was enacted in response to ongoing inequalities experienced by minority groups and provided Canada's first equality guarantee.[106] Judicial interpretation of the legislation saw women and other minority groups being granted equality "only to the extent that they were no different from white, able-bodied men".[107] Equality became a dead end for those considered to be outside the social norm because their differences were not accommodated for. As a result, the Charter was introduced in 1982.[108] This included the concept of equality without discrimination or substantive equality. According to Justice L'Heureux-Dubé, this nuanced understanding recognised equality as a comparative concept that did not always require treating people the same; sometimes it required treating them differently.[109]

Discussion over formal and substantive equality is popular throughout feminist literature.[110] But both approaches have been considered to fail the feminist ideal, as both presume that men are the benchmark against which women, as either equal or different, are to be measured.[111] Formal equality, as noted above, has failed to achieve equality in fact because women are differently placed and, in particular, bear the sociological and biological burden of reproduction. Likewise, a "difference" approach tends to theoretically locate women within the private sphere whilst maintaining the male aspirational benchmark. For example, biological differences between men and women are such that they tend to see women destined for a home-maker or housewife role. Although today's employment legislation provides for both maternity leave and partners/paternity leave,[112] other embedded factors see most women

105 Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act 1982, being schedule B to the Canada Act 1982 (UK) 1982 c 11.

106 Canadian Bill of Rights RSC 1985 App III, s 1(b); and L'Heureux-Dubé "Conversations on Equality", above n 104, at 275.

107 L'Heureux-Dubé "Conversations on Equality", above n 104, at 275; see *Bliss v Canada* [1979] SCR 183 and *Canada (Attorney Canada) v Lavell* [1974] SCR 1349.

108 L'Heureux-Dubé "Conversations on Equality", above n 104, at 276.

109 At 276.

110 See, for example, Joanne Conaghan *Law and Gender* (Oxford University Press, Oxford, 2013) at 81; and Catherine MacKinnon "Substantive Equality: A Perspective" [2011] Minnesota Law Review 1 at 4, 14 and 15.

111 Smart, above n 77, at 82.

112 Parental Leave and Employment Act 1987, pts 1 and 2.

taking the majority of time off work in order to care for their families. Those factors vary, but practically speaking it is usually the parent who earns the greater salary that tends to stay in work, and realistically speaking, this tends to be men.[113]

Equality jurisprudence creates a further tension between oppressed social groups.[114] Intersectional analysis, as discussed earlier, is a broader facet to the issue of women in the legal profession. Thus, to seek equality, whether it be formal or substantive, creates conflict between dominant and minority groups whilst simultaneously affirming the male benchmark.

For the reasons already discussed it becomes difficult to consider the resolution equality could provide. It is therefore sensible, in 21st century New Zealand, to demote the goal of equality from its long-reigning idol status.

D Equity

Equity is an ethical concept grounded in principles of distributive justice and fairness. The concept is often used in the health sector,[115] where it can be defined as:[116]

> [T]he absence of systematic disparities in health (or in the major social determinants of health) between social groups who have different levels of underlying social advantage/disadvantage—that is, different positions in a social hierarchy.

Defining equity within the context of feminist critique is no simple task. But what is clear is that equity is different from equality.[117] In contrast to equality, equity does not have a presupposed benchmark.

Seeking equity for women in the legal profession centralises fairness. Fairness becomes the guiding principle by which equity is achieved. Just as equity in health requires focus on the distribution of resources and other

113 "Gender pay gap" (1 September 2010) Ministry for Women <www.women.govt.nz>.

114 Darren Lenard Hutchinson "Identity Crisis: 'Intersectionality,' 'Multidimensionality,' and the Development of an Adequate Theory of Subordination" (2001) 6 Mich J Race & L 285 at 298.

115 P Braveman and S Gruskin "Theory and Methods: Defining equity in health" (2003) 57 J Epidemiol Community Health 254; and Family Violence Death Review Committee, above n 95, at 48 where the concept of equity is applied to family violence.

116 Braveman and Gruskin, above n 115, at 254.

117 At 255.

processes that drive health inequity,[118] equity in the legal profession requires focus on the structural inequities that drive gender imbalance. By centralising fairness, the differences between gender, race and class can be accounted for. This requires a reconstruction of concepts that have become fundamental to the model of the legal profession.

VI SEEKING DIVERSITY ON THE BENCH

So where to from here? It is clear that the absence of women at the senior levels of the legal profession extends beyond numerical asymmetry. At most, it is a starting point. While a single solution will not rectify the issue, a particularly important aspect of the position of women within the law is the judiciary. As Rt Hon Chief Justice Elias stated at the Australian Women Lawyers' Conference in 2008, "the visibility of women lawyers and judges is critical in breaking down stereotypes and is important for that reason alone".[119] Before discussing the potential of the judiciary to assist in women's uprise, we must not overlook the fact that the judiciary is a part of legal practice and therefore bound by current structural defects.

A Judicial appointment processes

As previously mentioned, women are underrepresented as judges. Judicial appointments are made by the Governor-General upon the recommendation of the Attorney-General. In addition to the legislative requirements, the Attorney-General provides guidelines regarding the procedures for judicial appointment.[120] The purpose of the criteria is to aid the Attorney-General in determining the suitability of prospective candidates, and includes the assessment of legal ability, qualities of character, personal technical skills and the candidate's reflection of society.[121] As David Williams QC has stated, the latter of these criteria is the only one that may be debatable.[122] It reads:

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118 At 255.

119 Sian Elias, Chief Justice of New Zealand "Address to the Australian Women Lawyers' Conference" (Australian Women Lawyers' Conference, Melbourne, 13 June 2008) at 8.

120 Christopher Finlayson "Judicial Appointment Protocol" (April 2013) Crown Law <www.crownlaw.govt.nz>. The procedures for judicial appointment must be made in accordance with the Senior Courts Act 2016, s 93.

121 At 3–4.

122 Williams, above n 18, at 44.

> *Reflection of society:* This is the quality of being a person who is aware of, and sensitive to, the diversity of modern New Zealand society. It is very important that the judiciary comprise those with experience of the community of which the court is part and who clearly demonstrate their social awareness.

According to Williams, this criterion "encompasses the fashionable, politically correct, but imprecise concepts of diversity and representativeness".[123] Such concepts are popular — particularly where women's uprise is concerned. Diversity, for instance, is popular because it confronts the male-dominated structure of the law and its practice by questioning its conception of value and other fundamental ideologies that permeate women's subordination.[124] By seeking diversity in people, ideologies are forced to diversify in their self-determining standards. However, what having a 'representative' or 'diverse' bench means is not clear and caution must be exercised in using either term as a guise for equality.

One interpretation of diversity on the bench envisages courts as being representative of the societies they serve, both in the name of democracy and in a commitment to equality under the rule of law.[125] As Chief Justice Elias stated extra-judicially, "judiciaries lack democratic legitimacy if they are comprised of white middle class men".[126] Counter to this view, however, is the argument that courts are not representative bodies. Therefore, to require democratic representation on the bench is "misguided" or "absurd".[127] There is a concern that by promoting diversity the fundamental concept of meritocracy is undermined. One of the essential elements of a sound judicial appointment system is that it ensures the individual with the greatest merit and ability is the candidate appointed.[128] As Williams states:[129]

123 At 44.

124 The term "diversity" is used constantly by today's legal profession and law firms to describe and examine staffing, see, for example, "Three law firms commit to diversity reporting framework" (31 May 2017) New Zealand Law Society <www.lawsociety.org.nz>.

125 See Susan Glazebrook, Judge of the Supreme Court of New Zealand "Looking Through the Glass: Gender Inequality at the Senior Levels of New Zealand's Legal Profession" (paper presented at the annual Chapman Tripp — Women in Law event, 16 September 2010) at 9; and Alysia Blackham "Court Appointment Processes and Judicial Diversity" (2013) 24 PLR 233.

126 Elias, above n 21, at 3.

127 Williams, above n 18, at 49, 50 and 53.

128 At 47.

129 At 51.

> … it is necessary to stress the danger and the temptation of allowing diversity to permit only moderately qualified candidates to be selected ahead of much better qualified candidates in terms of practical experience in the law and intellectual and analytical ability.

This tension between diversity and meritocracy is a common theme throughout various attempts at improving judicial appointment processes, and will be returned to shortly.

1 Reform: United Kingdom

In the United Kingdom, the Lord Chancellor established an Advisory Panel on judicial diversity to identify barriers to judicial diversity and make recommendations on how to achieve a more diverse judiciary at every level and in all courts.[130] Upon the recommendations of the Advisory Panel, the Crime and Courts Act 2013 (UK) was passed with the aim, amongst others, of promoting judicial diversity.[131] Amendments were made to the governing judicial appointment legislation,[132] widening the scope of the Supreme Court select commission by stating that they are "not prevented from preferring one candidate over another for the purposes of increasing diversity where two candidates are of 'equal merit'".[133] Other amendments included attempts to facilitate part-time judicial appointments and more diverse selection commission members for Supreme Court appointments.

It has been said that a more diverse collegium has not been achieved.[134] In a speech presented at a conference marking the ten year anniversary of the Judicial Appointments Commission, Lady Hale noted the homogeneity of the 13 recent appointments:[135]

> All of those 13 appointments were men. All were white. All but two went to independent fee-paying schools. All but three went to boys' boarding schools. All but two went to Oxford or Cambridge. All were successful QCs in private practice, although one was a solicitor rather than a barrister. All

130 See Blackham, above n 125, at 235.

131 See the Crime and Courts Act 2013 (UK) (explanatory note) at [339].

132 Constitutional Reform Act 2005 (UK), pt 3.

133 Blackham, Judge of the Supreme Court of the United Kingdom, above n 125, at 236.

134 Lady Hale "Appointments to the Supreme Court" (speech presented at the conference to mark the 10th anniversary of the Judicial Appointments Commission, University of Birmingham, 6 November 2015); and "More diverse Supreme Court has not happened, says Lady Hale" (10 November 2015) New Zealand Law Society <www.lawsociety.org.nz>.

135 Lady Hale, above n 134, at 3.

> but two had specialised in commercial, property or planning law. None had spent much, if any, time as an employee.

2 *Reform: Australia*

There has been similar dissatisfaction with homogenous judicial comprisal and vague appointment processes in Australia.[136] On 26 May 1993, the Senate referred matters involving gender bias and the judiciary to its Standing Committee on Legal and Constitutional Affairs.[137] Of the many findings made by the committee, it was noted that gender issues represented a systemic problem within the law, as opposed to an individual problem with judges.[138] As a result, the Standing Committee recommended changes to the judicial appointment process. According to the committee, by having a more transparent appointment process the orthodox pool of candidates would be widened, thus increasing the likelihood that a more diverse bench would be achieved.[139] It was within this context that the "McClelland reforms" were eventually introduced in 2008. The then Attorney-General, Robert McClelland, gave his assurance that:[140]

> … everyone who has the qualities necessary for appointment as a judge or magistrate is fairly and properly considered … This will increase the likelihood of greater diversity in the Government's appointments as well as ensuring their quality.

Three pillars of the McClelland reforms were: the articulation of publically available criteria; the advertisement of vacancies and call for nominations; and the use of an advisory panel to make recommendations to the Attorney-General. By allowing candidates to self-nominate, for example, it was thought that the appointments process was "better placed to find talent and increase the diversity of the Bench".[141]

It must be pointed out, however, that the McClelland reforms have been recently discontinued and judicial appointment practices have reverted back

136 Senate Standing Committee, above n 19, at [5.46].

137 At ix–xi.

138 At 75.

139 At 100–101.

140 Robert McClelland "Judicial Appointments Forum" (speech delivered at Bar Association of Queensland Annual Conference, Gold Coast, 17 February 2008) as cited in Elizabeth Handsley and Andrew Lynch "Facing up to Diversity? Transparency and the Reform of Commonwealth Judicial Appointments 2008–13" (2015) 37 Syd LR 187 at 195.

141 Handsley and Lynch, above n 140, at 196.

to the traditional approach. In any event, research suggests that its attempts at reaching diversity failed to materialise.[142] Whether the McClelland reforms would have yielded greater results had they continued will remain unknown.[143] However, reference to the United Kingdom's experience of reform would suggest that clear criteria and transparent processes are not sufficient to promote or increase judicial diversity.[144]

B Failure to effect structural change

Chief Justice Elias has commented that the problem of diversity in the judiciary may be more "deep-seated" than what could be cured by an appointments process: [145]

> If we are serious about achieving a more representative judiciary perhaps we have to tackle the culture of the profession, of which the judiciary is a part, and the cultural impediments women face in our societies more generally.

This line of thought is also evident in the Senate Standing Committee's report on gender bias, which stated that there is no singular solution to the problem of bias towards women under the law.[146] Although focus on the judiciary is one necessary avenue when considering women in the law, this focus should not blind us from reality. The tendency for gendered issues to become diluted amongst other related issues results in excessive reliance on a 'solution' and the risk the solution loses sight of its objective.

The Senate Standing Committee's report, for example, was one of few triggering mechanisms to the McClelland reforms. The comprehensive report focused solely on bias towards women within the law. The reforms, however, did not reflect the deep-rooted nature of the issues discussed in the report. Instead, the reforms tended to focus on public transparency and the need to keep judicial appointment procedures free from political influence. Although necessary objectives, these measures fail to alter judicial diversity because the requisite standards and values surrounding that process remain unchanged.

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142 Brian Opeskin "The State of the Judicature: A Statistical Profile of Australian Courts and Judges" (2013) 35 Syd LR 489 at 509–512.

143 Handsley and Lynch, above n 140, at 189 suggest such reforms are still attractive and are likely to be reintroduced at some point.

144 Blackham, above n 125, at 238.

145 Elias, above n 119, at 6.

146 Senate Standing Committee, above n 19, at [5.1].

1 Part-time judicial appointments

As part of the United Kingdom reforms, part-time judicial appointments were introduced.[147] Despite having the potential to allow for more diverse appointments to the bench, such as appointing those who need to factor in childcare responsibilities, it remains to be seen whether this change is sufficient to make part-time work an acceptable option for judges.[148] Working part-time in the legal profession can have career limiting affects and there is no tenable reason to think that the position would be any different on the bench. This amendment is cosmetic. There is a concern that notwithstanding the amendment, qualified women will continue to turn down judicial appointment because of the inherent inflexibility of the role.[149]

2 Meritocracy and diversity

Another failure of the reforms is the failure to address the tension between merit and diversity. The concept of merit is embedded in the current judicial appointment process and remained that way throughout the English and Australian reforms. To seek diversity without altering the fundamental understanding of merit is to embark on a futile enterprise.[150] As discussed thus far, the inability of the stringent model to value circumstances common to women inhibits women's uprise.

Merit is a consistent theme in legal practice and governs the senior levels of the profession. It is through merit that the profession allows, or disallows, its participants to advance. The question therefore becomes whether merit and diversity can co-exist. It seems that they cannot. For instance, even those in favour of diversity on the bench hold that once equally meritorious candidates are identified, the deliberate appointment of a woman, for example, would be justified through the objective of diversity.[151] Here, diversity remains subject to merit and because it is a self-determining and narrowly designed concept

147 Section 23 of the Constitutional Reform Act 2005 (UK) was amended to provide that the Supreme Court must be composed of a maximum of 12 full-time equivalent judges.

148 See Blackham, above n 125, at 236–237; and Elias, above n 119, at 5 where the Chief Justice states "[e]ven on the bench, strategies to relieve women judges with young children of circuit responsibilities may not be well-received".

149 Elias, above n 119, at 5.

150 See Margaret Thornton "'Otherness' on the Bench: How Merit is Gendered" (2007) 29 Syd LR 391.

151 Williams, above n 18, at 51.

it becomes hard to see how diversity could bring about any *real* difference. In essence, true diversities are phased out after passing through this meritorious domain.

Another view in opposition of coexistence is the argument that diversity detracts from merit. Williams, for example, stresses the danger of permitting "only moderately qualified candidates to be selected ahead of much better qualified candidates".[152] The concern here is that by promoting diversity, other abled candidates will miss out — resulting in a less able judiciary. But the assumption that meritocracy renders one's personal views redundant is highly misconceived, as is the assumption that judges are neutral agents of the law. Perhaps in theory they are, or at least should be, but in reality they are not. Despite swearing the same judicial oath and being required to produce legal reasons for their decisions, judges nonetheless bring their life experiences to the bench with them.[153] To argue that diversity replaces or is irrelevant to merit is incorrect.

If merit, in its plain and ordinary meaning, purports to be an objective standard how does one explain the higher proportion of women graduating with Honours but the scarcity of women at partnership or the judicial level? As already demonstrated it is not as simple as saying that "it is just a matter of time" or "women choose to leave the law". The questioning of merit has also taken place when considering the scarcity of female judges in civil law jurisdictions, where appointment is made based on academic excellence and entered into straight after graduation.[154] There, women have the highest representation at the lowest levels of the judiciary. As Justice Glazebrook noted in 2010, with regards to civil law jurisdictions, "[t]he door to senior judicial appointment remains shut to most women even … where women now comprise over half of all judges or new appointments to the judiciary".[155]

C Targeting the bench in New Zealand

The judiciary is an appropriate starting point in revolutionising New Zealand's legal profession and its structural design. The judge is the quintessential figure

152 At 51.

153 Glazebrook, above n 125, at 11.

154 At 2.

155 At 3.

of the law as both a profession and an institution. In this regard, it is not simply about achieving numerical symmetry on the bench. It is about provoking change in the perception of value, merit and womanhood.

Incorporating diversity within judicial appointment processes is crucial. However, the noticeable failures of attempted international reforms should serve as a warning to New Zealand's incorporation of diversity in the Attorney-General's guidelines. First, diversity must mean diversity. This means that homogeneity is eradicated, meritocracy is reconstructed and the constitution of value is broadened. In support of this approach, the extent of women's subordination must be fully appreciated. The fact that women are numerically underrepresented in the senior levels of the legal profession is only one aspect of this.

Secondly, the goal of equity must be kept in mind. Because equity does not presuppose any benchmark, the concept of diversity is truly supported. Equality, on the other hand, justifies diversity with reference to sameness and, by extension, ignores intersectionalities or true diversities. Equity centralises fairness, accommodates difference and supplements diversity.

VII CONCLUSION

From the historical story of Ethel Benjamin to the statistical under-representation of women today, the legal profession and its senior levels is the embodiment of inequity. Neither time nor choice can justify the reality that the numbers of female graduates entering the profession do not flow through to the senior levels.

Although it is tempting to accept the realities of the law and its practice, we must not become complacent. Women must not be disheartened or tempted to accept the "choice" between progression and family. Value must be seen in difference for there *is* value in difference. Through diversity on the bench, such changes can begin to take hold. But we must not leave diversity conditional to merit. If value is seen in difference, merit would naturally include that value.

A range of scenarios, from having the highest grade point average, completing law school in the face of serious hardship, exceeding billable targets, to meeting targets whilst juggling multiple family commitments, hold inherent value that demonstrates excellence. Diversity must be unconditionally embraced. And true diversity on the bench means that we can target both the

law and its practice. Through targeting the law, negative social constructions will not become 'truth' so easily. Following this, legal practice will become unable to rely on its current understanding of value, merit and womanhood.

Addressing women's absence from the senior positions of the legal profession requires change in a number of areas. However, if equity is the goal and diversity is achieved on the bench, deep inroads can be made towards the uprise of women in the legal profession.

WOMEN IN PARIS
— *The inclusion of gender considerations in the negotiation and text of the Paris Agreement*

Taylor Mitchell*

The Paris Agreement represents a new era of climate change law. It aims to coordinate international and domestic efforts in managing climate change, the effects of which women are disproportionality vulnerable to. This article examines the extent to which women and gender-focused groups were included in the creation and text of the Paris Agreement. This article argues that gender-considerate approaches can provide opportunities for nuanced and targeted climate change law. This is better achieved when women and gender-focused groups are direct stakeholders in the negotiation and drafting process. Such representation was limited in the drafting of the Paris Agreement, especially for women from developing countries and in leadership positions. The text of the agreement includes gender considerations, however this is restricted to specific concerns about adaptation and vulnerability rather than focusing on the broader relationship between gender and climate change issues. This article argues that, while the Paris Agreement includes more gender considerations than prior law, it falls short of adequately including the interests of women and considering the relationship between gender and climate change issues.

I INTRODUCTION

Climate change is arguably the most significant threat facing states. Rising temperatures bring food and water scarcity, disease, displacement and conflict. These effects will most strongly be felt by more vulnerable communities. Meanwhile, the vast majority of states have made negligible efforts to mitigate and adapt to climate change. However, in December 2015, the international community moved into a new era of climate change law through the adoption of the Paris Agreement (the Agreement). The treaty aims to coordinate

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international and domestic efforts to manage the many elements of climate change, from reduction of emissions to adaptation to its effects.

In this article I address the extent to which women and gender-focused groups were included in drafting the Paris Agreement. Women, especially those in developing nations, are disproportionately vulnerable to the effects of climate change.[1] A gender-responsive approach to climate change provides opportunities for nuanced and targeted policy efforts.[2] Prior to the Paris Agreement, international law had failed to include gender, among other social considerations, in the plan to address climate change. I argue that this failure needs to be rectified for climate change law to adequately support communities across the globe.

Part I outlines the current state of international climate change law: the United Nations Framework Convention on Climate Change and Kyoto Protocol are explained; and the aims and mechanisms of the Paris Agreement are detailed.

Part II examines the connection between gender and climate change law. It is argued that both mitigation and adaptation policies are more efficient, and that a number of social costs can be avoided through adopting a gender-responsive approach. This, therefore, justifies the inclusion of gender in the Paris Agreement.

Part III canvasses the drafting of the Paris Agreement at the 21st Conference of the Parties (COP21), and the extent to which women and gender-focused groups were involved in drafting the Agreement. This part begins by outlining the benefits of including women within the negotiation process, and then examines these benefits with regard to women in national delegations, the role of gender-focused non-governmental organisations (NGOs) and the inclusion of events bringing attention to gender issues. I argue that, although the inclusion of women and gender interests improved on previous COPs, representation was still inadequate. In particular, women were heavily underrepresented in leadership positions and among the delegations of developing nations. Further, gender-specific NGOs were outnumbered by those representing interests such as business and industry.

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1 Geraldine Terry "No climate justice without gender justice: an overview of the issues" (2009) 17 Gender and Development 5 at 14.

2 Margaret M Skutsch "Protocols, Treaties and Action: The 'Climate Change Process' Viewed through Gender Spectacles" (2002) 10 Gender and Development 30 at 32.

Finally, Part IV addresses the extent to which gender considerations were included in the final text of the Paris Agreement. The three articles that include gender considerations are examined and assessed for their drafting quality and significance. Then I consider what gender issues were not addressed in the Agreement and discuss how they might have been. I argue that the Agreement is restrictive in its approach to dealing with gender issues and that it fails to address the key problem-solving role that gender can play in the climate change debate.

Ultimately, while COP21 and the Paris Agreement were an improvement upon previous conferences and international law as it stood before the Agreement, I argue that both fell short of adequately including the interests of women and being truly gender-responsive. It is difficult to assess whether the efforts to include women in drafting the Paris Agreement will precipitate greater consideration of gender in domestic climate policy. For now, gender-focused NGOs will have to continue campaigning for and supporting the inclusion of these issues in domestic climate change law and policy.

II CURRENT INTERNATIONAL CLIMATE CHANGE LAW

The Paris Agreement was drafted at the 21st Conference of the Parties of the United Nations Framework Convention on Climate Change (UNFCCC). The UNFCCC emerged from the 1992 Rio Earth Summit, which was the first significant United Nations conference addressing climate change. The UNFCCC was signed in 1994 and has since been ratified by 197 parties. As the name suggests, the UNFCCC provides a framework for future action on its objective to achieve "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system".[3] It does so, not by creating binding emissions limits itself, but by facilitating parties to negotiate future treaties that create such limits.[4]

The Kyoto Protocol was the first international agreement negotiated out of the UNFCCC and aimed to set binding emissions limits. It followed the UNFCCC system by allocating different obligations to states based on whether

3 United Nations Framework Convention on Climate Change 1771 UNTS 107 (opened for signature 4 June 1992, entered into force 21 March 1994) [UNFCCC], art 2.

4 UNFCCC, art 4.

they were classified as developed (Annex I) or developing (Non-Annex).[5] Annex I states were obliged under the Agreement to reduce their emissions to below 1990 levels through domestic mitigation efforts and through funding mitigation infrastructure or reforestation in developing nations.[6] The Protocol is now widely considered a failure in achieving its aims, due to the lack of commitment by the world's largest emitters. The United States refused to ratify the Agreement due to dissatisfaction that the other largest emitters of the world — China and India — faced little to no obligations to reduce emissions as Non-Annex parties.[7]

The Paris Agreement is the successor to Kyoto. It seeks to address the failures of the first treaty and outline new obligations for the parties to the UNFCCC. It opened for signature on 22 April 2016 and has been signed by 197 parties to date. It entered into force on 4 November 2016[8] and, thirty days thereafter, at least 55 UNFCCC parties, accounting for at least 55 per cent of global greenhouse gas emissions, had ratified the treaty in accordance with art 21.[9] As of 7 August 2017, 159 parties had ratified the Paris Agreement, accounting for 86.32 per cent of global greenhouse gas emissions.[10] Crucially, the United States and China, the two largest global emitters, were early ratifiers of the Agreement, supporting an incredibly swift ratification process.[11] The aims of the Paris Agreement as outlined in art 2 are:[12]

> i) holding the increase in the global average temperature to well below 2 °C above pre-industrial levels and to pursue efforts to limit the

5 UNFCCC, art 4.

6 Kyoto Protocol to the United Nations Framework Convention on Climate Change 2303 UNTS 148 (opened for signature 11 December 1997, entered into force 16 February 2005) [Kyoto Protocol], art 3.

7 George W Bush, President of the United States "President Announces Clear Skies & Global Climate Change Initiatives" (National Oceanic and Atmospheric Administration, 14 February 2002).

8 UNFCCC Secretariat "Paris Agreement Status of Ratification" (7 August 2017) UNFCCC <www.unfccc.int>.

9 Paris Agreement (opened for signature 22 April 2016, entered into force 4 November 2016), art 21.

10 UNFCCC Secretariat "Paris Agreement Status of Ratification" (7 August 2017) UNFCCC <www.unfccc.int>; and "Paris Agreement Ratification Tracker" (7 August 2017) Climate Analytics <www.climateanalytics.org>.

11 "Paris Agreement" United Nations Treaty Collection <www.treaties.un.org>. Although, President Trump has since indicated that the United States will be withdrawing from the Agreement: Ari Natter "Donald Trump Notifies UN of Paris Exit While Keeping Option to Return" *Time* (online ed, 5 August 2017).

12 Paris Agreement, art 2.

temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change;

ii) increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production; and

iii) making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.

The means proposed to meet these aims shares Kyoto's approach of acknowledging the different responsibilities and capabilities of states in light of their past emissions and current capacity. However, unlike the comparatively crude division of Kyoto parties into Annex I and Non-Annex parties, the Paris Agreement addresses this concern by allowing each country to set its own Nationally Determined Contribution (NDC).[13] The NDCs are required to be ambitious, progressive and set with a view to achieving the art 2 aims.[14] Every five years countries are held to account for their NDC by a "global stocktake" of emissions administered by the UNFCCC Secretariat, and are required to update their NDC to meet a more ambitious target.[15] The NDCs are not legally binding, so there are no legal repercussions if the stocktake finds a state is not meeting its NDC. However, findings are reported to all parties, relying on a 'name and shame' system of accountability.[16]

This process is considerably more 'bottom up' than the Kyoto Protocol and allows for flexibility in setting targets that suit countries' circumstances. It appears this approach appeased critical countries like the United States, which were dissatisfied by the Kyoto Protocol placing weighty obligations on some nations and none on others.[17] However, this flexibility is also the key weakness of the Agreement, which relies heavily on states' willingness to avoid embarrassment and does not hold them legally accountable for emissions reductions.

13 Article 3.

14 Article 3.

15 Article 14.

16 Article 15.

17 Bush, above n 7.

III GENDER AND CLIMATE CHANGE

Before addressing the extent to which gender has been included in the creation and text of the Paris Agreement, it is important to outline the significance of the connection between gender and climate change. Climate change law and policy can generally be broken down into two key areas aimed at reducing negative social outcomes: mitigation and adaptation. Mitigation is aimed at reducing current emissions and avoiding further increases in global temperatures. Adaptation is aimed at helping vulnerable communities weather the negative effects of climate change. This article examines the gender dynamics of mitigation and adaptation approaches and argues that it is necessary for gender considerations to be included in these approaches if they are to most effectively and efficiently reduce the negative effects of climate change. This is for two key reasons: gender mainstreaming increases the efficiency of climate change policy; and if gender considerations are not included, climate change policy itself may threaten progress towards gender equity and actually engender negative social outcomes.[18]

A Mitigation

Historically, international mitigation law has focused on large-scale economic and technological solutions that are firmly rooted in industries traditionally controlled by men.[19] The Kyoto Protocol is a clear example of this. It primarily employed a market-based approach where states would trade carbon credits to offset their emissions if they were unwilling to adjust their domestic emissions.[20] This focus has been disproportionately dominant in international law and policy on climate change, resulting in the wider discourse around mitigation being tinged with a male viewpoint and an ignorance of social solutions and outcomes stemming from mitigation law.[21] Introducing gender and other human rights-based considerations to the scope of international climate change law creates opportunities to diversify and strengthen the approach taken by countries.

18 Skutsch, above n 2, at 32.

19 Minu Hemmati and Ulrike Röhr "Engendering the climate-change negotiations: experiences, challenges, and steps forward" (2009) 17 Gender and Development 19 at 20.

20 Kyoto Protocol, art 6.

21 Hemmati and Röhr, above n 19, at 20–21.

Aspects of mitigation law and policy support the idea that gender-responsive approaches can increase the efficiency of mitigation. Commentators highlight the nuance and efficiency that mitigation law could reach if it were to fully address the causes of growing emissions, instead of focusing on shifting technological practices.[22] In particular, although North America and Europe are currently disproportionately responsible for emissions, they are projected to be overtaken by developing regions.[23] This emissions landscape has its roots in two phenomena: the rapid population growth of developing countries; and the unsustainably large carbon footprints of people in developed countries.[24] Where population growth increases emissions, there is clear a synergy between addressing the estimated 200 million women who currently have no access to family planning services, and protecting the environment.[25]

In developing countries, gender-responsive mitigation efforts have the ability to engage communities and create 'win-win' outcomes for women and their families. Women are the primary managers of household energy use, so mitigation policies addressing household energy could be significantly more efficient if they engaged women as primary stakeholders.[26] For example, an energy mitigation programme in Georgia replaced traditional woodfire water heating with solar heating in low income households.[27] The traditional method had poor health outcomes for women and children due to the effort needed to collect firewood and smoke pollution.[28] The programme employed local women and trained them to install and maintain the solar panels, which reduced their domestic workload and increased their financial freedom.[29] From a mitigation perspective, the project resulted in a decrease of 245,000m^3 of annual carbon emissions.[30] It also led to reduced demand for firewood, which in turn could reduce deforestation.[31]

22 Terry, above n 1, at 9.

23 At 9.

24 At 9.

25 At 9.

26 UNFCCC Secretariat *Report on the in-session workshop on gender-responsive climate policy with a focus on mitigation action and technology development and transfer* FCCC/SBI/2015/12 (2015) at 5–6.

27 At 7.

28 At 7.

29 At 8.

30 At 8.

31 At 8.

Gender considerations have a more nuanced and equally important role in examining the social structures that lead to high energy consumption when accounting for the carbon footprints of individuals. Societal constructs of masculinity and femininity are linked to the way that consumers act. For example, Western masculine norms define motorsports and the use of powerful and emissions-heavy cars as a positive activity for men.[32] A Swedish study, looking into this culture, showed significantly greater car ownership and use by men over women.[33] The study acknowledged that if female car use was the norm, emissions from the transport sector would be significantly lower.[34] Encouraging countries to examine such behaviour and target their policies to promote better attitudes could achieve a great degree of mitigation without as much need for the development of new technologies or costly emissions trading schemes.

Examining these same examples, support can be found for the view that non-gendered policy threatens women's wellbeing and the progress of gender equity. Regarding transport emissions, some Western nations have engaged in emissions reduction efforts that appear to reinforce gender inequity rather than challenge it. For example, the congestion and emissions produced by mothers participating in the school run has led to substantial negative attention from the media and government in the United Kingdom.[35] This is despite large numbers of men driving alone to work at similar times. Traditionally, unpaid female activities such as the school run are viewed as less productive or necessary than the activities of typical employment.[36] Climate change policy suggests restricting these activities in order to lessen transport emissions, which can lead to women facing unequal treatment for car use.[37]

In developing countries, past climate change law has also had the potential to worsen gender inequity and reinforce women's poverty and lack of power. For example, the emissions trading scheme under the Kyoto Protocol did not require countries investing in developing nations to consider the social

32 At 10.

33 Gerd Johnson-Latham *A study on gender equality as a prerequisite for sustainable development* (Ministry of the Environment, Report to the Environment Advisory Council, Sweden, 2007) at 53.

34 At 50.

35 Terry, above n 1, at 10.

36 At 10.

37 At 10.

impact of their mitigation schemes.[38] Thereafter, many developed nations invested in large-scale infrastructure projects to achieve maximum credits for their funds.[39] Local communities benefitted from these projects by way of job opportunities for building and maintaining this infrastructure which, due to traditional male dominance in these sectors, fell largely to men.[40] Through this investment, gender pay gaps can be increased and reinforced, leaving women with consistently fewer resources than men.

B Adaptation

At the time the Kyoto Protocol was being adopted, the severe effects of climate change were not yet felt, and the early law reflects this. Kyoto provided adaptation policy that merely encouraged developing nations to prepare for its eventuality, and set up an Adaptation Fund that fell far short of projected needs.[41] Domestic adaptation policies have been intermittent and primarily focused on disaster relief.[42] Yet in the Paris Agreement, adaptation takes a primary position.[43] In 2016, a number of countries were already experiencing rising sea levels, extreme weather events and rapidly ascending temperatures.[44] In fact, the first six months of 2016 were the hottest on record, averaging approximately 1.3 °C warmer than pre-industrial levels.[45] The proportion of the global population vulnerable to the effects of climate change is growing, with the effects disproportionately experienced by women.[46] Rural women in developing countries who are responsible for collecting water, fuel and managing agricultural work are particularly at risk and in need of urgent adaptation planning action.[47]

With the current rate at which temperatures are rising, adaptation is set to become an insurmountable task for countries to address and is expected to

38 At 15.

39 At 36.

40 At 36.

41 The World Bank *World Development Report 2010: Development and Climate Change* (2010) at 233.

42 At 247.

43 Paris Agreement, art 2.

44 Damian Carrington "Shattered records show climate change is an emergency today, scientists warn" *The Guardian* (online ed, London, 17 June 2016) at 1 and 3.

45 Andrea Thompson "First Half of 2016 Blows Away Temperature Records" *Scientific American* (online ed, United States, 19 July 2016) at 3–6.

46 Terry, above n 1, at 7.

47 At 7.

cost between $70–$100 billion globally per year between 2010 and 2050.[48] As such, efficient expenditure is important for countries when creating adaptation policies. A gender framework is one means to achieve this efficiency. If women represent the most vulnerable members of society, then alleviating their struggles ensures targeted spending on those who need it most. For example, climate disasters have a devastating and immediate effect on women. In the 1991 Bangladesh cyclone, 82.5 per cent of deaths of people between 20 to 44 years old were women who died largely by drowning.[49] This stemmed from local gender norms that tied female honour to seclusion, meaning women stayed at home for too long before attempting to evacuate.[50] In addition, most women had not been taught to swim as children, as this was seen as a male activity.[51] Following Hurricane Mitch in Honduras and Nicaragua, women and girls faced poorer nutrition as cultural norms required that they eat after the men and boys.[52] Climate disasters are therefore an area where efficient outcomes can be achieved through disaster planning with gender considerations in mind.

Acknowledging and rectifying the lack of representation that women have in the decision-making and leadership of many communities can also increase the efficiency of adaptation policy. If adaptation efforts are created and implemented through local government or community leaders, women might be excluded if they are absent from these positions.[53] Engaging the expertise of local women is paramount, especially regarding developing countries' food supply, as women comprise more than half of the agricultural force in some Asian and African countries.[54] Failure to ensure the participation of these women when conducting adaptive planning undermines the potential success of policy implementation.[55] For example, women of the Ganges River Basin were consulted on their agricultural responses to increasingly frequent

48 The World Bank *Economics of Adaptation to Climate Change: Synthesis Report* (2010) at 89.

49 Valerie Nelson and others "Uncertain Predictions, Invisible Impacts, and the Need to Mainstream Gender in Climate Change Adaptations" (2002) 10 Gender and Development 51 at 55.

50 At 55.

51 At 55.

52 At 56.

53 Terry, above n 1, at 7–8.

54 Cheryl Doss *The role of women in agriculture* (Food and Agriculture Organisation of the United Nations, ESA Working Paper No 11–02, March 2011) at 8.

55 Nelson and others, above n 49, at 57.

monsoons.[56] They had already managed their own adaptation by switching to different crops and diversifying their food sources through fish farming.[57] If these women had not been consulted, adaptation policymakers might have wasted resources in suggesting efforts that had already been implemented or that had been tried and failed.

Adaptation efforts may also threaten the progress of gender equity and could have negative social outcomes. At the very least, gender-blind adaptation efforts allow current gender inequities to persist as, while both men and women may receive equal support, women begin from a lower position. In addition, they can add to current inequities, such as exacerbating unequal representation in leadership. The less assistance women are given to adapt to changing climates, the more time they will have to dedicate to farming or collecting water and fuel.[58] This reduces the time they have to get educated, to participate in local politics and to engage with their communities — areas where female participation is already limited. Gender inequities are reinforced and, in the case of future policy creation, women's voices are excluded from typical means of consultation. This is likely to worsen as climate change destabilises traditional job markets: reports studying communities in Tanzania and Kenya facing climate stress observed that men were more able to diversify their work to secure their lifestyles.[59] Women were held back because of a lack of capital to start their own businesses; gender norms excluded them from profitable activities; and reproductive burdens discouraged many employers from hiring them.[60] This becomes a vicious cycle. Women are limited to industries hit hardest by climate change and, because of the long hours and poor pay they receive, they are unable to raise capital or spend time lobbying those who may be able to help them.

Research suggests that climate disasters often lead to a more extreme reversion to strict or traditional gender roles. Following Hurricane Mitch in Honduras and Nicaragua, men exhibited increased levels of alcoholism, gambling and violence, often at the expense of women and family resources.[61]

56 Terry, above n 1, at 13.

57 At 13.

58 At 11.

59 At 13.

60 At 13.

61 Nelson and others, above n 49, at 56.

Women faced greater responsibility for the elderly and children when schools and other institutions were unable to provide for them.[62] This reduced their time and opportunity to seek extra work to support themselves and their families and they were less likely to be able to escape their circumstances. Adaptation policy that ignores this dichotomy of experience may give financial support to the family unit as a whole, or seek employment for both men and women without considering their differing responsibilities, and so it will fail to address these gendered outcomes.

In conclusion, gender-responsive approaches to mitigation and adaptation can improve the efficiency of climate policy and help reduce negative social outcomes. Further, as key stakeholders, women deserve a seat at the table when negotiating new law and can help improve its content and implementation. As the key piece of international law in this area for the time being, it was important for the Paris Agreement to recognise the role of women both in the drafting process and the text.

IV GENDER INCLUSION IN THE LAW-MAKING PROCESS

The main stage for the creation of the Paris Agreement was COP21 held from 30 November to 12 December 2015, although significant drafting of the Agreement was carried out at meetings throughout 2015. Conferences of the parties have been held every year since the enactment of the UNFCCC and women have had an increasingly larger presence at them. Greater participation by women and gender-focused groups has been important for the Agreement as a whole. Yet, while women were involved in the creation of the Paris Agreement to a degree not seen before in international lawmaking, there were significant gaps in their inclusion that need to be addressed moving forward. This section addresses the extent to which women were included and gender was discussed in the creation of the Paris Agreement. It outlines the general importance of including women in negotiations and then examines the three key forms that women and gender-focused groups took at COP21: their presence in national delegations; the roles of gender-focused third parties; and the holding of gender-focused events.

62 At 55.

A Importance of women in negotiations

Justification for the participation of women in foreign policy processes is typically framed in two ways: providing for participation corrects the injustice of women being excluded; and including women increases the efficiency of these processes.[63] This holds true in climate change law. Women are important stakeholders in climate change, both as problem-solvers and as those affected by it. Ensuring wider stakeholder representation means involving women in the creation of climate solutions. This lends greater legitimacy to the process, while failing to involve women amounts to an injustice.[64] Women from vulnerable communities such as female farmers or indigenous women play a particularly important role in the implementation of climate change policy, so their voices are especially necessary.

Female involvement can increase the efficiency of the process by ensuring the participation of perspectives often ignored by male negotiators and by adding gender-focused approaches to the negotiations.[65] Women have historically been excluded from participating in international diplomacy, with the exception of their role as the wives of important men.[66] The reasons discussed in the literature for this exclusion are diverse, from concerns about women's ability to juggle diplomatic life with family responsibilities, to views that women are too passive and conciliatory to be effective leaders.[67] However, a number of studies on the role of women in diplomacy have endorsed the efficiency framework by arguing that women bring a number of skills to diplomatic negotiations that broaden the style and success of decision-making groups in a diplomatic setting.[68] Studies have linked female negotiators to a more collaborative, patient, attentive negotiation style that is interested in sourcing "'win-win' outcomes", suggesting that female negotiators can

63 Moez Dharsani and Alexandra Ericsson "Women in Diplomacy: How is the Problem of Absence of Women in Diplomacy framed by the UN?" (Bachelors Thesis, University West, 2013) at 9–10.

64 Terry, above n 1, at 7–8.

65 Hemmati and Röhr, above n 19, at 20.

66 Dharsani and Ericsson, above n 63, at 8.

67 James M Scott and Elizabeth A Rexford "Finding A Place for Women in the World of Diplomacy: Evidence of Progress Towards Gender Equity and Speculation on Policy Outcomes" (1997) 17 Rev of Public Personnel Administration 31 at 32.

68 At 53.

greatly add to the value of international agreements.[69] It is on the basis of these observations that I examine the representation of female diplomats and gender-focused activists who seek to include female voices within the climate debate.

B National delegations to COP21

Women within the national delegations of the Parties at COP21 held the most direct influence over the negotiated Agreement. These delegations were comprised of experts from relevant industry, research and local organisations, as well as ministry and diplomatic representatives from the public sector.[70] They took an active role at the conference by participating in daily debates and negotiations, and in the drafting of the Agreement.

Female representation in these delegations has grown steadily as the COPs progressed, from as low as seven per cent representation to approximately 35 per cent representation at COP21.[71] The benefits of this for negotiations was discussed by attendees of the conferences, reflecting feminist scholarship on the value of female approaches to legal negotiation. Delia Villagrasa, a member of the environmental NGO community at the early COPs, noted that German and Swiss female lead negotiators acted differently from their male peers. They were proactive in engaging with the delegations of developing nations who required greater support.[72] Villagrasa also identified them as bridge-builders who, according to Jennifer Morgan, Director of the WWF Climate Programme, could cut gaps between negotiation and the real world.[73]

The New Zealand delegation presented strong female leadership at the conference. Aside from the leading ministerial representatives, Simon Bridges, Timothy Grosser and John Key, women took on strong leadership roles. Jo Tyndall was New Zealand's Climate Change Ambassador for the conference and Anna Broadhurst was the Lead Advisor from the Environment Division of the Ministry of Foreign Affairs and Trade.[74] However, while the involvement

69 At 53.

70 Hemmati and Röhr, above n 19, at 26.

71 At 26–27. See also, Women's Environment and Development Organization *UNFCCC: Progress on Achieving Gender Balance, By the Numbers: A Quick Review* (18 May 2016) [WEDO] at 1.

72 Hemmati and Röhr, above n 19, at 28.

73 At 28.

74 UNFCCC Secretariat *Provisional list of participants: Part two* FCC/CP/2015/MISC2 (Part 2) (2015) at 108.

of women has grown, and it appears those women who are awarded leadership positions are making inroads in ensuring more collaborative and equitable negotiations, very few of the women in national delegations are being awarded leadership positions. At COP21, only 10 per cent of Delegation Heads were women.[75] This was a considerable drop from the smaller UNFCCC drafting meetings leading up to COP21 in 2015, where, for a time, over 30 per cent of delegations were led by women.[76] This suggests that although there may be women qualified to lead, when it comes to more significant conferences such as COP21, men are overwhelmingly trusted with leadership positions over women. It also suggests the rising numbers of women attending may still be occupying clerical or administrative positions, rather than being engaged as experts or decision-makers for their countries.

Further criticism can be made about the representation of women in national delegations across regions. The statistics citing that 30 per cent of delegation attendees were women at COP21 ignored that some delegations had on average much better or worse representation. At COP21, 40 per cent of delegations from the Western European and Others (WEOG) regional voting bloc were women, and at the four drafting meetings prior to COP21, this bloc achieved 50 per cent representation on average.[77] New Zealand's delegation to COP21 had 15 women in a delegation of 37 (40.5 per cent).[78] However, national delegations from the Asia-Pacific and Africa blocs had around 30 per cent female representation at the drafting meetings, and around 25 per cent representation at COP21.[79]

While the high female representation of WEOG countries should be applauded, low female representation in regions where women are the most affected by climate change is concerning.[80] Realistically, it will not be women from developed nations experiencing the life-threatening food insecurity or forced migration that many women in the Asia-Pacific and African regions will face.[81] Because national delegations generally represent the key policy

75 WEDO, above n 71, at 2.

76 At 1.

77 UNFCCC Secretariat *Provisional list of participants*, above n 74, at 1.

78 At 108–109.

79 WEDO, above n 71, at 1.

80 Hemmati and Röhr, above n 19, at 24.

81 UNFCCC Secretariat *Report on the in-session workshop on gender-responsive climate policy*, above n 26,

makers and stakeholders from domestic climate sectors, the lack of female representation at COP21 points to a worrying lack of female representation at the domestic level.[82] In light of the Paris Agreement relying so heavily on the NDCs of parties, the make-up and decision-making of countries domestically is crucial for implementing the Agreement.

While third parties, the media and a transparent system can go some way to holding countries to account, there is no binding mechanism within the Agreement to force countries to adjust their policies.[83] Further, without gender considerations as a mandatory requirement in NDCs, there is even less incentive to involve women in policymaking.[84] For women to be so excluded from climate negotiations points to systemic ignorance of the benefits of diverse gender perspectives and the potential for numerous negative outcomes to manifest in climate policy flowing from the Paris Agreement.

C Gender-focused third parties

While female negotiators on national delegations ultimately must represent the varied interests of their states, lobbyists at the conference could represent more specific viewpoints. At COP21, the key representatives for women and advocates for gender-related issues were the large number of gender-focused NGOs and observers.

The involvement of gender-focused observers at the annual COPs has increased since 1995, akin to the representation of female negotiators. While some gender-focused organisations, such as ENERGIA (Gender and Energy Network) were involved in official COP events from COP8, at the first 10 COPs from 1995 to 2005 only 23 individuals represented women's organisations as official observers.[85] The late recognition of the Women and Gender Constituency (WGC) was another important indicator that women and gender groups were not being given a significant space at the early COPs. At the COPs, key observers are grouped into constituencies representing a specific interest as a way to manage effective interaction between the Secretariat

at 8.

82 Hemmati and Röhr, above n 19, at 26–27.

83 Paris Agreement, art 14.

84 Article 4.

85 Hemmati and Röhr, above n 19, at 23 and 27.

and the 1600 plus NGOs admitted as UNFCCC observers.[86] Membership of a constituency brings certain benefits, including access to the Plenary floor in the form of an intervention, receipt of informal advance information from the Secretariat and access to meetings with Ministers and the Secretariat that are otherwise closed to non-constituency observers.[87] While the Business and Industry, Local Government, and Environmental constituencies have been recognised since 1995, it was not until 2011 that WGC — alongside the Youth Constituency — joined the seven previously recognised constituencies.[88] The WGC presently includes 27 separate NGOs, from broad organisations focused on many aspects of gender, to regional groups and organisations recognising women of specific backgrounds such as agriculture.[89]

At COP21 the WGC and the NGOs affiliated with it engaged with the conference in a number of ways. Prior to the conference, they attended drafting sessions and presented briefing papers and written responses to draft versions of the document.[90] On the first day of the conference, the WGC held a press conference setting out key demands for world leaders.[91] At the opening plenary, several representatives from organisations including the Women's Environmental and Development Organisation (WEDO) and the All India Women's Conference held interventions in the debate, setting out expectations for the Agreement to be gender-responsive and to move away from market mechanisms.[92] Both the WGC and individual organisations were involved in events throughout the conference, which included a daily Women's Caucus, an exhibition space highlighting gender issues and a number of workshops and events highlighting specific issues.[93]

86 UNFCCC Secretariat "Non-governmental organization constituencies" (May 2014) UNFCC <www.unfccc.int> at 1.

87 At 1.

88 At 1.

89 Women and Gender Constituency "Members" (2016) Women and Gender Constituency <www.womengenderclimate.org>.

90 WGC *Women and Gender Constituency: Position Paper on the 2015 New Climate Agreement* (1 June 2015) and Eleanor Blomstrom and Bridget Burns *Gender equality in the climate agreement* (Centre for International Forestry Research, Gender Climate Brief 9, 2015) at 2.

91 WGC "Women Present Key Demands for World Leaders at UN Climate Talks in Paris" (press release, 30 November 2015).

92 WGC "Opening interventions at COP21" (press release, 2 December 2015).

93 WGC "COP21 Key WGC Events" (25 November 2015) Women Gender Constituency <www.womengenderclimate.org>.

The range of women's perspectives represented by the WGC and the NGOs affiliated with it generally good but not perfect. Of the 27 members, nine represent regional interests, with Asia-Pacific, African, Indian and European-focused organisations.[94] Clearly this leaves important regions unaccounted for, in particular Central and South America and the Middle East. The remainder either broadly tackle issues of gender and climate change or have specific focuses such as forests, education or agriculture.[95] It is important to note that membership of the WGC does not reflect the total representation of gender-focused observers at the conference, but constituency status does point to those organisations with the most power and influence. And while these NGOs were active throughout the conference, the WGC has the smallest membership base of the nine constituencies. This means that the 16 organisations focused on women faced competition for visibility against some 49 Indigenous Peoples groups, 254 Business and Industry observers, and 743 Environmental organisations.[96] As the most direct advocates for gender concerns at the COPs, this underrepresentation risks gender concerns being drowned out by advocates for other areas of climate policy.

D Gender-related events

The primary way for gender perspectives to be heard at COPs is through events. These have taken various forms over the years and have grown considerably in size and impact. While the UNFCCC and the Kyoto Protocol were born out of the Rio Earth Summit, which included some discussion of gender perspectives, this momentum did not carry through to the early COPs.[97] It was not until COP6 that regular gender-focused side events became the norm at the conferences.[98] These took a variety of forms from specialised workshops on specific cross-sections of climate change law to networking meetings for female environmental ministers.[99] It was not until COP13 onwards that multiple gender-focused events were included in each COP, rather than occasional one-off workshops. These events were hosted by a variety of parties, from observer

94 WGC "Members", above n 89.

95 WGC "Members", above n 89.

96 UNFCCC Secretariat "Admitted non-governmental organisations" UNFCCC <www.unfccc.int>.

97 Hemmati and Röhr, above n 19, at 21–22.

98 At 22.

99 At 24.

NGOs to nation states. It appears that the workshops and meetings were having some impact on the decisions of nations, as gender began to appear in plenary session statements and official resolutions emerging from the COPs.[100]

At COP21 the scope and variety of gender events and activism had vastly changed when compared to their absence in the early COPs. The fourth UNFCCC-run Gender Day (first established at COP18) was held on 8 December and included a huge range of events across both the official conference centre and in four further pavilions run by the WGC, the Moroccan delegation, the German delegation and the Netherlands delegation.[101] The specific activities of the day were wide reaching. Over 30 female ministers and lead negotiators attended a breakfast meeting and participated in a number of high-level panels alongside UN agencies and NGOs throughout the day, addressing women's involvement in negotiation, women's relationship with agriculture, and many other topics.[102] Workshops were held on engaging indigenous women in climate solutions and implementing a UNFCCC toolkit to ensure gender mainstreaming in domestic climate policy.[103] UNEP and UN Women launched a joint programme targeting women's access to sustainable energy development.[104] In addition to this dedicated day and the daily Women's Caucuses, the WGC maintained an education pavilion throughout the length of the conference.

In comparison to the early COPs, gender had a huge presence at COP21. Due to the small number of groups primarily dedicated to representing women, initiatives like events are necessary to counteract what may otherwise be an event overwhelmed by business or government interests. The concentration of this effort into a single day rather than being spread throughout the conference also improved visibility. The impact of these events is hard to measure empirically, however it appears clear that initiatives like Gender Days at least give national delegations a general awareness of gender considerations, if not a deeper understanding. This carries significance in terms of influencing parties both in the negotiations and in the NDCs they put forward following the Agreement.

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100 At 24.

101 UNFCCC "Gender Day" (December 2015) UNFCCC <www.unfccc.int>.

102 UN Women "UN Women at COP21: Gender equality and women's empowerment in the context of climate change" (press release, 3 December 2015).

103 UNFCCC "Gender Day", above n 101.

104 UN Women "UN Women at COP21", above n 102.

V GENDER IN THE TEXT OF THE PARIS AGREEMENT

As active as women and gender NGOs may have been at COP21, their participation centred on achieving meaningful reference to gender in the Paris Agreement. By simply including gender in the text of the Agreement, Paris has improved on the UNFCCC and Kyoto Protocol considerably, as neither prior treaty included any reference to gender or women at all.[105] The Paris Agreement has three references to gender in its text: in the preamble; and in arts 7 and 11, which outline how countries are to address adaptation and capacity-building measures as part of their NDCs. However, three references to gender does not guarantee that gender concerns are adequately addressed in the Agreement. Further, it is important to consider which aspects of the gender and climate change discourse have been excluded from the Agreement. While including gender in the Agreement was an important step in international climate change law, I argue it fell short of fully addressing gender issues and relegated women to being victims of global warming rather than promoting them as agents of change.

A Inclusion of gender

Accepting the inclusion of gender in the Agreement as a success by itself would be to adopt a tokenistic approach. It is important to assess the quality of the references within the Agreement against the outcomes sought for women. I propose to use a three-part framework to evaluate the articles of the Agreement, as follows:

i) How does the article address gender concerns?

ii) How significant is the inclusion of gender in the article?

iii) How significant is the article in the Paris Agreement?

Through the first question, I consider whether the reference to gender reflects the concerns of gender campaigners at COP21 and gender and climate change scholarship. It is important that the article addresses the nuanced role of gender in climate change law, rather than merely mentioning it. Similarly, that article should reflect all the ways gender and the specific area of climate change law interact. Through the second question I consider whether the reference to

105 Hemmati and Röhr, above n 19, at 29.

gender has a significant role in framing the issue the article addresses. Ideally the reference should be a focal point in the clause of the article it is included in, rather than being part of a large list of considerations. Finally, I consider how important the article is to the entire Agreement. Indicators of this may be that the article links closely to the core aims of the Agreement, imparts a compulsory obligation in the actions of parties or is positioned earlier in the Agreement rather than being relegated to the back of the treaty. It may also act as a key article which other aspects of the Agreement are reliant on. Finally, I look at how the three references to gender impact on the wider perception of gender as a relevant consideration in climate change law.

1 Preamble

The first reference to gender in the Agreement is within one of the 16 preambular clauses:[106]

> *Acknowledging* that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as *gender equality, empowerment of women* and intergenerational equity …

The clause is relatively direct in addressing gender concerns. It reflects the wider conversation around gender and climate change, namely that gender is one of a number of social considerations to be included within the discussion.[107] The reference to both gender equality and female empowerment suggests that the drafters grasped both the positive and negative impacts climate change policy could have on communities, and the benefit of including all genders in any actions taken. These are the kinds of gender and human rights considerations that the WGC and gender NGOs promoted during the drafting of the Agreement.[108]

While gender is one of a number of considerations in the clause, it is referenced twice by mentioning both "gender equality" and "the empowerment

106 Paris Agreement, preamble (emphasis added).

107 Terry, above n 1, at 6.

108 WGC *Position Paper on the 2015 New Climate Agreement*, above n 90, at 1.

of women", giving it greater significance. It could be argued that setting it aside from the initial list with the conjunction "as well as" reduces it to a secondary consideration. To the contrary, considering "as well as" is not a clear subordinating conjunction such as "before"; the phrase seems to have been included merely as a drafting technique to break up the list. Gender campaigners did not assume that gender should take a primary position over all other social considerations, so the fact that it has been included alongside other considerations in the article is not a negative outcome.[109]

Regarding the significance of the clause to the Paris Agreement as a whole, as part of the preamble to the operative clauses, it does not place any legal obligations on parties. However, art 31(2) of the Vienna Convention on the Law of Treaties states that the preamble is part of the context through which a treaty's ordinary meaning is to be interpreted.[110] Thus, parties are to interpret the operative clauses of the Agreement with the preamble in mind, especially if there are ambiguities in the text. However, unlike more assertive preambulatory phrases such as "affirming", "emphasising" or "stressing", "acknowledging" does not infer quite the same strength of intention of holding countries to account by the considerations listed in the clause.[111] While ideally countries would consider all aspects of the preamble in their actions under the Agreement, in reality it is unlikely that they will.

2 *Article 7*

Article 7 is the primary focus on adaptation measures for NDCs in the Agreement. Reference to gender can be found in paragraph 5 of the article:

> Parties acknowledge that adaptation action should follow a country-driven, *gender-responsive*, participatory and fully transparent approach, taking into consideration vulnerable groups, communities and ecosystems, and should be based on and guided by the best available science and, as appropriate, traditional knowledge, knowledge of indigenous peoples and local knowledge systems, with a view to integrating adaptation into relevant socioeconomic and environmental policies and actions, where appropriate.
>
> (emphasis added)

109 At 1–2.

110 Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980), art 31.

111 Giuseppina Scotto di Carlo *Vagueness as a Political Strategy: Weasel Words in Security Council Resolutions Relating to the Second Gulf War* (Cambridge Scholars Publishing, Newcastle upon Tyne, 2013) at 68.

The article refers to gender as a way of framing the quality and type of adaptation action that countries should pursue. The use of the term 'gender-responsive' as opposed to a specific reference to women evidences a more nuanced approach to gender. The article also takes a generalised approach to gender considerations, rather than specifying a particular methodology for countries to follow. Yet, by referencing the consideration and participation of local communities and their knowledge, art 7 indicates that countries are expected to develop locally-specific policies that work for communities. This is an approach that is emphasised in current gender-responsive adaptation efforts.[112]

Article 7 is one of the longest in the entire Agreement, and addresses a range of adaptation concepts through 14 paragraphs. Where the first four paragraphs of the article frame the issue of adaptation, paragraph 5 is the first to prescribe a recommended approach to adaptation for parties to take in their NDCs. It is the only paragraph within art 7 that primarily deals with the quality and nature of adaptation policy to be made. The later paragraphs instead focus on cooperation between parties in developing policy, or on the mechanisms of creating plans and communicating them for transparency purposes.

Article 7 is one of the most significant articles in the Agreement. As set out in art 2, increasing the ability to adapt to the adverse effects of climate change is one of the Agreement's core purposes.[113] Further, it is one of the undertakings parties must make as part of their NDCs, as set out in art 3. As global warming progresses and countries feel its effects more seriously, adaptation efforts are going to take a more prominent place within the NDCs and the Paris Agreement. With this, art 7, and paragraph 5 in particular, has the potential to directly affect the way parties plan for domestic adaptation.

3 Article 11

Article 11 deals primarily with the responsibilities under the Agreement to promote capacity-building of developing nations and communities. Paragraph two reads:

> Capacity-building should be country-driven, based on and responsive to national needs, and foster country ownership of Parties, in particular, for developing country Parties, including at the national, subnational and local

112 Nelson and others, above n 49, at 56.

113 Paris Agreement, art 2.

> levels. Capacity-building should be guided by lessons learned, including those from capacity-building activities under the Convention, and should be an effective, iterative process that is participatory, cross-cutting and *gender-responsive*.
>
> (emphasis added)

In light of the above discussion in Part III concerning how vulnerable women from developing nations are to the effects of climate change, gender considerations are an important aspect of capacity-building efforts. This paragraph promotes a 'bottom-up' approach where states being assisted in capacity-building have greater agency in the relationship. The inclusion of "gender-responsive" within the last sentence of the paragraph may lead to the reference being read as only concerning the participation process of capacity-building (as is discussed in that sentence) rather than the full scope of capacity-building.

Article 11 only has five paragraphs, and only two of those specifically address the nature of capacity-building. The inclusion of gender in this paragraph is significant for directions of capacity-building. Gender considerations could potentially have been taken into account in para five, which outlines the institutional arrangements that are to be made to support the capacity-building process underneath the Agreement, especially as previous efforts under Kyoto institutions had a number of negative outcomes for women in developing regions.[114]

Article 11 is the least important of the three discussed. Article 11 only directs the actions of developed countries that have the means to support capacity-building. It involves developing countries in its protection of their right to self-govern to an extent, which is clearly an improvement on Kyoto mechanisms and an outcome sought by gender campaigners.[115] Further, it should be noted that art 11 is a subsidiary article to art 9 on financing, which is likely to take the primary role in regards to supporting developing nations, and which does not make any reference to gender.

The overall effect of these references is positive, but limited. This is most evidently expressed in all three being prefaced with the word "should" rather than "shall", which throughout the Paris Agreement negotiations was recognised

114 Skutsch, above n 2, at 37.

115 WGC *Position Paper on the 2015 New Climate Agreement*, above n 90, at 8–9.

as an indicator of recommendations as opposed to legal obligations.[116] Some countries are therefore likely to fail to meet the standards expressed in their NDCs on the excuse of capacity or irrelevance, and it places a continuing onus on the civil community and gender-focused organisations to keep countries informed and accountable under the Agreement.

B Gaps in the Paris Agreement

While it is important to closely examine the references to gender in the Agreement, it is necessary also to highlight the absence of references to gender in the text. Due perhaps to both the fledgling nature of the Agreement, and to its relative improvement over the Kyoto Agreement's complete lack of mentioning gender, few extended critiques of the Agreement from a gender perspective have been made so far. However, in examining the goals for the Agreement held by gender-focused groups prior to its drafting and to their critiques of draft editions of the Agreement, some consensus emerges about the areas where the Paris Agreement has failed to adequately address gender concerns.

Gender was reflected in the articles that detail the specific obligations for two out of the three core aspects of the Agreement's purpose as expressed in art 2. Article 7 referenced adaptation and art 11 referenced capacity-building, which arguably is a secondary consideration to the Agreement's broader financing goals. Yet there is no mention of gender in regards to mitigation in art 4, the third core purpose of art 2. This is especially concerning considering mitigation is arguably the primary purpose of the agreement — particularly in light of the huge emphasis before, during and after COP21 of setting temperature increase limits.[117] The key implication of this gap is that women's position in climate change law under the agreement has been relegated to that of victims needing support in adapting and building capacity, rather than as agents of change who can help actively tackle global warming.

As to how the Paris Agreement could have better provided for gender concerns, there are two key critiques. First, it is suggested that gender,

116 Lisa Friedman "Negotiations: How the world solved the 'shall' crisis and reached a new climate accord" *Climatewire, E&E News* (online ed, United States, 14 December 2015). This language is in contrast to a number of aspects of the Agreement, largely relating to transparency measures, which use stronger language and are legally binding upon the parties.

117 Saleemul Huq "1.5 to stay alive: UN's warming goal feels the heat" *Climate Change News* (online ed, Bangladesh, 22 September 2016).

alongside other human rights concerns, should have been included within the art 2 purpose section. Second, it is suggested that gender references should have been inserted into the majority of the Agreement's articles.

1 Purpose approach

Article 2 holds a primary position in the framing and implementation of the overall agreement. Article 3 of the Agreement sets the requirement that all aspects of the NDCs that parties are required to address (as defined in arts 4, 7, 9, 10, 11 and 13) must be done with the view to achieving the purpose as outlined in art 2.[118] This means that the contents of art 2 must be adhered to in relation to mitigation (art 4), adaptation efforts (art 7), the financing of developed countries (art 9), technology development (art 10), capacity-building (art 11) and the transparency framework (art 13).

WEDO, one of the prominent women's advocacy organisations at the conference, released a Gender Brief prior to COP21 with recommendations as to how gender could be best incorporated into the Agreement. Their singular recommendation for the text of the operative agreement was that art 2 should include the following obligation:[119]

> … ensure that all climate change related actions, respect, protect, promote, and fulfill human rights for all, including the rights of indigenous peoples; ensuring gender equality and the full and equal participation of women; ensuring intergenerational equity; ensuring a just transition of the workforce that creates decent work and quality jobs; ensuring food security; and the integrity and resilience of natural ecosystems.

In earlier drafts, art 2.2 had included some aspects of this human rights approach, but by the beginning of COP21 the article had been reduced to its current form.[120] A version of this phrase resulted in the human rights preamble clause, and while this can still influence one's reading of the Agreement, it does not impose binding obligations on parties of the type included in the proposed art 2.

The WGC, representing the common views of all the gender organisations present at COP21, published a response to the Draft Agreement as it stood

118 Paris Agreement, art 3.

119 WGC *Position Paper on the 2015 New Climate Agreement*, above n 90, at 2.

120 WGC *Response on the 'Draft Paris Outcome', Version of December 5th, 15.00, including the 'Reflections' Note* (7 December 2015) at 1.

coming into COP21. Their response supported the purpose approach and the need for the explicit mentioning of specific human rights concerns like those of women and indigenous peoples in the article, rather than the "dangerously diluted" form art 2.2 took.[121] Following the finalisation of the Agreement, the WGC reiterated this point in a press statement to the parties, claiming it "would have gone far to ensure that all forthcoming climate actions take into account the rights, needs and perspectives of women and men and encourage women's full and equal participation in decision-making".[122] Instead, the WGC claimed, the removal of these concerns shifted the overall purpose of the Agreement from one that was considerate of fundamental human rights to one that was committed to continuing business interests.[123] While this claim is somewhat exaggerated — human rights concerns were included within the preamble, and intermittently throughout the operative text — it does have some merit in that the social implications of the Agreement are less central, and instead the purpose adopts a conventionally technical outlook.

2 *Individual article approach*

Women's organisations also recommended the incorporation of gender in specific articles throughout the Agreement, often in conjunction with the purpose approach. The analysis above shows gender was incorporated into specific articles throughout the Agreement, but only to a limited extent. An argument could be made that gender is appropriately or proportionately included in many, if not all of the articles of the Agreement. The WGC referred to a number of articles where they supported the specific inclusion of gender considerations. In particular, the WGC identified articles addressing loss and damage, financing, technology and mitigation.[124] They emphasised their concern that gender issues were missing in mitigation considering its significance to the agreement at large.

The core strength of the individual article approach is the specific tailoring of certain aspects of the articles to gender. For example, the use of "gender-responsive" in art 11 connected the term to ideas of participation in

121 At 1.

122 WGC "A Reality Check on The Paris Agreement: Women Demand Climate Justice" (press release, 12 December 2015) at 1–2.

123 At 2.

124 WGC *Response on the 'Draft Paris Outcome',* above n 120.

the capacity-building process, highlighting to countries that women should be involved from a democratic perspective. Yet the general nature of the Agreement was to be built upon through the use of specific guidelines and recommendations from the UNFCCC as to how best to achieve it, so this point is not particularly persuasive. In fact, gender activists, when suggesting articles for the Draft Agreement, tended to keep references to gender broad so as to acknowledge the wide reach of gender issues across the policy process.[125]

The purpose approach is stronger due to its colouring of the entire agreement with a gender focus. While art 3 does not obligate compliance with art 2 for every article, all the key provisions targeted by gender activists are covered by the obligation, and those that are not will be read in light of the purpose as per art 31 of the VCLT.[126]

While the individual article approach allows greater signposting of important sections, gender is always a relevant consideration. The Paris Agreement can be amended to follow either of these approaches, however, such amendments would only apply to parties that agree to be bound by them.[127] At this early stage it is unlikely that any party would try to amend the agreement, although it is possible this may be explored if actions by parties under the Agreement are overwhelmingly found to negatively impact gender equity and human rights.

VI CONCLUSION

In the eyes of the international community, the Paris Agreement is in many ways a success story. It achieved widespread support, leading to remarkably swift ratification. It provides for the differing circumstances of parties, yet seeks ambitious commitments for the necessary goal of avoiding excessive temperature increases. These achievements are only more extraordinary considering the decades of stagnant international action that preceded them. Yet these strengths also point to its weaknesses, raising the question of whether the consideration afforded to parties for their unique circumstances is too lenient. Further, the United States's recent denouncement of the Agreement has further tested its apparent strength. While this denouncement has so far

125 At 1–4.

126 At 1–4; and VCLT, above n 110, art 31.

127 VCLT, art 40.

had the effect of leading to a rallying cry in favour of the Agreement by the remaining parties, there remains significant uncertainty as to how it will affect parties' commitments in the future.

There is therefore an imperfect balance in the Agreement: positive steps forward are taken to advance international responses to climate change, while weaknesses in the Agreement's effectiveness remain. This imperfect balance is further evident in the extent to which women and gender-focused groups were involved in the creation and text of the Paris Agreement. Gender is a necessary consideration of climate change law both to increase its efficiency and in order to reduce its social harm. This consideration begins with gender inclusiveness in the creation of law, as women and gender-focused groups lend legitimacy and unique perspectives to the process. While this was achieved in the creation of the Paris Agreement to an extent, it was ultimately inadequate in fully and equitably representing the voices of women in leadership positions, in negotiating parties from developing regions, and in relation to the presence of other observer interests such as industry or local municipalities. This was ultimately reflected in the text for, although reference to gender is a success that should be recognised, the references were limited and placed no obligations upon parties. Those drafting the Agreement ignored the common consensus of gender activists at COP21 and decided on a treaty where the purpose section failed to recognise the social implications underlying the environmental law.

Despite these failings, the question remains whether the Paris Agreement will actually facilitate meaningful gender considerations in the domestic policies of the parties. As the Agreement has only recently come into force it is a difficult question to resolve, although one that will gain more clarity as states' NDCs are submitted to the UNFCCC. Certainly gender NGOs will need to continue to campaign and support countries to include gender within their contributions, and to use the Agreement's various transparency measures in shedding light on those that fail to do so. At this pivotal time, ensuring gender remains part of the debate and informs the actions of parties is essential for a future of international climate change law that benefits us all.

"WE'RE ALWAYS GOING TO ARGUE ABOUT ABORTION"[1]
— *International law's changing attitudes towards abortion*

Anjori Mitra*

International human rights law is frequently invoked in relation to the availability (or non-availability) of access to a safe and legal abortion. This article discusses how international law has addressed abortion from the drafting of the Universal Declaration of Human Rights to the present day. The first part of this article closely examines the drafting of human rights treaties to demonstrate the deliberate choice made by the drafters to allow states to regulate abortion as they saw fit through their domestic law. This was a deliberate move to ensure wide consensus among states with different abortion laws. The second part of this article considers how, perhaps in response to increasing rates of maternal mortality, international bodies have, over time, increasingly recognised an international human right to safe and legal abortion, despite the silence of treaties on this matter. Abortion rights have usually been construed as necessary implications of other well recognised rights, including the rights to life and health as well as the freedom from torture and ill-treatment. While international recognition of any human right to a safe and legal abortion was initially tentative, in recent years there has been a greater willingness to recognise such a right. This article concludes that international human rights law has transformed over the years in its attitude towards abortion. It has gone from giving states total discretion to regulate abortion through their domestic laws to increasingly recognising the existence of abortion rights at an international level.

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1 A comment made by Hillary Clinton, former United States Secretary of State, in 2014: Zeke J Miller "Hillary Clinton Calls Hobby Lobby Decision a 'Really Bad Slippery Slope'" (1 July 2014) Time <time.com>.

I INTRODUCTION

In October 2012, Savita Halappanavar, an Indian citizen living in Ireland, died after her requests for an abortion were denied by Irish medical professionals.[2] Though continuing the pregnancy placed her life at risk, and it was obvious the foetus would not survive, Ms Halappanavar was told the requested abortion was illegal.[3] In the immediate aftermath of her death, what happened to Ms Halappanavar was repeatedly characterised as a violation of international human rights law: there were reports that Ms Halappanavar's husband planned to take a case to the European Court of Human Rights,[4] and a United Nations Special Rapporteur publicly criticised Irish abortion law.[5] The Executive Director of Amnesty International in Ireland also considered Irish abortion laws were at odds with international human rights law, commenting "international human rights law is clear about the right of a woman to access a safe and legal abortion where her life is at risk".[6]

Indeed, it is not unusual for international human rights discourses to be invoked in relation to abortion, by parties on both sides of the debate. For example, Rita Joseph, a human rights advocate involved with various United Nations delegations, has argued that the major human rights treaties protect the unborn child's right to life and so prohibit abortion.[7] Human Rights Watch, an international non-governmental organisation, has stated that "[w]here access to safe and legal abortion services are unreasonably restricted, a number of women's and girl's human rights may be at risk".[8] In 2015, Amnesty International produced a report in which, after a comprehensive review of various United Nations treaties and reports, it concluded that restrictive abortion laws violate

2 "Woman dies after abortion request 'refused' at Galway hospital" (14 November 2012) BBC <www.bbc.com>.

3 In this article, "abortion" is used to refer to "the deliberate termination of a human pregnancy": *Concise Oxford English Dictionary* (11th ed, Oxford University Press, Oxford, 2009) at 4.

4 "Savita Halappanavar's family to take case to European Court of Human Rights" *The Times of India* (online ed, Mumbai, 30 November 2012).

5 Sarah Stack "United Nations watchdog expresses concerns following Savita death" *Irish Independent* (online ed, Dublin, 17 December 2012).

6 "Irish govt must clarify on abortion issue: Amnesty" *The Times of India* (online ed, Mumbai, 17 November 2012).

7 Rita Joseph *Human Rights and the Unborn Child* (Martinus Nijhoff Publishers, Leiden, 2009).

8 "Q&A: Human Rights Law and Access to Abortion" (24 July 2017) Human Rights Watch <www.hrw.org>.

international human rights law.[9] As this article demonstrates, what role (if any) international law plays in relation to abortion has been considered during the drafting of treaties, by treaty bodies and international adjudicative bodies, at international conferences and by United Nations special rapporteurs.

All this begs the question of just what international law actually says about abortion. Can groups or individuals legitimately invoke international human rights mechanisms as granting a right to access a safe and legal abortion, and if so, in what circumstances? There are certainly important reasons justifying consideration of access to abortion at an international level. First, unsafe abortions pose a global health issue that has been recognised as a matter of international concern, including by the World Health Organisation, which estimates 21.6 million unsafe abortions occur each year,[10] and the United Nations, which has identified that the rate of maternal mortality in states with restrictive abortion laws is three times greater than other states.[11] If restrictive domestic abortion laws are contributing to high rates of women dying, it is obviously desirable for international law to intervene to the extent it can to deal with what seems to be a public health crisis. Secondly, established human rights recognised in major international treaties, notably rights to life, health, privacy as well as freedom from torture and ill-treatment, appear to be engaged when access to safe and legal abortion is at issue. Such rights provide a useful existing framework for dealing with unsafe abortion on a global level. Finally, as already noted, international law is already frequently invoked in relation to abortion, by individuals, non-governmental organisations and international bodies, so it seems appropriate for international law to respond to the issue.

This article therefore considers how international human rights law has responded to abortion since the drafting of the Universal Declaration of Human Rights, and demonstrates that international law has undergone a transformation in its attitude towards abortion. The first section of this article closely examines the drafting of the major international human rights treaties to show that the drafters made conscious decisions to be ambiguous about

9 Amnesty International *She is not a criminal: the impact of Ireland's abortion law* (Amnesty International, 2015).

10 World Health Organisation *Unsafe abortion: Global and regional estimates of the incidence of unsafe abortion and associated mortality in 2008* (6th ed, 2011) at 1.

11 United Nations Department of Economic and Social Affairs Population Division *Abortion Policies and Reproductive Health Around the World* (2014) at 1.

abortion in treaties. Indeed, this was often the only way to deal with intractable differences between states' positions on abortion, and gave states a great deal of freedom to regulate abortion within their own borders. However, as the second section discusses, developments in international law in more recent times have shown a concerted move towards the recognition of a right to access safe and legal abortions. This has primarily been achieved by interpreting well-established treaty rights to encompass abortion rights.

II THE RIGHT TO LIFE AND ABORTION

The extent to which international law should protect the unborn, and therefore permit or forbid abortion, was the subject of significant debate during the drafting of the right to life provisions in various international instruments. First, this section examines the drafting of the major United Nations human rights instruments to show that, due to states' inability to agree on the issue, those instruments were deliberately drafted to give states maximum freedom in terms of their domestic abortion law. The drafting, and subsequent interpretation, of various regional human rights instruments is then considered, which again reveals a practice of deferral to individual states in respect of abortion.

In order to put the following discussion into context, it is useful to keep in mind the basic characteristics of international law. International law is a fundamentally consensual system and states are not bound by treaties unless, and only to the extent that, they agree to be bound.[12] However, once bound, states must observe the obligations conferred by treaties.[13] International declarations on their own have no binding force, but generally have strong moral force and, over time, can acquire legal force as customary law (if their terms constitute a general practice accepted as law by states).[14]

It is a common criticism of international law that there is no way to ensure states comply with international law — there is "no international police force, and no international prison where states can be locked up".[15] However, there are certainly incentives for states to comply with international law.[16]

12 Jan Klabbers *International Law* (2nd ed, Cambridge University Press, Cambridge, 2017) at 24 and 45–46.

13 At 46.

14 At 38–39.

15 At 11–12.

16 Klabbers, above n 12, at 10–12.

In the context of the human rights discussed in this article, those incentives are primarily political: for example, a breach might result in investigation and condemnation by United Nations bodies, or an adverse decision by an international court or tribunal.[17] Either scenario would detrimentally affect a state's international standing.

A United Nations human rights instruments

The international human rights system, as we know it today, began with the Universal Declaration of Human Rights (UDHR), adopted by the United Nations General Assembly on 10 December 1948 with the intention of enshrining fundamental, universal human rights in law.[18] Unsurprisingly, art 3 declares "[e]veryone has the right to life, liberty and security of person". However, the extent to which the right to life should apply prior to birth was a matter of significant debate during the drafting of the UDHR.

The initial drafting committee was formed in 1946 and consisted of representatives from Australia, Chile, China, France, Lebanon, the Soviet Union, the United Kingdom and the United States.[19] The drafting committee formulated the right to life as simply reading "everyone has the right to life". The committee also noted alternative texts proposed by Chile ("[u]nborn children … shall have the right to life") and Lebanon ("everyone has the right to life … from the moment of conception").[20] The range of proposals suggested from those countries indicate an early acknowledgement that states' different positions on abortion needed to be dealt with by drafting rights broadly enough to be read consistently with all states' domestic laws.[21]

The abortion debate also arose during the drafting of the International Covenant on Civil and Political Rights (ICCPR).[22] The drafting committee

17 More extreme breaches of human rights, such as government sponsored genocide, may have more significant international consequences, such as sanctions, interventions or proceedings before the International Criminal Court.

18 *Universal Declaration of Human Rights* GA Res 217A III (1948); and Klabbers, above n 12, at 109–111.

19 United Nations Economic and Social Council *Report of the Drafting Committee to the Commission on Human Rights* E/CN, 4/21 (1 July 1947) at 1.

20 At 74.

21 For the range of proposals suggested see "Abortion Policies: A Global Review" (2002) United Nations <www.un.org>; and United Nations Economic and Social Council *Commission on Human Rights Drafting Committee Second Session: Summary Record of Thirty-Fifth Meeting* E/CN.4/AC.1/SR.35 (29 May 1948) at 3–5.

22 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December

of the UDHR had produced a draft human rights convention, which formed the basis of the ICCPR.[23] The suggested wording for the right to life was "it shall be unlawful to deprive any person of his life", but Lebanon proposed an alternate text that included the words "from the moment of conception".[24] The ICCPR working group also proposed including protection for life "at any stage of … human development".[25] In response, a revised wording was proposed by the working party: [26]

> It shall be unlawful to procure abortion except in a case in which it is permitted by law and is done in good faith in order to preserve the life of the woman, or on medical advice to prevent the birth of a child of unsound mind to parents suffering from mental disease, or in a case where the pregnancy is the result of rape.

This text was careful not to sanction abortion unless it was permitted by domestic law. It would therefore have no effect in states where abortion was not already legal. It would only have been problematic for states that permitted abortion in wider circumstances than those set out, though in 1947 there were few, if any, such states.[27]

However, the proposed text was criticised when it subsequently came up for debate before the United Nations Commission on Human Rights (UNCHR) as leaning too far in favour of permitting abortion.[28] Panama argued the provision could prevent ratification by states that criminalised abortion.[29] The United Kingdom, where abortion was legal in certain circumstances, defended the provision, arguing its deletion could prevent ratification by those

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1966, entered into force 23 March 1976).

23 *Report of the Drafting Committee*, above n 19, at 82–86.

24 *Report of the Drafting Committee to the Commission on Human Rights*, above n 19, at 82.

25 United Nations Economic and Social Council *Working Group on Convention of Human Rights – Summary Record of the Second Meeting* E/CN.4/AC.3/SR.2 (5 December 1947) at 3.

26 United Nations Economic and Social Council *Commission on Human Rights Second Session: Report of the Working Party on an International Convention on Human Rights* E/CN.4/56 (11 December 1947) at 6.

27 "Abortion Policies: A Global Review", above n 21; and "Country Studies" (9 October 2015) Federal Research Division, Library of Congress <www.loc.gov>.

28 United Nations Social and Economic Council *Commission on Human Rights Second Session: Summary Record of the Thirty-Fifth Meeting* E/CN.4/SR/35 (12 December 1947) at 15–17.

29 At 16–17.

states that had legalised abortion.[30] The matter arose again, at a later session of the UNCHR, when Lebanon tried to amend the right to life to read: "human life is sacred from the moment of conception".[31] This proposal was rejected. Chile, despite its own prohibition of abortion, considered it was important that the ICCPR be signed by as many states as possible and favoured leaving the right vague as to its application to the unborn, a proposal agreed to by the United Kingdom, United States and Australia,[32] all of which permitted abortion in certain circumstances.[33] Australia also considered the Lebanese proposal was a "declaration of religious faith…[that] should not be included in a legal document".[34]

However, that was not the end of the matter. In 1957, when the draft ICCPR came before the Social, Humanitarian and Cultural Committee to the United Nations General Assembly, a number of states with restrictive abortion laws proposed that the right to life be amended to begin from the moment of conception.[35] The suggestion was ultimately rejected, in part, because of states' different domestic laws on abortion. The Committee's report recorded that "[l]egislation on the subject was based on different principles in different countries and it was, therefore, inappropriate to include such a provision in an international instrument".[36] The final text of the ICCPR leaves the position of the unborn ambiguous. Article 6 simply reads: "Every human being has the inherent right to life. This right shall be protected by law".[37]

The debates on the right to life and the unborn during the drafting of the UDHR and ICCPR, prolonged as they were, pale in comparison to the debates which occurred during the drafting of instruments specifically designed to protect children: the Declaration of the Rights of the Child and

30 At 15.

31 United Nations Economic and Social Council *Commission on Human Rights Sixth Session. Lebanon: Proposed Text for Article 5* E/CN.4/398 (3 April 1950).

32 United Nations Economic and Social Council *Commission on Human Rights Sixth Session Summary Record of the Hundred and Forty-Ninth Meeting* E/CN.4/SR.149 (17 April 1950) at [10]–[11].

33 "Abortion Policies: A Global Review", above n 21.

34 *Summary Record of the Hundred and Forty-Ninth Meeting*, above n 32, [12]–[14].

35 The countries were Belgium, Brazil, El Salvador, Mexico and Morocco: United Nations Economic and Social Council *Draft International Covenants on Human Rights: Report of the Third Committee* A/3764 (10 December 1957) at [112]. See also: Marc J Bossuyt *Guide to the "travaux préparatoires" of the International Covenant on Civil and Political Rights* (Martinus Nijhoff Publishers, Dordrecht, 1987).

36 *Draft International Covenants on Human Rights: Report of the Third Committee*, above n 35, at [112].

37 ICCPR, above n 22.

the Convention on the Rights of the Child.[38] The first draft of the Declaration of the Rights of the Child (DRC), prepared in 1950, did not specify whether it applied to the unborn.[39] During the debate before the United Nations General Assembly, Italy (where abortion was prohibited in all circumstances, except to save a woman's life) proposed the Declaration provide that children required special safeguards, care and legal protection from the moment of conception.[40] That proposal was rejected on the basis it would be at odds with states that had legalised abortion and was too controversial to be included in an instrument intended to be universal.[41] Similarly, a proposal that the DRC protect the child's right to life from the moment of conception was rejected.[42] A compromise was reached by incorporating the following words into the preamble: "Whereas the child by reason of [their] physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth".[43] What constitutes "appropriate" legal protection for the unborn is a matter left to individual states.

In 1978, it was proposed the DRC be given binding force in treaty form. The first draft of the Convention on the Rights of the Child (CRC) was largely similar to the DRC.[44] However, concerns were expressed by Barbados and Austria as to the ambiguity surrounding the protection of the unborn, and particularly what this meant in terms of abortion.[45] As a result, the second draft did not refer to the unborn at all, and defined a "child" as "every human being from the moment of his birth to the age of 18 years".[46]

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38 *Declaration of the Rights of the Child* GA Res 1386, A/Res/14/1386 (1959); Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990).

39 United Nations Economic and Social Council *Social Council Report of the Sixth Session* E/CN.5/221 (1950) at [55]–[61].

40 United Nations *Yearbook of the United Nations 1959* (United Nations, New York, 1960) at 193. See also: "Abortion Policies: A Global Review", above n 21.

41 *Yearbook of the United Nations 1959*, above n 40, at 193.

42 At 193. The proposal was made by Afghanistan, Argentina, Brazil, Italy, Spain and Uruguay.

43 At 193–194.

44 United Nations Economic and Social Council *Letter Dated 17 January 1978 from the Permanent Representative of Poland* E/CN.4/1284 (1978); and United Nations Economic and Social Council *Question of a Convention on the Rights of the Child: Austria, Bulgaria, Colombia, Jordan, Poland, Senegal and Syrian Arab Republic: draft resolution* E/CN.4/L.1366/Rev.1 (14 February 1978) at 1–6.

45 United Nations Economic and Social Council *Question of a Convention on the Rights of the Child: Report of the Secretary-General* E/CN.4/1324 (1 February 1979) at 7 and 31.

46 United Nations Economic and Social Council *Question of a Convention on the Rights of a Child: Note verbale dated 5 October 1979 addressed to the Division of Human Rights Representation of the Polish People's*

During meetings in 1979 and 1980 of the Working Group formed to draft the CRC, several representatives reiterated that "consideration should be given to … the right to life of the unborn child, abortion [and the definition of] 'child.'"[47] The Holy See proposed the second draft be amended so the preamble read: [48]

> Recognizing that the child due to the needs of his physical and mental development requires particular care and assistance before as well as after birth with regard to health, physical, mental, moral and social development as well as legal protection in conditions of freedom, dignity and security.

A number of states whose domestic laws protected the rights of the child from conception supported the Holy See's proposal, but even those states recognised the text could affect wide ratification of the CRC and argued that the text did not necessarily prohibit abortion.[49] Other states were unconvinced, arguing the preamble should be neutral and not prejudice the interpretation of the definition of child contained within the operative part of the CRC.[50] Ultimately, the Working Group decided to consider the issue after the definition of "child" was adopted.[51]

However, the same issues arose during the drafting of the definition of "child". Some states considered that if the definition of child did not capture the unborn, this was contrary to their domestic laws, but did recognise that explicit protection of the unborn would be equally problematic for other states.[52] The final agreed definition of "child" was therefore left deliberately ambiguous as to when childhood begins: "a child is every human being from the moment of [their] birth to the age of 18 years…".[53]

Republic to the United Nations in Geneva E/CN.4/1349 (17 January 1980).

47 United Nations Economic and Social Council *Question of a Convention on the Rights of the Child: Report of the Working Group* E/CN.4/L.1468 (12 March 1979) at [6].

48 The proposed paragraph can be seen from the comments in *Note verbale dated 5 October 1979*, above n 46, at [6]; and United Nations Economic and Social Council *Question of a Convention on the Rights of the Child: Report of the Working Group* E/CN.4/L.1542 (10 March 1980) at [6].

49 At [6]. This document, and those referred to in the following paragraphs, do not clarify the position of each individual state, but instead record in general terms that there was significant debate around these matters.

50 At [7].

51 At [7]–[8].

52 At [28]–[29].

53 *Question of a Convention on the Rights of the Child: Report of the Working Group*, above n 48, at 2.

States then returned to debating the preamble, in particular, the text proposed by the Holy See. Some states argued that the preamble should remain neutral so as not to taint the interpretation of "child" in the treaty and risk not achieving wide ratification of the CRC.[54] Other states argued that, since the legislation of most states provided at least some protection to the unborn, the Holy See's text should be acceptable to all, as it did not specify the length of the period before birth that was covered.[55] In an attempt at compromise, the Working Group settled on a text that did not explicitly refer to the unborn: [56]

> Recognizing that, as indicated in the Declaration on the Rights of the Child adopted in 1959, the child due to the needs of his physical and mental development requires particular care and assistance with regard to health, physical, mental, moral and social development, and requires legal protection in conditions of freedom, dignity and security.

Some states disliked this text and felt it slanted the CRC towards the legalisation of abortion; the United States disagreed, arguing that this wording was neutral and that the CRC needed to be neutral on the topic of abortion in order to be acceptable to the largest number of states.[57]

The wording of the draft CRC's preamble remained unsettled. The debate surrounding whether "child" included the unborn under the CRC was reopened when the Working Group met in 1988 and 1989 and amended the draft convention to include protection of the right to life.[58] The Federal Republic of Germany (West Germany) then suggested that the preamble simply contain the same wording as the DRC, which stated that the child needed "appropriate legal protection, before as well as after birth".[59] A number of states supported this suggestion, while others opposed reopening the debate when consensus was unlikely to be reached.[60] The debate became increasingly

54 At [10].

55 At [11].

56 At [19].

57 At [18].

58 United Nations Economic and Social Council *Question of a Convention on the Rights of the Child: Report of the working group on a draft convention on the rights of the child* E/CN.4/1988/28 (6 April 1988) at [14]–[26].

59 Commission on Human Rights *Pre-Sessional Open-Ended Working Group on a Convention on the Rights of the Child: Proposal Submitted by the Federal Republic of Germany* E/CN.4/1989/WG.1/WP.6 (28 November 1988).

60 United Nations Economic and Social Council *Question of a Convention on the Rights of the Child: report*

heated, culminating in West Germany threatening to formally request a vote in the Working Group if the amendment was not incorporated, and Italy declaring that because no state manifestly opposed the DRC, protection of the right to life of the unborn constituted jus cogens (an international legal norm that was accepted by all and could not be derogated from).[61] In an attempt to overcome the stalemate, the Working Group formed a drafting group to deal with the provision, composed of states on both side of the debate.

The drafting group created a compromise text similar to the West Germany's amendment, and — in order to allay the concerns of states that had legalised abortion — urged that a statement be included in the travaux préparatoires (preparatory materials) stipulating that: [62]

> In adopting this preambular paragraph, the Working Group does not intend to prejudice the interpretation of article 1 [the definition of the child] or any other provision of the Convention by States Parties.

This was adopted, though states, including Senegal and the United Kingdom, disagreed as to whether the statement could affect the interpretation of the convention.[63] Legal counsel advised that while the interpretive statement could be included in the travaux, the preamble was meant to inform the interpretation of a treaty when there is ambiguity, so it was strange to require recourse to the travaux in order to interpret the preamble.[64] The travaux were supplementary means of interpretation, so the preamble would have priority.[65] However, it is arguable that the wording of the preambular paragraph in question (for example in the use of terms like "appropriate") is so ambiguous that recourse to the travaux is necessary in order to ascertain its meaning.

The Chairman of the Working Group, when reporting to the Commission on Human Rights, explicitly acknowledged that because states had been unable

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of the working group on a draft convention on the rights of the child E/CN.4/1989/48 (2 March 1989) at [35]–[36].

61 At [39]–[40].

62 Commission on Human Rights *Pre-Sessional Open-Ended Working Group on the Convention on the Rights of the Child: Proposal of the Drafting Group on Preambular Paragraph 6* E/CN.4/1989/WG.1/WP.19 (29 November 1988); *Question of a Convention on the Rights of the Child: report of the working group on a draft convention on the rights of the child*, above n 60, at [43].

63 *Question of a Convention on the Rights of the Child: report of the working group on a draft convention on the rights of the child*, above n 60, at [44]–[47].

64 Annex, at 144.

65 Annex, at 144.

to agree, the abortion question was left open to interpretation: [66]

> It had been necessary to reconcile numerous differences relating to traditions, cultures, religions … legal systems and … political attitudes … the Group had been able to reach agreement on … the definition of a child … i.e. on the inclusion into, or exclusion from, that definition of children before birth. Considering the fundamental divergence of views on that issue, the Working Group had preferred not to prejudge the solution that each State party to the convention might adopt.

When the CRC was adopted, a number of parties commented, both formally and informally on its implications in respect of abortion. For example, upon ratification, France and Tunisia issued declarations and Luxembourg issued a reservation, stipulating that the CRC did not affect their laws permitting abortion.[67] On the other hand, Guatemala interpreted the CRC as "consistent" with domestic law, which protected life from the moment of conception.[68] The Holy See stated that the draft convention "recogni[s]ed clearly the right to life of the unborn child."[69] Such diversity of views confirms the CRC's ability to be interpreted in conformity with virtually any national abortion law, an outcome that was clearly intended by its drafters.[70]

The examination of the drafting history of the international instruments discussed above has shown that, time and again, it was simply impossible for states to reach consensus on any formulation of the right to life that made explicit reference to the unborn because of differing individual states' abortion laws. Clearly, states were very uncomfortable with the prospect of adopting or ratifying instruments that conflicted with their domestic law. At the same time, it is obvious that states recognised the need for consensus to ensure adoption and ratification of, and compliance with, the instruments being drafted. Without consensus after all, there cannot be an effective international

66 United Nations Economic and Social Council *Commission on Human Rights forty-fifth session Summary Record of the 54th meeting: Question on a Convention on the Rights of the Child* E/CN.4/1989/SR.54 (15 June 1989) at [5].

67 Committee on the Rights of the Child *Reservations, Declarations and Objections Relating to the Convention on the Rights of the Child* CRC/C/2/Rev.3 (11 July 1994) at 17, 23 and 28.

68 At [55].

69 United Nations General Assembly *Summary record of the 39th meeting: Adoption of a Convention on the Rights of the Child* A/C.3/44/SR.39 (13 November 1989) at [35].

70 Philip Alston "The Unborn Child and Abortion Under the Draft Convention on the Rights of the Child" (1990) 12(1) Human Rights Quarterly 156 at 157.

legal system. The only solution was to ensure international instruments could be interpreted consistently with virtually any domestic law on abortion; to allow states free reign on how they dealt with this matter.

B Regional human rights instruments

The following section considers the extent to which issues similar to those discussed above arose during the drafting of the major regional human rights instruments.

1 American human rights instruments

The American Declaration of the Rights and Duties of Man (ADR) was adopted at the Ninth International Conference of American states in 1948, at the same time the Organisation of American States (OAS) was created.[71] It was the first international human rights instrument, predating the UDHR by seven months. The Inter-American Commission on Human Rights (IACHR), the quasi-judicial body that deals with alleged violations of the ADR, considers that the Declaration has the binding force of a treaty.[72]

Article 1 of the ADR simply protects the right to life of "every human being". The original draft ADR presented to the 1948 Conference read "every person has the right to life, including those who are not yet born". That text was rejected in favour of one that does not refer to the unborn, due to significant concerns raised by states regarding domestic laws permitting abortion. According to the IACHR, it was a deliberate decision, on the part of the drafters, to defer to national law on the issue: [73]

> … the draft which was finally approved is a compromise formula, which even if it obviously protects life from the moment of birth, leaves to each State the power to determine, in its domestic law, whether life begins and warrants protection from the moment of conception or at any other point in time prior to birth.

71 *American Declaration of the Rights and Duties of Man* OAS Res XXX (1948). As at September 2017, the OAS consists of 35 American states.

72 Christina M Cerna "Reflections on the Normative Status of the American Declaration of the Rights and Duties of Man Anniversary Contributions – International Human Rights" (2009) 30 U PA J Intl L 1211 at 1212–1213. The *Baby Boy* case was the IACHR's first statement on the legal obligations of states under the ADR: *White and Potter (Baby Boy) v United States* Inter-American Commission on Human Rights, case 2141, 6 March 1981.

73 *Baby Boy*, above n 72, at [5] per Dr Andres Aguilar M.

In 1969, the OAS met to draft the American Convention on Human Rights (ACHR).[74] It had, before it, a draft prepared by the American Court of Human Rights (ACtHR), which stated that the right to life must be protected by law "and generally from the moment of conception".[75] This wording was already a compromise — the first three drafts of the ACHR did not contain the words "in general". The rapporteur assigned to undertake a comparative study between the draft ACHR and the ICCPR had recommended that the question of the right to life of the unborn be left open, so as not to create a higher threshold than that of the ICCPR.[76]

Before the OAS, Brazil (supported by the United States) proposed the deletion of the words "in general from the moment of conception" on the basis that Brazilian law, while generally protecting the unborn, permitted abortion in cases of rape or to save a woman's life.[77] Brazil argued that the wording appeared to prohibit abortion and could prevent ratification, so it was better not to mention the unborn and permit individual states to decide on the abortion issue for themselves.[78] The Dominican Republic also proposed removal of references to conception in order to ensure the rights in the ACHR were universal.[79] On the other hand, Venezuela opposed Brazil's suggestion, arguing domestic laws should not determine international rights.[80] By majority, the current art 4(1) was adopted. It reads as follows:[81]

i) Every person has the right to have his life respected;

ii) This right shall be protected by law and, in general, from the moment of conception;

iii) No one shall be arbitrarily deprived of his life.

74 American Convention on Human Rights 1144 UNTS 123 (opened for signature 22 November 1969, entered into force 18 July 1978).

75 Organización de los Estados Americanos (Organisation of American States) *Conferencia Especializada Interamericana Sobre Derechos Humanos* (*Inter-American Specialized Conference on Human Rights)* OAS/Ser.K/XVI/1.2 (November 1969) at 14.

76 Organisation of American States *Comparative Study of the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and of the Draft Inter-American Conventions on Human Rights* OEA/ Ser.L/V/IL 19, doc. 18 (1968).

77 *Inter-American Specialized Conference on Human Rights*, above n 75, at 121.

78 At 121.

79 Alvaro Paul "Controversial Conceptions: The Unborn and the American Convention on Human Rights" (2010) 9 Loy U Chi Intl L 209 at 223.

80 At 223.

81 At 214–215.

The ACHR is the only treaty that explicitly recognises rights of the unborn and thereby accords less deference to national law on abortion than the United Nations treaties do. This is most likely because there was little divergence of views between the states that drafted the ACHR — the vast majority of the members of the OAS had strong Catholic traditions and, accordingly, restrictive domestic abortion laws.[82] The words "in general", however, do permit states to interpret the text as not to prohibiting abortion, if necessary. The United States for example, which permitted abortion in some circumstances, issued an interpretive declaration at the time art 4 was voted on, stipulating that it would interpret art 4(1) at its own discretion (though it ultimately did not become a party to the treaty).[83]

The IACHR considered the right to life provisions in the OAS instruments in *White and Potter (Baby Boy) v United States*, where the Supreme Judicial Court of Massachusetts acquitted a doctor who had been charged with manslaughter for performing an abortion.[84] A Catholic non-governmental organisation argued arts 1 and 4 of the ADR created a right to life from the moment of conception. As such, the organisation alleged the United States had breached the aborted foetus' rights under arts 1 and 7 (children's rights to special protection) and 11 (right to health) of the ADR. The organisation also referred to the United States court decisions in favour of access to abortion in *Roe v Wade,*[85] and *Doe v Bolton,*[86] as violations of the ADR. The claim was brought as a breach of the ADR, as opposed to the ACHR, because the United States had not ratified the ACHR.

In its decision, the IACHR discussed the circumstances in which art 1 of the ADR was drafted to conclude that states had deliberately decided art 1 should not refer to the unborn. It also discussed the drafting of art 4 of the ACHR and referred to the phrase "in general" as a "compromise". It concluded the drafting history showed states had never intended the ADR to protect the unborn and as such, it did not have that effect — states had discretion to interpret art 1 in accordance with national laws on abortion; this had been the

82 "Abortion Policies: A Global Review", above n 21; and "Country Studies," above n 27.

83 Paul, above n 79, at 228.

84 *Baby Boy*, above n 72.

85 *Roe v Wade* 410 US 113 (1973).

86 *Doe v Bolton* 410 US 179 (1973).

drafters' intention in wording that provision vaguely. The United States had therefore not breached the ADR. However, demonstrating art I of the ADR is capable of wide interpretation, two dissenting opinions held that the lack of explicit mention of the unborn in art I did not necessarily mean the article did not apply from the moment of conception.[87]

2 *European human rights instruments*

The Charter of the Fundamental Rights of the European Union (EU Charter) sets out the human rights which must be observed during the implementation of European Union law, and became legally binding on European Union states and institutions on 1 December 2009.[88] Article 2 of the EU Charter states "everyone has the right to life" with no mention of the unborn. The official commentary to the EU Charter records that during its drafting, there were attempts to explicitly extend the right to life to the unborn however, the drafters ultimately decided it was best the EU Charter remain vague in relation to this point.[89]

Similarly, art 2 of the European Convention of Human Rights (ECHR) provides that "everyone's life shall be protected by law".[90] The European Commission of Human Rights (the Commission)[91] has considered whether art 2 extends to the unborn.[92] In *Paton v United Kingdom*, the Commission considered whether United Kingdom laws permitting abortion breached art 2.[93] The Commission noted that the fact "everyone" was not defined "tend[s] to support a view that it does not include the unborn".[94] This interpretation

87 *Baby Boy,* above n 72, per Dr Luis Demetrio Tinoco Castro and Dr Marco Gerardo Monroy Cabra.

88 Charter of the Fundamental Rights of the European Union [2012] OJC 326. The Charter has 26 states parties which are also member states of the European Union. The background to the Charter can be found at "Fact sheets on the European Union: The Charter of Fundamental Rights" (June 2017) European Parliament <www.europarl.europa.eu>.

89 EU Network of Independent Experts on Fundamental Rights *Commentary of the Charter of Fundamental Rights of the European Union* (June 2006) at 33–34.

90 Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953), art 2. As at September 2017, the Convention has 47 states parties.

91 The Commission was a Tribunal which, until 1998, heard cases of alleged breaches of the ECHR. It was replaced by the ECtHR.

92 While no information on the drafting of this article was located by the author, this case provides helpful interpretation of art 2.

93 *Paton v United Kingdom* (1980) 19 DR 244 (ECHR).

94 At [9].

was supported, in the Commission's view, by the fact the rest of the ECHR contained a number of rights that could only be exercised by persons already born.

The Commission also held art 2 could not protect the rights of the unborn absolutely, because that could conflict with the mother's right to life if the pregnancy was life-threatening. The Commission reasoned that this could not have been the drafters' intention because when the ECHR was drafted, almost all contracting parties permitted abortion where a woman's life was at risk. The Commission did not definitively decide whether art 2 still provided some limited protection to the unborn but considered that even if it did, United Kingdom laws permitting abortions for health reasons would be a justified limitation on any right of the unborn.

In *H v Norway*, the Commission considered whether Norwegian laws permitting abortion on request within the first 12 weeks of pregnancy breached foetal rights under arts 2 and 3 (right to freedom from inhuman treatment and torture).[95] Again, the Commission declined to definitively decide the extent to which art 2 protected the unborn:[96]

> The Commission finds that it does not have to decide whether the foetus may enjoy a certain protection under Article 2 … but it will not exclude that in certain circumstances this may be the case notwithstanding that there is in the Contracting States a considerable divergence of views on whether or to what extent Article 2 … protects the unborn life.

It went on to state that "in such a delicate area the Contracting States must have a certain discretion".[97] Norwegian law was within this discretion. There was no indication of what type of abortion law would fall outside the discretion.

Subsequently, before the European Court of Human Rights (ECtHR), it was alleged in *Boso v Italy* that Italian abortion law contravened foetal rights to life under art 2 of the ECHR.[98] The Court held that Italian law, which allowed abortions to preserve life and health ("health" including economic, social and familial concerns), did not exceed the state's "discretion in such

95 *H v Norway* (1992) 73 DR 155 (ECHR).

96 At [1].

97 At [1].

98 *Boso v Italy* (50490/99) Grand Chamber, ECHR 5 September 2002. The ECtHR hears alleged breaches of the ECHR.

a sensitive area".[99] The implication that state discretion on abortion can be exceeded suggests that the unborn may have some rights under art 2, but the ECtHR refrained from ruling if, and to what extent, these rights might apply.

In *Vo v France*, the ECtHR, while not dealing explicitly with abortion, ruled that, for the purposes of art 2, states had a "margin of appreciation" when it came to determining when life began.[100] This was for two reasons: first, because the extent to which the unborn should be protected had not been resolved within the majority of contracting states to the ECHR themselves, and second, because there was no European consensus on when life began. It was therefore neither desirable, nor possible, to determine whether the unborn was protected by art 2. According to the ECtHR, the ECHR had been deliberately drafted in a manner that left the abortion question open, because it was inappropriate for international law to impose a single moral code upon states, given the divergence of views on the issue.[101] In a separate opinion of five judges, it was noted that though the unborn may have some interests, this did not necessarily equate to rights under art 2.[102] Three other separate opinions suggested an unborn child could have a right to life, but because most parties to the ECHR had legalised abortion in some circumstances (apparently considering this was not contrary to art 2), legal abortions were an exception to that right.[103]

The decisions discussed above indicate a deliberate choice by European tribunals to defer to state law on the abortion question, by referring to a "discretion" or "margin of appreciation" accorded to states when it comes to regulating abortion through domestic law. In no decision has it been held that state law permitting abortion violates art 2. Neither has the extent to which art 2 protects the unborn (or, indeed, if it actually does) been clarified. The only point clarified is that the ECHR does not confer absolute rights to life on the unborn. However, this is hardly controversial, given virtually all states parties permit abortion in some circumstances (as noted in *Paton*).[104] Beyond this, the matter has been left to individual states as a discretionary

99 At [3].

100 *Vo v France* (2005) 40 EHHR 12 (ECHR) at [55].

101 At [82].

102 Per Rozakis J joined by Caflisch, Fischbach, Lorenzen and Thomassen JJ.

103 Per Costa J joined by Traja J and per Mularoni J joined by Straznica J.

104 *Paton*, above n 93.

matter at international level. The Commission and the ECtHR have clearly been cognisant of the need not to alienate states from the ECHR system by making any definitive decision on the matter, given the differing views and laws of individual states when it comes to abortion.

3 African human rights instruments

The African Charter on Human and People's Rights (African Charter), which is the key human rights instrument in Africa, entered into force in 1986.[105] The travaux preparatoires of the African Charter are not publicly available. However, the protection of life in art 4 of the African Charter is similar to other treaties in making no mention of the unborn. It is unlikely there was any particular intention on the part of the drafters to protect the unborn's right to life, because art 14 of the subsequent Protocol to the African Charter on the Rights of Women in Africa (the Maputo Protocol) recognises access to abortion as a human right (this is discussed later in this article).[106]

The above discussion of the three regional human rights instruments has shown that, like their United Nations counterparts, these instruments appear to have been deliberately drafted to remain open to interpretation when it comes to abortion. In the case of the American and European systems, the decisions of regional courts and tribunals particularly illustrate the freedom given to individual states to regulate abortion by the relevant regional instruments.

III ACCESS TO ABORTION AS A NECESSARY IMPLICATION OF EXISTING RIGHTS

As discussed above, the major international and regional human rights instruments were drafted so as to remain neutral on the abortion issue. Clearly, the intention of states at the time of drafting was for abortion to remain a matter to be regulated by individual states through their domestic laws, without international interference. However, the position has changed significantly since the drafting of these treaties. In the decades since the drafting of the major international treaties, there has been increased consideration of the

105 African Charter on Human and People's Rights 1520 UNTS 1987 (opened for signature 27 June 1981, entered into force 21 October 1986), art 4. As at September 2017, the Charter was ratified by 53 states of the African Union, an intra-governmental organisation.

106 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (opened for signature 11 July 2003, entered into force 25 November 2005) [Maputo Protocol].

extent to which there is a positive international human right to a safe and legal abortion. There have also been a series of decisions from treaty bodies on the issue of access to abortion.

The following section discusses the most frequently used approach for recognising a positive right to abortion — recognising access to a safe and legal abortion as a necessary implication of, or requirement for the observance of, well-established rights already enshrined in the major treaties. Those rights include the rights to life, health, privacy, enjoyment of scientific progress, the right to determine the number of children a person has, freedom from torture and ill-treatment, and freedom from discrimination. This section will first examine reports produced by major international conferences and, then, in some detail, the recognition of abortion rights by United Nations bodies. It will lastly discuss developments within regional human rights systems.

It is important to note that the consideration of abortion rights discussed below largely conflates two situations in which abortion may pose a risk to a woman's life. The first is when a pregnancy itself poses a risk to a woman's life or health, and she is unable to obtain an abortion due to her state's laws. The second is when a woman seeks an abortion for whatever reason (including, but not limited to health risks) and must undergo an unsafe abortion because of restrictions on access in domestic law. Sometimes, both situations are treated as equally justifying abortion rights. On other occasions, it has been considered that human rights law requires the provision of access to abortion in the first situation, and of decriminalisation of abortion in the second situation.

In this section, the phrase "unsafe abortion" is used to refer to abortions that are unsafe because they are illegal and there is therefore no state regulation of them. For example, such abortions may be carried out by persons lacking the necessary skills, or in an environment that does not conform to minimal medical standards. The phrases "abortion rights" and "right to access to abortion" are used to refer to the right to access a safe and legal abortion.

A International conferences

The earliest suggestions, at the international level, that access to abortion could constitute an aspect of existing international human rights were made at key international conferences. The 1975 Report of the World Conference of the International Women's Year, for example, rather timidly asked governments to provide adequate facilities that enabled women to decide on the number and

spacing of their children "consistent with their national policy",[107] and to adopt programmes to address ill-health caused by unsafe abortion.[108]

Similarly, the 1994 International Conference on Population and Development Programme of Action (ICPD Programme), signed by 179 states, defined the right to the highest attainable standard of health as including "a state of complete physical, mental and social well-being … in all matters relating to the reproductive system … [including] the freedom to decide if, when and how often to [reproduce]".[109] It required that people have access to "methods of their choice for the regulation of fertility which are not against the law".[110] The ICPD Programme also called upon governments to reduce illegal/unsafe abortions, but made clear that it was up to states to legislate in relation to abortion: "Any measures or changes related to abortion within the health system can only be determined at a national or local level according to the national legislative process".[111] These sentiments were re-affirmed in the 1995 Beijing Declaration and Platform For Action, adopted unanimously by 189 countries at the Fourth World Conference on Women.[112]

The comments from these international conferences were early indicators that a right of access to abortion could exist as an aspect of established human rights. These comments impliedly invoked women's equal rights with men to determine the number and spacing of their children (Convention on the Elimination of All Forms of Discrimination Against Women, art 16(e)) and the right to the highest attainable standard of health (International Covenant on Economic, Social and Cultural Rights, art 12). However, the frequent references back to national law continued the tradition of deferring to individual states in respect of abortion. As discussed below, various United Nations bodies, especially treaty monitoring bodies, have not only developed the notion that abortion rights may exist as necessary implications of established rights, they have progressively accorded less deference to national law on the matter.

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107 United Nations *Report of the World Conference of the International Women's Year* E/CONF.66/34 (19 June and 2 July 1975) at 88.

108 At 77 and 81.

109 United Nations *Report of the International Conference on Population and Development* A/CONF.171/13/Rev.1 (1995) at [7.2].

110 At [7.2].

111 At [8.25] and see [8.19]–[8.26].

112 United Nations General Assembly *Implementation of the Outcome of the Fourth World Conference on Women: Action for Equality, Development and Peace* A/50/744 (10 November 1995) at [89]–[97].

B Developments in the United Nations

As mentioned, international human rights bodies have increasingly recognised access to abortion as necessary for the observance of other, long recognised, international human rights. There appear to be a number of reasons for this. In particular, the United Nations has recognised that abortion laws across the world have become more liberalised in recent times. At least since 2005, a large number of states, including the majority of developing countries, consider their domestic rates of maternal mortality are unacceptable.[113] This has, perhaps, made the argument that restrictive abortion rights breach international law a more palatable concept for many states. At the same time, restrictive abortion laws affecting a significant portion of the world's population are a concern that simply cannot be ignored at the international level. The World Health Organisation's most recent statistics are from 2008 and estimated that 21.6 million unsafe abortions, resulting in 47,000 deaths, occurred in that year.[114] In 2011, the average unsafe abortion rate was more than four times greater in countries with restrictive abortion laws, and in 2013, the rate of maternal mortality in states with restrictive abortion laws was three times greater than in other states, with 223 deaths per 100,000 live births.[115] In such circumstances, the matter is so serious that it necessarily warrants attention by international bodies.

1 Committee on the Elimination of Discrimination Against Women

The Committee on the Elimination of Discrimination Against Women (CEDAW Committee), which monitors compliance with the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),[116] has emphasised the human rights implications of restrictive abortion laws since the 1990s. In its 1998 report, the CEDAW Committee criticised numerous states for their restrictive abortion laws. The Committee recommended numerous reforms, making a number of comments to the effect that such

113 United Nations Department of Economic and Social Affairs Population Division *Abortion Policies*, above n 11, at 1 and 12–13.

114 World Health Organisation, above n 10, at 1.

115 United Nations Department of Economic and Social Affairs Population Division *Abortion Policies*, above n 11, at 1.

116 Convention on the Elimination of All Forms of Discrimination Against Women 1249 UNTS 13 (opened for signature 18 December 1979, entered into force 3 September 1981).

laws impinge on women's "reproductive rights",[117] their rights to life and to health, and their general right to freedom from sex discrimination especially in relation to health.[118] Then, in 1999, the CEDAW Committee stated in General Comment 24 that the right to health required that "when possible, legislation criminalising abortion should be amended, in order to withdraw punitive measures imposed on women who undergo abortion".[119] The Committee also emphasised that, in order to comply with CEDAW, health services needed to address women's specific health needs, including those related to their reproductive functions.[120]

In 2009, the CEDAW Committee considered abortion rights when it heard the case of *LC v Peru*.[121] LC, a young girl pregnant as a result of rape, attempted suicide leading to serious injuries requiring emergency surgery. Surgery could not be performed unless the pregnancy was terminated. LC's mother requested a legal abortion because the pregnancy posed a serious risk to LC's life and health. The hospital refused to perform the abortion. It was only after LC eventually miscarried that surgery was performed, three and a half months after it was first recommended.

The CEDAW Committee found art 12 of CEDAW (right to equality in healthcare) was breached because LC lacked:[122]

> … access to an effective and accessible procedure allowing her to establish her entitlement to the medical services that her physical and mental condition required. Those services included both the spinal surgery and the therapeutic abortion.

The CEDAW Committee also found art 2(c) and (f) (states to establish legal measures to ensure equal rights for women) had been breached, due to the lack of effective mechanisms to enable the right to an abortion to be exercised

117 Although CEDAW contains no definition of any reproductive rights.

118 United Nations *Report of the Committee on the Elimination of Discrimination against Women (Eighteenth and nineteenth sessions* A/53/38/Rev.1 (14 May 1998) at [109] in relation to Croatia, at [159] in relation to Nigeria, at [201] in relation to Panama, at [284] in relation to New Zealand, at [337] in relation to Peru, at [349] in relation to the Republic of Korea and at [426] in relation to Mexico.

119 Committee on the Elimination of Discrimination Against Women *General Recommendation No 24: Article 12 of the Convention (Women and Health)* A/54/38/Rev.1 (1999) at 7.

120 At 7.

121 Committee on the Elimination of Discrimination Against Women *Views: Communication No 22/2009, LC v Peru* CEDAW/C/50/D/22/2009 (4 November 2011).

122 At [8.15].

under national law. In addition. breaches of art 3 (states to ensure equal enjoyment of rights between women and men) and art 5 (states to eliminate sex-stereotyping) were also found, the latter on the basis that LC was denied an abortion due to gender stereotypes of women as mothers.

The CEDAW Committee's decision confirmed that the denial of abortion could be a breach of recognised treaty rights prohibiting discrimination. However, the CEDAW Committee did point out that LC was entitled to the abortion under Peruvian law. This is important — the decision is less groundbreaking than it seems at first glance, because the CEDAW Committee did not (and was not required to) find a state's abortion law was in breach of international law (and thereby recognise the existence of abortion rights at international level). Instead, all the CEDAW Committee did was find that Peru's failure to observe its *own* abortion law was a breach of treaty rights.

However, over the last few years, the CEDAW Committee has become extremely vocal in the need for states to decriminalise abortion. In 2014, the CEDAW Committee issued a statement in which it interpreted the 1994 ICPD Programme as "recognis[ing] reproductive rights as based on internationally accepted human rights standards … codified in the human rights treaties".[123] It went on to state that the observance of reproductive rights (and, by extension, treaty rights) required the legalisation of abortion "at least in cases of rape, incest, threats to the life and/or health of the mother, or severe foetal impairment" and the decriminalisation of abortion for other reasons. This was a clear statement to the effect that access to abortion, at least in some circumstances, is a requirement imposed by the major human rights treaties.

These concepts were then applied by the CEDAW Committee in 2015, when it considered whether legal restrictions on sexual and reproductive health services (primarily on access to contraceptives) in the Philippines breached CEDAW.[124] The relevant executive order issued by the Philippines government was couched in terms of protecting "pro-life issues and responsible parenthood", with reference to the constitution, which equally protected the life of the

123 Committee on the Elimination of Discrimination Against Women *Statement of the Committee on the Elimination of Discrimination Against Women on sexual and reproductive health and rights: Beyond 2014 ICPD review* (2014).

124 Committee on the Elimination of All Forms of Discrimination Against Women *Summary of the inquiry concerning the Philippines under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women* CEDAW/C/OP.8/PHL/1 (August 2014).

mother and the unborn from conception.[125] The CEDAW Committee held the order was discriminatory (in breach of art 12), in part because it forced women to seek unsafe abortions (abortion is criminalised in the Philippines). Among other things, the CEDAW Committee called upon the Philippines to decriminalise abortion. In respect of the observance of the right to health, the CEDAW Committee referred to General Comment 24 and stated:[126]

> … it is discriminatory for a state party to refuse to legally provide for the performance of certain health services for women … distinctive health features that differ for women in comparison to men include biological factors such as women's reproductive functions. Given that such factors have a bearing on women's reproductive health needs, the Committee considers that substantive equality requires that States parties attend to the risk factors that predominantly affect women.

The CEDAW Committee therefore went where it was not required to go in *LC v Peru* — it held that a state's domestic abortion laws were contrary to treaty rights. By so doing, it recognised the existence of abortion rights at the international level.

The observations of the CEDAW Committee on periodic reports by states have also repeatedly called for relaxation of abortion laws. The CEDAW Committee has generally requested states legalise abortion in cases of risks to a woman's life/health, rape and incest and foetal deformity, and decriminalise abortion in all other cases. There are many examples of this — in 2016 alone the CEDAW Committee, in its concluding observations on periodic reports, called for the legalisation and decriminalisation of abortion in at least twelve different states.[127] In those concluding observations, the CEDAW Committee

125 At 2.

126 At [32].

127 See, for example: Committee on the Elimination of Discrimination against Women *Concluding observations on the seventh periodic report of Argentina* CEDAW/C/ARG/CO/7 (18 November 2016) at [32]–[33]; Committee on the Elimination of All Forms of Discrimination Against Women *Concluding observations on the combined fifth and sixth periodic reports of Burundi* CEDAW/C/BDI/CO/5-6 (25 November 2016) at [38]–[39]; Committee on the Elimination of All Forms of Discrimination Against Women *Concluding observations on the eighth periodic report of Bangladesh* CEDAW/C/BGD/CO/8 (25 November 2016) at [34]–[35]; Committee on the Elimination of All Forms of Discrimination Against Women *Concluding observations on the combined eighth and ninth periodic reports of Bhutan* CEDAW/C/BTN/CO/8-9 (25 November 2016) at [28]–[29]; Committee on the Elimination of All Forms of Discrimination Against Women *Concluding observations on the combined eighth and ninth periodic reports of Haiti* CEDAW/C/HTI/CO/8-9 (9 March 2016) at [33]–[34]; Committee on the Elimination of All Forms of Discrimination Against Women *Concluding observations on the combined*

did not undertake any analysis of how restrictive abortion laws might breach treaty rights — rather, it treated it as axiomatic that such laws are contrary to CEDAW and rights to health. The CEDAW Committee, therefore, appears to no longer feel the need to closely link discussions of abortion with existing rights. There is a greater tendency to treat access to abortion — or at least, reproductive rights — as *obviously* protected by human rights treaties.

2 *The Human Rights Committee*

The United Nations Human Rights Committee (HRC) protects the rights in the ICCPR. Like the CEDAW Committee, within the last decade the HRC has actively criticised restrictive abortion policies, in this case as breaching ICCPR rights. Again, there are more examples than can be discussed here, but a few will suffice. In 2000, the HRC stated that in order to assess compliance with the right to freedom from torture and ill-treatment, it required states parties to provide safe abortions to women pregnant from rape — suggesting a failure to do so breaches that right.[128] Throughout the 2000s, the HRC has criticised a number of states for their restrictive abortion laws, suggesting on many occasions that such laws could breach rights to life, health, privacy, freedom from discrimination and freedom from torture and ill-treatment.[129]

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seventh and eighth periodic reports of the United Republic of Tanzania CEDAW/C/TZA/CO/7-8 (9 March 2016) at [34]–[35]; Committee on the Elimination of All Forms of Discrimination Against Women *Concluding observations on the combined seventh and eighth periodic reports of Japa*n CEDAW/C/JPN/CO/7-8 (7 March 2016) at [38]–[39]; Committee on the Elimination of All Forms of Discrimination Against Women *Concluding observations on the combined seventh and eighth periodic reports of the Philippines* CEDAW/C/PHL/CO/7-8 (25 July 2016) at [39]–[40]; Committee on the Elimination of All Forms of Discrimination Against Women *Concluding observations on the combined fourth and fifth periodic reports of Myanmar* CEDAW/C/MMR/CO/4-5 (25 July 2016) at [38]–[39]; Committee on the Elimination of All Forms of Discrimination Against Women *Concluding observations on the combined fourth to seventh periodic reports of Trinidad and Tobago* CEDAW/C/TTO/CO/4-7 (25 July 2016) at [32]–[33]; and Committee on the Elimination of All Forms of Discrimination Against Women *Concluding observations on the sixth periodic report of the Netherlands* CEDAW/C/NLD/CO/6 (2016) at [37]–[38].

128 See, for example Office of the High Commissioner of Human Rights *General Comment No 28: Article 3 (Equality of Rights Between Men and Women*) CCPR/C/21/Rev.1/Add.10 (2000) at [11].

129 Office of the High Commissioner for Human Rights *Concluding Observations of the Human Rights Commitee: Poland* CCPR/CO/82/POL/Rev.1 (5 November 2004) at [8]; Officer of the High Commissioner for Human Rights *Concluding Observations by the Human Rights Committee: Mauritius* CCPR/CO/83/MUS (27 April 2005) at [9]; *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant:* United Nations *International Covenant on Civil and Political Rights: Concluding Observations of the Human Rights Committee: Ireland* CCPR/C/IRL/CO/3 (30 July 2008) at [13]; and United Nations *International Covenant on Civil and Political Rights: Concluding observations on the sixth periodic report of Ecuador* CCPR/C/ECU/CO/6 (11 August 2016) at [15]–[16].

In its adjudicative function, the HRC has heard some notable abortion cases. In 2005, it considered *KL v Peru*.[130] KL, a 17 year old girl, was pregnant with an anencephalic foetus (a foetus missing a major portion of its brain). Her doctor recommended abortion because the pregnancy endangered her life. Medical personnel refused to authorise the abortion, incorrectly stating that it was unlawful under Peruvian law. KL gave birth to the baby, who died four days later. The HRC held Peru breached art 7 of the ICCPR (right to freedom from torture and ill-treatment) in forcing KL to continue the pregnancy, which caused her grave mental distress and depression upon seeing her daughter's deformities and experiencing the baby's death. Breaches of arts 17 (right to privacy) and 24 (right of minors to adequate protection) were also found.

The HRC issued another decision concerning abortion in 2011. In *LMR v Argentina*, a mentally disabled woman (LMR) was taken to an Argentinian hospital where it was discovered that she was pregnant due to rape.[131] Under Argentinian law, LMR was entitled to a legal abortion, but the hospital refused to perform it, forcing LMR to travel 100 km to another hospital. The second hospital was issued with an injunction before the abortion took place and judicial proceedings were commenced to prevent the abortion. The judge ruled that the abortion should be denied because it was unacceptable to remedy the consequences of rape "with another wrongful assault against … the unborn child."[132] This was overturned on appeal, over a month after the abortion was first requested. Under pressure from Catholic groups, hospitals refused to perform the procedure as LMR was now 20 weeks pregnant. She eventually obtained an illegal abortion.

The HRC found the denial of an abortion breached art 7 (right to freedom from torture and ill-treatment) because of the mental and physical suffering experienced by LMR,[133] and breached art 17 (right to privacy) in unlawfully interfering with LMR's legally protected abortion right.[134] The HRC also found a breach of art 3 (freedom from sex discrimination).[135]

130 United Nations Human Rights Committee *International Covenant on Civil and Political Rights Views: Communication No 1153/2003, KL v Peru* CCPR/C/85/D/1153/2003 (22 November 2005).

131 United Nations Human Rights Committee *International Covenant on Civil and Political Rights: Views: Communication No 1608/2007, LMR v Argentina* CCPR/C/101/D/1608/2007 (28 April 2011).

132 At [2.4].

133 At [9.2].

134 At [9.3].

135 At [9.4].

In the cases discussed above, the HRC suggested that abortion rights might exist as an implication of the rights to privacy, freedom from torture and ill-treatment as well as freedom from sex discrimination. No doubt these are powerful indicators towards recognising rights to abortion. However, there is a significant caveat — in both cases, as in the case of *LC v Peru* before the CEDAW Committee, the abortions denied were legal under the state's laws, and the denial was based on an erroneous belief they were illegal. This is particularly obvious in the findings on privacy: the HRC made clear that the refusal to act in accordance with an individual's private decision to terminate a pregnancy was unjustified *because* the abortion was legal. The HRC did not (because it was not required to) find there was a breach of ICCPR rights due to abortion being illegal under a state party's laws.

However, in 2016, the HRC decided the case of Amanda Mellet.[136] Ms Mellet was denied an abortion under Irish law, even though the foetus had serious birth defects and would die in utero or shortly after birth. She was forced to travel overseas to obtain an abortion, and was not eligible for bereavement counselling or aftercare in Ireland because she had obtained an abortion. The HRC held that even though the abortion Ms Mellet sought was illegal in Ireland, Ms Mellet's art 7 right to freedom from torture and ill-treatment was violated due to the physical and mental suffering she underwent in being forced to continue the pregnancy, and obtain an abortion overseas, without access to adequate support. Furthermore, Ms Mellet's art 17 right to privacy was breached because Irish law had arbitrarily made a decision in respect of her reproductive functions. Finally, Ms Mellet's art 26 right to freedom from discrimination was violated because she was denied the care and support women in her position who carried the foetus to terms would have received, which in turn related to gender-based stereotyping of women as 'reproductive instruments'. Crucially, the HRC explicitly stated that Ireland's own position that its abortion laws struck a fair balance between the rights of the mother and foetus did not mean that those laws could not breach international human rights.

The Mellet case took the HRC further than it had gone in previous decisions. The HRC found a legal refusal of abortion nonetheless violated

136 United Nations Human Rights Committee *United Nations International Covenant on Civil and Political Rights: Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 2323/2013, Mellet v Ireland* CCPR/C/116/D/2324/2013 (17 November 2016).

ICCPR rights, that is, that a states party's abortion laws had constituted breaches of international human rights. This is a significant indication that access to abortion is now recognised as a necessary implication of other treaty rights and states can no longer expect total freedom in regulating abortion.

3 Reports from Special Rapporteurs and United Nations experts

With the Mellet decision and the reports of numerous treaty bodies in favour of recognising abortion rights, 2016 was a crucial year. That same year saw a number of other statements at the international level which considered access to abortion as an international human right. For example, the January 2016 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment highlights the need to specifically consider gender implications when assessing breaches of that right, particularly since the purpose and intent elements of torture are always satisfied when an act is gender specific.[137] The Report then stated that the criminalisation of abortion, as an offence that is aimed solely at women, constitutes a violation of human rights law and that laws prohibiting abortion in cases of incest, rape, foetal impairment or to safeguard the woman's life or health violate the right to freedom from torture and ill treatment.[138] Furthermore, administrative hurdles to access a safe abortion, when that abortion is legal, amounts to torture and ill-treatment.[139] Finally, the Report concluded that "States have an affirmative obligation to reform restrictive abortion legislation that perpetuates torture and ill-treatment by denying women safe access and care".[140]

A similar approach was taken by the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health in the April 2016 report, which explicitly stated denial of access to abortion breached the right to health for adolescent girls, and called on states to decriminalise abortion.[141] Just days later, the report of the Working Group on the issue of discrimination against women in law and in practice referred to restrictive abortion laws as discriminatory and breaching women's

137 United Nations General Assembly *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment* A/HRC/31/57 (5 January 2016) at [5] and [8]–[9].

138 At [43] and [72(b)].

139 At [44].

140 At [44].

141 United Nations General Assembly *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health* A/HRC/32/32 (4 April 2016) at [92] and [113(b)].

human rights, including the right to freedom from torture and ill-treatment. In a strong condemnation of such laws, the Working Group stated:[142]

> Criminalization of termination of pregnancy is one of the most damaging ways of instrumentalizing and politicizing women's bodies and lives, subjecting them to risks to their lives or health in order to preserve their function as reproductive agents and depriving them of autonomy in decision-making about their own bodies. Restrictive laws apply to 40 per cent of women worldwide … Ultimately, criminalization does grave harm to women's health and human rights by stigmatizing a safe and needed medical procedure.

On 27 September 2016, a group of United Nations experts publicly called for the decriminalisation of abortion laws. The powerful statement included the following comments:[143]

> Criminalisation of abortion and failure to provide adequate access to services for termination of an unwanted pregnancy are forms of discrimination based on sex. Restrictive legislation which denies access to safe abortion is one of [the] most damaging ways of instrumentalising women's bodies and a grave violation of women's human rights. The consequences for women are severe, with women sometimes paying with their lives.
>
> […]
>
> We urge States to repeal restrictive laws and policies in relation to abortion, which do not meet the international human rights law requirements and that have discriminatory and public health impacts, and to eliminate all punitive measures and discriminatory barriers to access safe reproductive health services. These laws and policies violate women's human right to health and negate their autonomy in decision-making about their own bodies.
>
> We cannot tolerate the severe violation of women's human rights on the basis of their sex and biological differences. We cannot tolerate the high incidence of women's and girls' preventable deaths resulting from maternity-related issues, including from unsafe abortion.

142 Human Rights Council *Report of the Working Group on the issue of discrimination against women in law and in practice* A/HRC/32/44 at [79]–[80].

143 "'Unsafe abortion is still killing tens of thousands of women around the world' – UN rights experts warn" (27 September 2016) United Nations Human Rights Office of the High Commissioner <www.ohchr.org>.

As can be seen from the above comments, the experts treated it as self-evident that such laws contravene international human rights law, including freedom from discrimination and the right to health.

C Developments outside the United Nations

There have also been developments in this area at a regional level. There have been moves within the American system that indicate a recognition of some right to an abortion. In Europe, there has been a substantial body of case law that has recognised limitation on access to abortion might contravene treaty rights. However, the most dramatic development has occurred in Africa where abortion rights have been given treaty recognition.

1 The American system

In 2008, the IACHR and IACtHR considered the case of "Beatriz", a pregnant El Salvadorian woman who was denied an abortion. The pregnancy endangered her health due to pre-existing medical conditions and because the foetus was anencephalic.[144] The IACHR ordered Beatriz be granted an abortion; El Salvador did not comply with the order, so the IACtHR issued a decision requiring the state to take "all necessary medical measures" to protect Beatriz's right to life and physical integrity.

Similarly, in 2010, the ACHR ordered Nicaragua to treat "Amelia", a pregnant cancer patient, though treatment would induce a miscarriage.[145]

In neither case were the human rights implications of the abortion issue discussed. However, the issuing of orders arguably demonstrates recognition, in both cases, of abortion rights as a requirement of the rights to life and health.

2 The European system

In the 1981 case of *Bruggemann v Federal Republic of Germany*, two women from West Germany applied to the Commission concerning the repeal of liberal abortion laws by a domestic court.[146] The ruling stated that abortions were only permissible within 12 weeks of conception and where the pregnancy

144 Camila Gianella Malca "Upcoming Decision of the Inter-American Court of Human Rights on Access to Therapeutic Abortion?" (21 October 2013) PluriCourts Blog <www.jus.uio.no>.

145 Inter-American Commission on Human Rights "PM 43-10 "Amelia" Nicaragua" Organization of American States <www.oas.org>.

146 *Bruggemann v Federal Republic of Germany* (1978) 10 DR 100 (ECHR).

resulted from rape or caused distress to a woman that could not be averted in any other way. This was based on the recognition of a foetal right to life. The applicants alleged this breached art 8 of the ECHR (right to privacy) by forcing them either to use contraception or abstain from sexual intercourse.

The Commission held that pregnancy, abortion, and sexual life were aspects of private life,[147] but there were limits to private life when it interfered with the rights or interests of others.[148] Pregnancy could not pertain solely to an individual's privacy, because pregnant women's private lives were connected with the foetus.[149] The Commission considered it unnecessary to rule on the question whether the unborn had a right to life under the ECHR, so as to justify an interference in privacy "for the protection of others" under art 8. It noted that international treaties protect certain interests of the unborn (such as the prohibition of execution of pregnant women under art 6(5) of the ICCPR), so a balancing exercise between a woman's right to privacy and the interests of the foetus was necessary.[150] Not every restriction on abortion would constitute a breach of the right to privacy. West Germany's abortion provisions were not sufficiently restrictive to interfere in private life because there were still circumstances where abortions were legal.[151]

This decision recognised restrictions on access to abortion could breach the right to privacy, but there was no indication of when this would be so. Instead, by finding in favour of West Germany, the Commission continued the traditional approach of deferring to domestic law on the issue. By stating that the interests of the foetus were relevant, the Commission implied that the unborn may have some rights, but left it up to national law to decide if this included a right to life and to what extent.

A dissenting opinion held that while it was not conclusive that the right to life did not cover the unborn, the rights and freedoms in the ECHR could not apply to the unborn, as they are of a nature that can only be exercised by born persons, and the West Germany court ruling was an interference of the right to privacy.[152] In a joint separate opinion, three members of the Commission stated

147 At [55].

148 At [59].

149 At [59].

150 At [60].

151 At [61]–[62].

152 Per Mr T Opsahl, joined by MC Nørgaard and L Kellberg.

that "personally" they felt that abortion in the early stages of pregnancy should be a woman's private choice, but could not read this as a requirement for compliance with art 8, partly because the art reflected a viewpoint of privacy that "has been formed mainly by men" and was thus not necessarily suitable to deal with the abortion question.[153] This last point suggests women's rights are only protected to the extent that they overlap with men's rights, so specifically female issues, such as abortion, occupy a grey area in human rights law and are left to be decided by individual states.

In 2007, the ECtHR considered *Tysiac v Poland*, in which a woman was not provided an abortion despite serious risk to her health (the pregnancy resulted in permanent disability).[154] Unlike the HRC cases discussed, the ECtHR did not find that her rights to freedom from inhuman or degrading treatment (art 3) were breached.[155] However, the ECtHR did find that there had been a breach of privacy (art 8), arising from the state's failure to ensure that the complainant was able to undergo an abortion on the basis that the abortion was permissible under state law.[156] Importantly, the required abortion was legal in Poland — the ECtHR therefore did not find that access to abortion would be required under the right to privacy even when the state prohibited that abortion.

A, B and C v Ireland concerned three Irish women who travelled to England to obtain abortions, as they were unable to do so in Ireland.[157] Before the ECtHR, A and B alleged that Irish laws, which did not allow abortion to preserve heath and wellbeing, breached art 8 (right to privacy). The ECtHR held that art 8 did not confer a right to abortion, but reiterated that pregnancy is part of private life and restrictions on abortion interfered with private life.[158] To determine if the interference was unjustified (and so a breach of art 8), the ECtHR examined whether the interference was in accordance with the law and pursued a legitimate aim or was necessary in a democratic society.[159] The ECtHR found that the interference was in accordance with law as the abortions

153 At [3].

154 *Tysiac v Poland* (2007) 45 EHRR 42 (Grand Chamber, ECHR).

155 At [68].

156 At [132].

157 *A, B and C v Ireland* (2011) 53 EHRR 13 (Grand Chamber, ECHR).

158 At [212]–[213].

159 At [218]–[241].

were prohibited under Irish law.[160] The abortion laws pursued a legitimate aim: the protection of Irish moral beliefs.[161] In spite of reviewing national polls and reports that suggested moral beliefs on abortion had changed since the law's enactment, the ECtHR declined to find the beliefs supporting the law were no longer prevalent in Irish society.[162] The ECtHR also found that although Irish abortion laws were more restrictive than is the trend among states parties to the ECHR, the ECtHR would allow a broad discretion to states in legislating on a sensitive and morally charged issue such as abortion.[163] This discretion was not unlimited, but the Irish law still fell within it, and did not violate A and B's art 8 rights.[164] The ECtHR did find a violation of art 8 in relation to C, a cancer patient who had been concerned about the pregnancy's effects on her health, but only because the state had not set up appropriate mechanisms to enable her to determine the risks of her pregnancy and if she would be eligible for a legal abortion under Irish law.[165]

The decision in respect of A and B illustrates the level of deference given to states to legislate on abortion. The test used was inherently paradoxical: abortion laws reflecting Irish moral beliefs pursued a legitimate aim and were permissible in a democratic society because they reflected Irish moral beliefs. Denials of abortion under state law were in accordance with law because state law did not permit those abortions. Using this test, it is hard to envision a circumstance where restrictive abortion laws would ever breach art 8. In spite of appearing to consider abortion laws under the ECHR, the ECtHR in effect simply ruled that the denial of abortion to A and B were legal under Irish law. This decision stands in stark contrast to the HRC's later decision in *Mellet*, in which the HRC did not shy away from finding Irish abortion laws breached the ICCPR, despite the moral beliefs behind those laws.[166]

In *RR v Poland*, RR was informed the foetus she was carrying was likely malformed.[167] Polish law allowed abortions where there was a high risk the foetus

160 At [219]–[221].

161 At [222].

162 At [226].

163 At [235]–[237].

164 At [238]–[241].

165 At [267]–[268].

166 *Mellet,* above n 136.

167 *RR v Poland* (2011) 53 EHRR 31 (Section IV, ECHR).

was severely damaged and could not yet survive outside the mother's body. RR's repeated requests for the relevant genetic tests — and as the pregnancy progressed, an abortion — were denied. When she eventually obtained the tests and discovered the foetus was malformed, it was too late in the pregnancy for a legal abortion to be performed. The Court found a breach of art 3 (right to freedom from torture and ill-treatment) of the ECHR, because RR was in a position of great vulnerability, suffered significant anguish, and was forced to wait for genetic testing (to which she was legally entitled) due to the delay of medical professionals.[168] A breach of art 8 (right to privacy) was also found — the state had interfered in RR's private decision to undergo genetic testing and an abortion to which she should have been legally entitled.[169] The Court stated that while states had discretion under the ECHR to formulate their own abortion laws, once these laws were created, states had to ensure that they were followed.[170] As with the HRC cases, the Court did not suggest that a right to an abortion existed as an implication of other rights. Rather, it simply found that Poland had failed to act in accordance with its own abortion laws.

Despite the conservative approach taken in the decisions discussed above, in 2008 (interestingly, three years before the decision in *RR v Poland*), the Council of Europe took what appears to be a significant step in the direction of recognising abortion rights.[171] First, the Rapporteurs of the European Committees on Equal Opportunities for Women and Men and on Social, Health and Family Affairs recommended that restrictive abortion laws be relaxed because they may cause women to seek illegal, unsafe abortions.[172] The Parliamentary Assembly of the Council of Europe (PACE) then passed a resolution inviting member states to decriminalise abortion "within reasonable gestational limits" and ensure legal abortions were accessible.[173] Both the

168 At [153]–[162].

169 At [192]–[214].

170 At [200].

171 A body overseeing the enforcement of the ECHR, consisting of 47 member states.

172 Gisela Wurm *Access to Safe and Legal Abortion in Europe: Rapporteur of the Committee on Equal Opportunities for Women and Men* Doc. 11537 (Council of Europe, Parliamentary Assembly, 8 April 2008) at [8] and [34]; Christine McCafferty *Access to Safe and Legal Abortion in Europe: Rapporteur of Committee on Social, Health and Family Affairs* Doc. 11576 (Council of Europe, Parliamentary Assembly, 15 April 2008).

173 *Resolution 1607: Access to Safe and Legal Abortion in Europe* (Council of Europe, Parliamentary Assembly, 2008) at [7.1]–[7.4].

Rapporteurs and the Resolution refer to access to abortion as part of the rights of women to personal integrity and autonomy — but make no explicit link between abortion laws and any right in the ECHR or any other human rights instrument. This was perhaps to avoid the implication that becoming a party to a human rights treaty may impose upon states an obligation inconsistent with its national law. While the majority of member states of the Council of Europe do permit abortion in circumstances such as to preserve the life or health of the woman, or in cases of rape or foetal impairment, the specifics of criteria that must be satisfied, and the availability of abortion on wider grounds, such as for social or economic reasons, still vary widely.[174] It would have been politically unattractive to imply the ECHR (or some other treaty) imposed obligations in respect of abortion laws on states. On the other hand, the comments of the Rapporteurs and the Resolution do show some recognition that access to safe and legal abortion can be a right in and of itself.

3 The African system

The Maputo Protocol to the African Charter on Human and People's Rights is the first international treaty recognition of abortion as a human right, both as a necessary implication of existing rights and as a freestanding right.[175] As part of this recognition, the Protocol, unlike the cautious approach of the Council of Europe discussed above, does not merely invite the relaxation of abortion laws; it requires it. Article 14, entitled "*Health and Reproductive Rights*", requires states parties to:

> … protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.

The Protocol was adopted by the African Union in 2003 and entered into force in 2005. As at September 2017, 36 of the 54 parties to the African Charter have ratified the Protocol; an additional 15 states have signed but not ratified the Protocol.[176]

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174 "Abortion Policies: A Global Review", above n 21.

175 Maputo Protocol, above n 106.

176 "Ratification Table: Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa" (2017) African Commission on Human and People's Rights <www.achpr.org>.

The wording of art 14 clearly indicates access to abortion is a necessary aspect of the right to health. The interpretative document to art 14 issued by the African Commission on Human and People's Rights further refers to restrictions on abortion as breaches of the right to enjoy the benefits of scientific progress, the right to freedom from cruel, inhuman and degrading treatment and the rights to life and health.[177] Both this document and the plans of action in respect of the Protocol emphasise the discriminatory impact of restrictive abortion laws; that is, such laws prevent women's enjoyment of existing human rights on the same level as men.[178] On 20 January 2017, the Africa Leaders' Summit on Safe Legal Abortion issued the *Africa Leaders' Declaration on Safe, Legal Abortion as a Human Right* (*Africa Leaders' Declaration)* which, as the title suggests, confirmed the existence of "the right to a safe, legal abortion as a fundamental women's human right in Africa" and required states to decriminalise abortion.[179] This declaration is another bold move in this area — it refers to access to abortion as a human right in and of itself, and not simply necessary for the observation of other human rights.

Why has Africa taken such a decisive step in recognising a right to abortion? According to the *Africa Leaders' Declaration*, the reason is, in part, to address the alarming rate of unsafe abortions on the continent: an estimated six million unsafe abortions in Africa occur each year, resulting in around 29,000 deaths.[180] Sub-Saharan Africa has the highest statistics of maternal mortality in the world, with 987 deaths per 100,000 live births in 1990, since reduced to 846 deaths in 2000 and 546 deaths in 2015.[181] It is important to note the Maputo Protocol and associated documents make clear that women's rights are breached both when the pregnancy itself threatens a woman's life and when a woman is forced to seek an unsafe abortion for any reason. The Protocol is a ground-breaking document — not only the first international

177 African Commission on Human and Peoples' Rights *General comment No 2 on Article 14.1 (a), (b), (c) and (f) and Article 14.2 (a) and (c) of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa* at [31]–[40].

178 African Union *Draft Maputo Plan of Action 2016–2030 for the Operationalisation of the Continental Policy Framework for Sexual and Reproductive Health and Rights*. At this time, only the draft plan of action is available.

179 *The Africa Leaders' Declaration on Safe, Legal Abortion as a Human Right* (Africa Leaders' Summit on Safe Legal Abortion, 20 January 2017).

180 "Maternal mortality fell by almost half between 1990 and 2015" (February 2017) UNICEF <https://data.unicef.org>.

181 "Maternal mortality", above n 180.

treaty recognition of a positive right to abortion, but also one that protects the right to abortion in relatively wide terms.

D Conclusions on the development of abortion rights

The discussion in the second part of this article has shown significant movement towards recognition of abortion rights at an international level. The United Nations has made clear indications that restrictive abortion laws do breach a number of existing, well-recognised treaty rights, particularly through the decisions and reports of the CEDAW Committee and HRC. This is consistent with the decisions of adjudicative bodies in the Americas and Europe. Finally, and most dramatically, the step of enshrining abortion rights in a treaty has been taken in Africa. The movement towards recognising abortion rights indicates that the traditional approach of leaving contentious issues like abortion to states' discretion has been qualified by public health concerns; in particular, maternal mortality.

Certainly, abortion rights have developed in a back door manner. It is unlikely states considered, when they ratified treaties containing rights such as to health, privacy and freedom from torture, that those rights also required access to safe and legal abortions. Furthermore, when states did directly consider abortion while drafting treaties, they deliberately left the matter ambiguous on the plain wording of those treaties. It is therefore potentially unattractive to now interpret treaties in a manner that binds states to obligations they did not expect to have when they ratified the relevant treaties. Surely the drafters of the ICCPR, who took such care in leaving the abortion question ambiguous on the plain wording of the rights to life, would be surprised to find other rights in the same treaty require access to a safe and legal abortion.

On the other hand, given the grim statistics of maternal mortality and unsafe abortion, reading abortion rights as incidental to other rights, which the majority of states are already bound by, is a useful way for international bodies to require action to be taken in this area, especially by states that would never sign up to a treaty that explicitly provided for abortion rights. There is also nothing inherently wrong with applying the international human rights treaties to address current global concerns; the drafters of those treaties could never have expected that they had considered every single scenario to which the treaty would apply.

IV CONCLUSION

The role international law should play in regulating abortion has been a live issue since the inception of the modern human rights system; it continues to be contentious and frequently raised, particularly given the global health issue posed by unsafe abortion.

International law's attitude towards abortion is a case study in the flexibility of international human rights law and its ability to change over time to address current concerns. As the first part of this article has discussed, the drafters of the major human rights treaties deliberately left the question of abortion open through ambiguous wording — in particular, the extent to which the right to life applies before birth. Whether abortion was to be permissible under international law was originally a matter left up to individual states. The American and European human rights case law emphasised this. The travaux préparatoires of the various treaties are replete with concerns that if treaties explicitly took a stance on the matter, this would be a barrier wide ratification. International law, after all, is a consensual system — worthless if states do not agree to be bound by treaties.

However, over time, international bodies have been unable to stay silent in the face of the growing push for the recognition of women's rights and alarming global statistics of maternal mortality and unsafe abortion. This developed from an interpretation of existing treaty rights — such as to life, health, privacy and freedom from torture and ill-treatment — as requiring access to a safe and legal abortion. Though it means reading abortion rights into existing rights, which was likely never intended, at the time treaties were concluded, international bodies will not shy away from doing so.

Given that there has been wide recognition, at the international level, of restrictive abortion laws breaching existing rights, it appears appropriate that an international treaty enshrining this position should be enacted at the United Nations level. This would prevent the need for international bodies to reference various documents (including treaties, periodic reports or previous statements) for the proposition that abortion rights exist. Of course, there is no guarantee a treaty containing abortion rights would be widely ratified (or observed by ratifying states). However, it would at least have the advantage of clarifying the position at international level — something that appears to be sorely needed, given the amount of attention given to this matter within the past few decades. It would also address the potential disingenuousness of

interpreting existing treaties, which do not explicitly mention abortion, as protecting abortion rights. Specific treaty recognition of abortion rights would also provide such rights greater legitimacy and moral force, and political pressures may indeed entice otherwise unwilling states to ratify the relevant treaty. This is particularly important given the increasing global trend towards the relaxation of abortion laws and the clear concerns about abortion repeatedly raised at international level.

Whether it continues to treat abortion rights as aspects of existing rights, or takes the step of enshrining such rights in a treaty, it is important that international human rights law continues to address issues around access to abortion. After all, how can access to abortion be anything but a human rights issue, so long as people like Savita Halapannavar continue to suffer, and die, due to restrictive domestic abortion laws.

LEGISLATION NOTE

‘OKU HANGE ‘A E TANGATA, HA FALA OKU LĀLANGA[1]

— Pacific people and non-violence programmes under the Domestic Violence (Amendment) Act 2013

Helena Kaho*

A variety of factors place Pacific women at high risk of experiencing domestic violence in their lives. This article discusses the mandatory non-violence programmes for perpetrators under the Domestic Violence (Amendment) Act 2013 in light of the pan-Pacific value of collectivism. It argues that non-violence programmes reflect an individualistic approach that is at odds with the ethos of collectivism. These programmes ultimately fail to harness the protective and preventive potential of Pacific communities in changing violent behaviour.

I MANDATORY PROGRAMMES UNDER THE DOMESTIC VIOLENCE ACT 1995: A ‘ONE SIZE FITS ALL’ MODEL

Mandatory “stopping violence” programmes for perpetrators of domestic violence (or respondents) were introduced in New Zealand by the Domestic Violence Act 1995 (DVA).[2] In conjunction with protection orders, domestic

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1 A Tongan saying: ‘humankind is a mat being woven’. The term ‘Pacific’ is used to refer to people from the Pacific islands nations who live in New Zealand. Pacific people are not a homogeneous group, with the seven largest Pacific ethnic groups in New Zealand being Samoan, Cook Islands Māori, Tongan, Niuean, Fijian, Tokelauan and Tuvaluan. While there are significant differences between the ethnic groups, common core values are identifiable, one of these being the centrality of relationships in the worldview of many Pacific cultures. As the writer is of Tongan descent, a Tongan expression of this view was chosen to ground this commentary.

2 As the mandatory programmes are ordered following the court granting a protection order, this paper refers to the perpetrator of the violence as the respondent.

violence programmes for respondents and protected persons were part of the legislative toolkit for achieving the objectives of the DVA, being protecting victims of violence and reducing and preventing violence in the home.[3] Conceived initially as a type of counselling, the programmes evolved through the parliamentary process to encompass a broad range of educational functions,[4] reflected in the now revoked Domestic Violence (Programmes) Regulations 1996 (the Regulations). Mandatory programmes for respondents were required to "have the primary objective of stopping or preventing domestic violence on the part of [the respondent]".[5]

The programmes were expected to change the behaviour of respondents by increasing understanding about: the nature and effects of domestic violence; the objects of the DVA, effect of protection orders and consequences of breaching them; the social, cultural and historic context in which violence occurs; the impact of domestic violence on victims and children; the effect of abusive behavior on victims; and by helping respondents develop skills to deal with potential conflicts in non-abusive ways.[6]

Ultimately, the programmes were intended to effect positive changes to respondents' behaviour and to achieve the statutory objectives of stopping and preventing violence.[7]

The DVA relies heavily on the efficacy of domestic violence programmes to change respondents' behaviour. This was reflected in the prescriptive nature of the Regulations, which stipulated the number of programme sessions a respondent had to attend, the number of hours group programmes had to run, hours allowed per session, and the maximum number of participants in a group.[8] Programmes had to "involve the use of well-founded methodologies which have been shown to be effective in stopping or preventing domestic

3 Section 32(1) of the Domestic Violence Act 1995 states "[o]n making a protection order, the court *must* direct the respondent to attend a specified programme, unless the court considers that there is good reason for not making such a direction" (emphasis added). Section 32(1) of the DVA was repealed on 1 October 2014. The version cited is as at 31 March 2014. Section 5 of the DVA sets out the statutory objectives.

4 Domestic Violence (Programmes) Regulations 1996, reg 32(1).

5 Regulation 32(1).

6 Sub-regulations 2(a)–(f).

7 Regulations 32(2)(a)–(f).

8 Regulation 33(b).

violence".[9] To this end, elements of two mainstream violence intervention frameworks — the Duluth feminist psycho-educational model and cognitive behavioural therapy (CBT) — informed many of the programmes. [10]

The Regulations made express provision for Māori programmes.[11] There was also room for culturally sensitive programmes for other ethnic groups to be approved, with the programme approval panel required to take into account relevant values and beliefs "of any other cultural or ethnic group".[12] Pacific programmes, though few, were available for Pacific respondents, and were based on generic Pacific format and content. In a review of the Family Court during 2011 and 2012, the stopping violence programmes were criticised for providing a 'one size fits all' model.[13] The review suggested that programme results could be improved if they were delivered with more flexibility, and were better tailored to the needs of individual respondents.[14]

II THE DOMESTIC VIOLENCE (AMENDMENT) ACT 2013: BEYOND THE 'ONE SIZE FITS ALL' MODEL

The Domestic Violence Amendment Act 2013 (DVAA) was enacted with a focus on improving safety for protected persons and children, holding respondents accountable for their actions, and providing more flexible, evidence-based and responsive services.[15] In addition to sweeping changes made to the programme provider approval process, the programmes were renamed "non-violence programmes", and several other key measures were implemented. Respondent accountability was increased through mandatory reporting requirements for respondents who do not attend the non-violence programmes, with failure

9 Regulation 33(e).

10 Department of Corrections *Community-based Domestic Violence Interventions: A Literature Review* (2012) at [5].

11 Regulation 27.

12 Regulations 21–25. Under reg 47(2)(d), the approval panel was also required to have at least two members who have expertise in Pacific culture, and knowledge and understanding of the impact of domestic violence on Pacific communities.

13 Ministry of Justice *Family Court Review: Regulatory Impact Statement* (August 2012) at [11].

14 Department of Corrections *Community-based Domestic Violence Interventions: A Literature Review* (2012) at [67]. See also [5], "Assessments of Duluth-type and cognitive behavioural programmes" or programmes that combine the two approaches "show few significant … differences in effectiveness between programme types. At best programmes appear to have a weak positive impact on recidivism rates."

15 Ministry of Justice *Changes to Domestic Violence Programmes* (2014) at [1.2.2].

to comply with court directions to attend a programme punishable by imprisonment.[16]

Under the DVAA, the programmes retain the primary objective of stopping or preventing domestic violence.[17] On making a protection order, the court must now direct respondents to undertake an assessment with a service provider and subsequently attend a mandatory non-violence programme.[18] The purpose of the assessment is to ascertain the respondent's motivation level and risk profile, and to determine the appropriate duration, content, delivery and style for the non-violence programme.[19] The terms of attendance will be agreed upon and documented.[20] During the assessment, the views of the protected person can be taken into account in assessing risk and as an important source of information on the offending.[21] The reforms mean that based on the assessment of risk and need, respondents can attend a mixture of individual and group module sessions, with family sessions scheduled if deemed safe and appropriate.[22]

In terms of ascertaining and catering for the treatment needs of individuals, the changes signal a welcome improvement on the 'one size fits all' approach under the DVA and Regulations. The assessment, flexible nature of programmes and ability to tailor them has the potential to reflect movements in the health, mental health and education fields towards developing specific conceptual frameworks for each Pacific culture, rather than relying on generic Pacific frameworks and modes of delivery.[23] However, despite the reforms, at a fundamental level the non-violence programmes remain an inadequate measure to effectively address violence in Pacific communities.

16 DVAA, s 51Q(2). See generally DVAA, ss 51N–51Q.

17 DVA, s 5(1); DVAA, s 51A.

18 DVAA, ss 51D(1) and 51H.

19 Section 51A.

20 Section 51L.

21 Ministry of Justice *Changes*, above n 15, at [2.3.3(c)].

22 At [2.3.5].

23 The framework is intended to guide policymakers and assist with training providers who work with Pacific communities. For a cultural framework for addressing family violence in seven Pacific communities in New Zealand, see Pacific Advisory Group *Nga vaka o kāiga tapu: A Pacific Conceptual Framework to address family violence in New Zealand* (Ministry of Social Development, March 2012) at 2.

III SAME MAT, DIFFERENT TEXTURES: THE DIVERSITY OF PACIFIC PEOPLES

As noted above, 'Pacific people', in the sense of a homogenous ethnic group, do not exist. 'Pacific' is an umbrella category used to refer to diverse Pacific ethnic groups for policy making purposes. While there are commonalities between Pacific groups in New Zealand — shared ancestry, histories and origins, core values and traditions — each ethnic group has its own distinct, unique and cherished culture.[24] Hierarchies and sub-groups also exist within the ethnic groups, comprising for example, people born or raised in New Zealand, people born or raised overseas, and people who identify with multiple ethnicities.[25] People may also align themselves at different times along ethnic, geographic, church, family, age, gender, island-born/New Zealand-born or other lines.[26]

IV PACIFIC PEOPLES AND DOMESTIC VIOLENCE

Although domestic violence has long been identified as a significant issue for Pacific people as both perpetrators and victims of family violence,[27] it is difficult to ascertain whether there are significant differences in rates of offending between ethnic groups, as statistics are aggregated under the umbrella 'Pacific' category. Although concerning, the statistics have not always matched concerns voiced by the Pacific community about high levels of familial violence. This suggests that underreporting is an issue, and that rates of violence may be far greater than statistics reflect.[28] Pacific people are vulnerable in the face of factors that may increase the likelihood of violence occurring. The highest rates of partner abuse "tend to be found among young families with small children

24 Colin Tukuitonga and Sitaleki A Finau "The health of Pacific peoples in New Zealand up to the early 1990's" (1997) 4(2) Pacific Health Dialog 59 at 59. See also Ronji Tanielu and Alan Johnson *More Than Churches, Rugby & Festivals: a report on the state of Pasifika people in New Zealand* (Salvation Army Social Policy and Parliamentary Unit, 2013) at 7.

25 Tukuitonga and Finau, above n 24, at 60.

26 Melani Anae and others *Pasifika Education Research Guidelines: Report to the Ministry of Education* (Auckland Uniservices, 3 December 2001) at 7.

27 *Nga vaka o kāiga tapu,* above n 24, at 13.

28 Roine Lealaiauloto and Geoff Bridgman "Pacific Island Postnatal Distress" (1997) 4(2) Mental Health Quarterly 20. See also *Te Rito: New Zealand Family Violence Prevention Strategy* (Ministry of Social Development, February 2002); Talia Shadwell "Domestic violence within Pasifika community drops" (23 October 2015) Stuff <www.stuff.co.nz>; and *2014 New Zealand Crime and Safety Survey: Main Findings* (Ministry of Justice, 2015).

from low socio-economic backgrounds".[29] New Zealand's Pacific population is youthful[30] and Pacific people have the lowest median weekly income of all ethnic groups.[31] Pacific families face a raft of other pressures that impact negatively on their wellbeing and may contribute to rates of domestic violence, such as low educational achievement, inadequate housing, poor health and high rates of substance abuse.[32] Pacific women, mothers in particular, may face unique challenges that increase the likelihood of experiencing domestic violence,[33] and have been identified as less likely than other ethnic groups to report family violence or access support services.[34] Cultural attitudes towards violence also play a part, with some research suggesting that compared with non-Pacific groups, Pacific communities are more likely to tolerate violence or view it as being normal.[35]

V A CRITIQUE OF THE NON-VIOLENCE PROGRAMMES: A PACIFIC PERSPECTIVE

A The Need to Address the Collective

The focus of the DVAA's non-violence programmes is on treating the individual respondent. However, effective domestic violence interventions require a comprehensive understanding of the broader context in which domestic violence occurs. For Pacific peoples this will involve: taking into account the collective nature of Pacific cultures and the web of relationships that surrounds Pacific peoples; developing interventions that work at both an individual and familial level; and considering the respondent's connections (or

29 Denise Lievore and Pat Mayhew *The scale and nature of family violence in New Zealand: A review and evaluation of knowledge* (Ministry of Social Development, April 2007) at 7.

30 *2013 Census QuickStats about culture and identity* (Stats NZ). See also *The Profile of Pacific Peoples in New Zealand* (Ministry of Social Development, September 2016) at 3.

31 Ronji Tanielu and Alan Johnson *This Is Home: an update on the state of Pasifika people in New Zealand* (Salvation Army Social Policy and Parliamentary Unit, May 2014) at 23.

32 Janis Paterson and others "Intimate Partner Violence Within a Cohort of Pacific Mothers Living in New Zealand" (2007) 22(6) Journal of Interpersonal Violence 698 at 700.

33 At 701.

34 'Ana Hau'alofa'ia Koloto and Sashi Sharma "The Needs of Pacific Women when they are Victims of Family Violence" (2005) 26 Social Policy Journal of New Zealand 84 at 90.

35 Wanzhen Gao and others "Pacific Island Families Study: Intimate Partner Violence and Postnatal Depression" (2010) 12 J Immigrant Minority Health 242 at 243. See also Lievore and Mayhew, above n 29, at 10 and Koloto and Sharma, above n 34, at 90.

lack thereof) with extended family, church and community.[36] Understanding these relationships is important because the family and community may be "directly and actively involved in dynamics of abuse" through directly or tacitly supporting it, or through intervening or providing a preventive function.[37]

Approaches that focus on resolving problems at an individual level run counter to core Pacific values and lived experience as part of a wider collective, whether that collective is family-based, community-based, church-based or otherwise. A culturally appropriate approach that recognises the centrality of the collective would expand services and resources beyond a focus on the victim/perpetrator paradigm to include extended family, and other important groups. Being central to Pacific lives, these groups possess great power to influence behaviour and attitudes, and to reinforce the treatment and learning that may be undertaken on an individual basis in the non-violence programmes. In order to stop and prevent violence, shifts in patterns of human behaviour must occur. For Pacific people, this requires not just mandatory non-violence programmes for the respondent, but ideally, ongoing interventions and holistic reinforcement of the anti-violence messages within wider community groups.[38] Empowering communities to disrupt the patterns of violence on an ongoing basis could be a powerful weapon against violence, especially where victims may be reluctant to involve the Police or social services. Families and communities can protect the victim and challenge the perpetrator's behaviour. Moreover, the centrality of the collective in Pacific cultures means that collective disapproval or sanction may carry significant weight for Pacific respondents — a deterrent factor that is not harnessed by programmes focused on the individual.

In the context of domestic violence, Pacific cultures and communities must not only be considered and understood in terms of their role in perpetrating or tolerating violence, but also in light of their potential as agents of change.[39]

36 An example of this approach is the Ministry of Social Development funded 'Pasefika Proud' campaign against domestic violence in Pacific communities. The campaign is designed, delivered and led by Pacific peoples, and draws on the combined efforts of families, churches, communities and service providers to prevent and address violence.

37 Mimi Kim *Innovative Strategies to Address Domestic Violence in Asian and Pacific Islander Communities: Examining Themes, Models and Interventions* (Asian & Pacific Islander Institute On Domestic Violence, February 2010) at 4.

38 Such as in the Pasefika Proud campaign.

39 The Pasefika Proud campaign acknowledges that Pacific cultures are a strength that can be used positively to prevent violence within families. See also Kim, above n 37, at 26.

Employing an individualistic treatment framework (as is manifested in the non-violence programmes) alone will not reach Pacific respondents in the ways their communities can. Where cultural contexts, norms and values are a factor in the prevalence and patterns of abuse, they must also be part of the solution.

Developing effective interventions for Pacific peoples that draw on wider circles of connection is not without its challenges. This is especially because acculturation has an impact on domestic violence.[40] Migration and adaptation to the New Zealand way of life has brought changes to traditional Pacific family structures and relationships with loss of kinship ties and family support structures. The attenuation of these links may exacerbate women's isolation and vulnerability to violence.[41] Pacific communities now comprise recent and older migrants and several generations of New Zealand-born people. Intergenerational attitudinal differences, lack of communication and understanding, cultural differences and changes to traditional gender roles can cause tension in families and undermine traditional structures of authority and meaning.[42] Some of these factors can be drawn out during individual assessments, with the respondent's cultural identity and levels of connection to their communities forming a key part of the information ascertained.[43]

B Addressing the Role of Culture in Relation to Domestic Violence

The role of culture in relation to gendered family violence must also be examined, with traditional attitudes around gender roles, often reinforced by religious beliefs, leading to tolerance of violent behavior in some communities. A clear understanding of traditional perspectives on gender roles, and whether they have any bearing on people's attitudes towards domestic violence is imperative. In developing this understanding, a pan-Pacific approach is not appropriate. Each Pacific culture must be evaluated with regard to the traditional and contemporary status of women, the influence of religion and other factors, and how these factors influence understandings of, and attitudes towards, domestic

40 Janis and others, above n 32, at 700.

41 *Addressing Family Violence within Pacific Families and Communities: Programme of Action for Pacific Peoples* (Taskforce For Action On Violence Within Families, 2009) at 1.

42 At 17.

43 Identification and levels of connection with culture have been identified as impacting upon holistic wellbeing from a Pacific perspective. See for example, Sam Manuela and Chris G Sibley "The Pacific Identity and Wellbeing Scale – Revised: (PIWBS-R)" (2015) 21(1) Cultural Diversity and Ethnic Minority Psychology 146.

violence. Community education with culturally tailored content, developed and delivered by Pacific people, is one way to equip communities to combat domestic violence on an ongoing basis.[44]

VI TOWARDS INCORPORATING PACIFIC FRAMEWORKS IN THE NON-VIOLENCE PROGRAMMES

The 2013 amendments to the DVA enhanced the scope for non-violence programmes to be individually tailored to respondents' needs. This might be perceived as a further step in the right direction for Pacific communities — after all, ensuring that programmes address respondents' unique needs is important. However, there is a fundamental cultural dissonance between the atomised, individualistic approach of the non-violence programs under the DVA, and the collective-focused interventions and policies that are being developed and delivered by Pacific providers, communities and churches. Pacific worldviews are grounded in a collective approach, girded by a complexity of relationships between people, their families and the community, and reflecting key values and practises around collectivity and reciprocity. This differs significantly from a Western worldview, where the focus on the self as an individual, rather than on the collective, is prioritised.[45] Evaluating respondents' needs on a purely individual basis without taking into account the Pacific relational worldview leaves the preventive aspects of relationships beyond the individual and nuclear family unaddressed. On a deeper level, doing so overlooks the very foundations of Pacific cultures in favour of a Western treatment model. It is not an easy task to reconcile the differing cultural frameworks, particularly where the relevant legislation reflects one perspective, but policy directions reflect another. However, it is imperative that these fundamental cultural differences are acknowledged and addressed in future legislation, so that there is a clear steer on the focus for research and policy. This will be important for finding long-term solutions to domestic violence against women in Pacific communities.

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44 See, for an example of this type of initiative, the Kainga Tu'umalie programme run by Affirming Works. Kainga Tu'umalie is a faith-based programme aligned with the conceptual framework discussed in *Fofola e fala kae talanoa e kāinga: A Tongan Conceptual Framework for the prevention of and intervention in family violence in New Zealand – Fāmili lelei* (Ministry of Social Development, March 2012) at 9.

45 *Talking Therapies for Pasifika Peoples: Best and promising practice guide for mental health and addiction services* (Te Pou o te Whakaaro Nui, Auckland, 2010) at 14.

This commentary began with a saying: "*Oku hange ʻa e tangata, ha fala ʼoku lālanga:* humankind is a mat being woven". The expression captures the essence of connectedness and the collective experience of being that is central to most Pacific cultures. By itself, a strand of pandanus leaf has no purpose. It is only as part of something greater, the *fala*/mat, that the strand fulfils its potential. As a mat is woven, each strand supports and is simultaneously supported by other strands. Every individual strand is intrinsically important, but only as a part of the greater whole. Similarly, Pacific people cannot be viewed in isolation from their families, communities, and faith-based and other networks they belong to. These connections must be recognised and reflected in domestic violence interventions for Pacific people if the interventions are to work.

BOOK REVIEW

FEMINIST JUDGMENTS OF AOTEAROA NEW ZEALAND TE RINO: A TWO-STRANDED ROPE

Dr Bridgette Toy-Cronin*

The idea behind the Aotearoa Feminist Judgments Project is simple, yet powerful: "Imagine a feminist judge sitting on the bench alongside the original judge/s in a particular case. How might she have decided the case and written her decision?"[1] The collection consists of 25 judgments: 19 are feminist judgments (the Pākehā muka (strand)), and six came to be known during the project as the mana wahine judgments (the Māori muka). Carefully integrated and yet separate, together they create a strong and cogent two-stranded rope — *Te Rino*.

The collection is edited by Aotearoa legal academics Elisabeth McDonald and Rhonda Powell from University of Canterbury, and Māmari Stephens from Victoria University of Wellington. They are joined by international editor Rosemary Hunter, from Queen Mary University of London. Hunter brings to the project her wealth of experience from other countries' feminist judgment projects, including her leading role in the English[2] and Australian[3] projects, and providing support to the Northern/Irish, Indian and United States feminist judgment projects.[4]

The concept for *Te Rino*, as with the other countries' projects that preceded it, is that authors write their judgments within the constraints of the

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1 Elisabeth McDonald, Rhonda Powell, Māmari Stephens, and Rosemary Hunter (eds) *Feminist Judgments of Aotearoa New Zealand Te Rino: A Two-Stranded Rope* (Oxford, Hart Publishing, 2017) at 25.

2 Rosemary Hunter, Clare McGlynn and Erika Rackley (eds) *Feminist Judgments: From Theory to Practice* (Oxford, Hart Publishing, 2010).

3 Trish Luker and Rosemary Hunter (eds) *Australian Feminist Judgments: Righting and Rewriting Law* (Oxford, Hart Publishing, 2014).

4 McDonald, Powell, Stephens and Hunter, above n 1, at 6, n 7.

"precedent, legislation, style and relevant legal and social science research, which existed at the time".[5] Within those limits, the judgments are then "exercises in imagination, designed to make us see possibilities in law that, arguably, the original judges in these cases may not have seen".[6] The judgments in *Te Rino* span 100 years, from the 1914 decision of *Waipapakura v Hempton*[7] to the 2015 decisions of *Taylor v Attorney-General*,[8] *Seales v Attorney-General*,[9] and *R v S*.[10] As anyone who is familiar with those decisions will recognise, the feminist judgments in this volume are not just those that "have historically been the focus of feminist critique, such as criminal, employment and family".[11] While the volume does contain judgments from those areas of law, it also encompasses judgments on civil rights,[12] social welfare,[13] medical law,[14] customary rights,[15] and the environment.[16] The focus of the feminist perspective ranges from female litigants (defendants and appellants), through to the environment in 'Justice' Wheen's ecofeminist approach to *Squid Fishery Management Company Ltd v Minister for Fisheries*,[17] and to Papatuaūānuku in *Bruce v Edwards*.[18] The project engages with judgments from all levels of our courts, as well as the Human Rights Review Tribunal. Each judgment is preceded by a commentary discussing the broader societal context of the original judgment and explaining the judgment writers' approach.

As the editors point out in Chapter 3, there are a number of unifying themes across the judgments.[19] First, anti-subordination — that is, "a concern

5 At ix.

6 At ix.

7 *Waipapakura v Hempton* (1914) 33 NZLR 1065 (SC).

8 *Taylor v Attorney-General* [2015] NZHC 1706.

9 *Seales v Attorney-General* [2015] NZHC 1239.

10 *R v S* [2015] NZHC 801.

11 At 8.

12 *Taylor v Attorney General*, above n 8; *Brooker v Police* [2007] NZSC 307.

13 *Ruka v Department of Social Welfare* [1997] 1 NZLR 154 (CA); *Lawson v Housing New Zealand* HC Auckland M538/94, 29 October 1996.

14 *Seales v Attorney-General*, above n 9; *Hallagan v Medical Council of New Zealand* HC Wellington CIV-2010-485-222, 2 December 2010; *Re W [PPPR]* (1993) 11 FRNZ 108.

15 *Bruce v Edwards* [2002] NZCA 294; *Waipapakura v Hempton*, above n 7.

16 *Squid Fishery Management Company Ltd v Minister of Fisheries* CA39/04, 7 April 2004; *West Coast ENT Inc v Buller Coal Ltd* [2013] NZSC 87.

17 At 361–384.

18 *Bruce v Edwards*, above n 15.

19 McDonald, Powell, Stephens and Hunter, above n 1, at 3235.

that legal rules should not perpetuate structures of male power and female subordination".[20] Second, a critique of the public/private distinction and recognition of the value of home, privacy and care. Third, a critique of the balancing of rights and the tendency to accord more weight to rights that are more important to men. Fourth, the feminist ethic of care, applied not only to people, but also to the environment and non-human animals.

There are reminders, as the editors note from the outset, that there is no single feminist approach: "feminism is not monolithic. There are multiple strands within feminist legal theory and the judgments do not take a uniform position".[21] This is illustrated by the judgment in *Seales v Attorney-General*,[22] which shows that, even within one strand of feminist thinking, diverse approaches might be taken. Citing academic Carol Gilligan's work, 'Justice' Manning applies the feminist ethic of care, observing:[23]

> As society's primary caregivers, many women tend to define themselves first and foremost in terms of their family's needs. When they become elderly or suffer from a debilitating condition or disability, and are themselves in need of care, they may find it difficult to accept the role reversal in being cared for. The inculcated response of self-sacrifice and the fear of being an emotional, financial and time-consuming burden to their families, whose interests they are used to putting first over a lifetime, makes them vulnerable to feel pressure to take the assisted dying option, even if they are initially ambivalent or they do not yet wish to die.

Her solution is that, to protect women, suicide should continue to be criminalised.[24] This judgment illustrates that within a single branch of feminist theory, such as the ethic of care, it is possible for different conclusions to be drawn — in this case a kind of paternalism that many strands of feminism would reject.

Te Rino is feminist not only in content but also in the way in which it was produced. The project was collaborative, bringing together many authors and supporters, both individuals and organisations. There are 57 contributors to this volume: four editors, who also authored contributions, and 53 other authors, with "most senior women law academics in New Zealand" involved in

20 At 32.

21 At 32.

22 At 125.

23 At 137.

24 At 134–142.

some way, as well as practitioners and a number of junior women academics.[25] There are also several males among the contributors, including the unique contribution of retired Family Court Judge John Adams, who rewrote his own judgment.[26] This demonstrates, as Māmari Stephens observes, that to engage in applying different ways of looking at the law, "We don't need qualifications of learning or ethnicity or gender, so much as a commitment to being *open*".[27] Funding was provided by the New Zealand Law Foundation, which assisted the authors to meet face-to-face in workshops to engage in a "collaborative writing process, drawing on feminist (collective) methodology".[28]

The most distinctive contribution is the development of the mana wahine judgments. Māmari Stephens provides a fascinating glimpse into the production of these judgments in the first introductory chapter.[29] She writes about her experience in the Māori Women's Refuge and discovering the value of "Māori having space to do important things in Māori ways without needing the permission, oversight or approval of Pākehā women".[30] This insight is carried over into the development of the mana wahine judgments in *Te Rino*, which, although intertwined with the Pākehā judgments, sit separately. The mana wahine commentary and judgments are marked with shaded grey boxes to highlight the difference between this muka and the pākehā muka. It strives to be "a model for intersectionality in practice",[31] recognising that Māori women experience sexism and discrimination "based on ethnic or cultural identity, as well as deprivation and marginalisation based on the legacy of colonialism".[32] Stephens, discussing the purpose of the mana wahine judgments, suggests they "bring the complex and contradictory lives of Māori women to the fore" but also "legitimise Māori ways of thinking and cultural practice", not only for the benefit of Māori women, but "ultimately for all Māori".[33] The most significant

25 At 8.

26 *V v V* [2002] NZFLR 1105 (FC).

27 At 5.

28 At xi.

29 There are three introductory chapters in total: 1) an overview of the editors approach to the project; 2) explaining Māori legal concepts to any international readers; and 3) the history of the international feminist judgments project, and an overview of the judgments and the development of the mana wahine judgments.

30 At 5.

31 At 28.

32 At 42.

33 At 10.

contribution of this volume, in terms of its place internationally, is that it may "feed into the possibility, as yet inchoate, of an international indigenous judgments project".[34]

Another particularly local insight that the book provides is its discussion of the way that our judges are trained to write judgments. Margot Schwass provides training for the New Zealand judiciary on judgment writing, and she was employed to train the authors of the *Te Rino* judgments. The editors recount that the training focussed on writing "issues-driven judgment", as an "issues-based structure works well for writers and readers as it results in a clear, succinct and readable judgment".[35] This approach is, however, the antithesis of the feminist approach, as Rosemary Hunter notes:[36]

> … the emphasis on clear issue-identification, minimal factual description and parsimony in reasoning, militated against many of the things we were trying to achieve as feminist judges.

The feminist approach, as is illustrated in many of the judgments in this collection, begins with acknowledgment of the participants and a focus on the story at the outset of the judgment, not with legal issues.

Direct engagement with the people in court is part of feminist judging and is also a feature of therapeutic and procedural justice approaches to judging.[37] It is a method designed to involve people in the justice process and acknowledge them as people, rather than abstracting them to their procedural role — defendant, appellant, or victim, for example. The opening acknowledgment in *Ruka v Department of Social Welfare* is particularly illustrative of that approach. 'Justice' Stephens, after acknowledging her fellow judges in Te Reo and English, opens her judgment as follows:[38]

> My learned friends have recounted in some considerable detail the extraordinary extent of the abuse Ms Ruka experienced between 1974 or 1975 and 1992. I need not revisit those accounts in detail; but I hope that Ms Ruka will now have the opportunity to lead a very different kind of life to

34 At x.

35 At 10.

36 At 14.

37 Rosemary Hunter, Sharyn Roach Anleu and Kathy Mack "Judging in lower courts: Conventional, procedural, therapeutic and feminist approaches" (2016) 12(3) Int J Law Context 337 1.

38 At 94.

> that which led her here before us.
>
> Kia hora te marino
>
> Kia whakapapa pounamu te moana
>
> Kia tere te karohirohi
>
> Let the calm be widespread,
>
> Let the ocean lie flat,
>
> May it shimmer.

This is an affecting and powerful opening; a letting out of breath, a gathering in, a signal of hope. The acknowledgement and engagement of the participants in the justice process is also achieved by giving participants pseudonyms to humanise them. In *Re W [PPPR]*,[39] for example, the pseudonym "W" from the original judgment is replaced with the pseudonym "Katrina Williams", which helps to focus the judgment on Ms Williams, and counters the tendency to focus on the unborn baby or the opinions of the medical specialists.[40]

The judgments then, in general, pay close attention to women and to the story that culminated in a court case, rather than taking an issues-driven approach. As Rhonda Powell writes, "One of the ways in which a judge can be 'feminist' is by listening to women's stories, hearing the perspectives of woman litigants and recognising women's experiences in the way that they recount the facts of cases, so that these experiences also become legal truths".[41]

This is perhaps most plainly illustrated in the judgment in *R v Wang*, a case about a woman who killed her abusive husband while he was asleep. In producing the *Te Rino* version of *R v Wang*, the authors went beyond the original judgment, also accessing the court file and notes of evidence, which included facts omitted from the original judgment. Lexie Kirkconnell-Kawana and Alarna Sharratt, writing the commentary for the judgment, observe:[42]

> In the original judgment, the Court minimised the extensive history of abuse, reducing the description of the harm within the relationship to the one line that it was a 'loveless and coercive marriage'.

39 *Re W [PPPR]*, above n 14.

40 At 172.

41 At 35.

42 At 489.

The court file, however, recorded extensive additional evidence presented at trial, including Ms Wang's experience as a Chinese immigrant woman isolated in New Zealand, suffering from a major depressive illness, subjected to extensive and ongoing abuse, and whose attempts to seek assistance from friends had been rebuffed with advice to endure the abuse. This judgment, and many others in the volume, are stark reminders that judgments do not simply present neutral fact, but like all texts, are selective and performative pieces of writing.[43] The judgments demonstrate a method for paying attention to what might otherwise escape notice. As Glazebrook J and Judge Caren Fox note in the foreword/he kupu whakataki, the book can help judges to "recognise the possibility of bias and flawed decision making processes and do their best to eliminate them".[44] They then go on to sound a word of warning:[45]

> But judges must take care not to replace one set of biases for another. A judge's overriding duty is to decide cases according to the law, even if this leads to a result that is against their inclination.

This comment suggests that feminist judging might be a form of bias, rather than a way of ensuring equality. However, the judgments do not try to impose a feminist perspective at the cost of legal principle. Instead, they actively engage with lived experiences of women (and the environment), creating space to see cases in ways that we have been blind to and may be continuing to be blind to. In that sense, the feminist project has larger implications, showing us how to engage with facts in a different way, by letting those facts inform the law, rather than disregarding or ignoring them. It brings into sharp relief what it is that legal thinkers ignore when they engage with text. As academic Elizabeth Mertz has observed, when we use the phrase "thinking like a lawyer", we are "often implying that it involves a honing of general analytic ability".[46] Mertz argues that "thinking like a lawyer" is really:[47]

> … a very particular, culturally laden kind of thinking … [which] is socially and institutionally grounded in specific practices and power relationships.

43 Paul Atkinson and Amanda Coffey "Analysing Documentary Realities" in David Silverman (ed) *Qualitative Research* (3rd ed, Sage Publications, London, 2011) at 77.

44 At viii.

45 At viii.

46 Elizabeth Mertz *The Language of Law School: Learning to "Think Like a Lawyer"* (Oxford University Press, Oxford, 2007) at 98.

47 At 98.

> It asks some kinds of questions while neglecting others and makes sharp demands for proof in some places where elsewhere it accepts unproven assumptions.

The Te Rino judgments shine a bright light on these institutional practices while also providing a workable remedy to the problems they identify. The judgments and the commentary that precede them, are a powerful means of teaching us to see a legal case through a different lens, helpful both in the classroom and for established researchers, practitioners, and members of the judiciary.

As Māmari Stephens notes, there is much to learn from a generalist legal project such as this.[48] This collection offers an opportunity to step back and survey the land of the law, and to do so with fresh eyes — a valuable opportunity when many are practising or researching in highly specialised areas. Hopefully this is reason enough for anyone to purchase the volume, but if further motivation is required, royalties from the project will go to supporting Community Law initiatives that help women to access legal support and education. Nā tō rourou, nā taku rourou ka ora ai te iwi.

48 At 14.

LEGISLATION NOTE

IT'S TIME FOR ABORTION LAW REFORM IN NEW ZEALAND

Jackie Edmond* **and Erica Burke***

Abortion laws in New Zealand are in need of reform. The current legislative regime imposes conditions on access to abortions that are unnecessarily restrictive. The legislative regime does not recognise women's autonomy over their bodies, requiring those seeking access to abortion services to jump through a series of hoops that diminish their control. The bodily integrity of those who seek abortions must be acknowledged and protected under the legislative framework.[1] This note serves as a call to reform, and provides a snapshot of what the key problems with current abortion law are. It describes the legislative framework, discusses barriers to access, and briefly reviews the case law in this area.

I THE LEGISLATIVE FRAMEWORK

The legislation that governs abortions is contained within various sections of the Crimes Act 1961 and the Contraception, Sterilisation, and Abortion Act 1977 (CSAA).

A The Crimes Act

Under the Crimes Act, abortion is unlawful and carries a maximum sentence of 14 years' imprisonment.[2] It is also an offence to supply the means (for

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1 This note will refer to "women's" access to abortion services as women are the primary users. However, people of different genders also access abortion services.

2 Section 183.

example, a drug or instrument) of carrying out an abortion.[3] The Crimes Act contains a limited number of exceptions to these offences. An abortion carried out no later than 20 weeks' gestation will be lawful in the following, archaically worded, circumstances:[4]

i) If the continuance of the pregnancy would result in serious danger (not being danger normally occurring as a result of childbirth) to the woman's life, physical or mental health.[5]

ii) If there is a substantial risk that the child would, if born, "be so seriously physically or mentally abnormal as to be seriously handicapped".[6]

iii) If the pregnancy is the result of sexual intercourse between a parent and child, siblings, a grandparent and grandchild[7] or a dependent family member.[8]

iv) If the woman is "severely subnormal".[9]

Absent from the above exemptions is a pregnancy resulting from sexual violation or rape. The Crimes Act is also silent as to a decision to have an abortion being based on simply not wanting a child at that time. This undermines a person's ability to plan and exercise control over one's life.

B The CSAA[10]

The CSAA governs the management and administration of abortion services. It also establishes the Abortion Supervisory Committee (Supervisory Committee).[11] This is a tribunal that consists of three members who are

3 Section 186.

4 Section 187A.

5 Section 187A(1)(a).

6 Section 187(A)(1)(aa).

7 Section 187A(1)(b)(i)–(iii).

8 Section 187A(1)(c). See also s 131(1).

9 Section 187A(1)(d), within the meaning prescribed by s 138(2).

10 Of note, medical practitioners are referred to as "he" throughout the relevant sections of the CSAA. The Supervisory Committee has identified the wording within the CSAA as "clumsy" and "outdated". Their 2016 Annual Report outlines areas of the CSAA that are in need of updated language: Abortion Supervisory Committee *Annual Report of the Abortion Supervisory Committee* (2016) [Supervisory Committee Annual Report] at 3.

11 Contraception, Sterilisation, and Abortion Act 1977 [CSAA], s 10.

appointed by the Governor-General. The Committee's responsibilities, outlined in the CSAA, include the consideration and review of licence applications to perform abortions by hospitals or clinics;[12] ensuring that facilities of an adequate standard are provided;[13] appointing certifying consultants;[14] and reporting annually to Parliament on the operation of abortion law in New Zealand.[15] This last obligation requires the Supervisory Committee to provide statistical information concerning abortions, and how the relevant laws have been managed.

In order to obtain an abortion, the CSAA requires two certifying consultants to authorise that the woman meets one or more of the criteria set out in s 187A of the Crimes Act.[16] The woman must see or speak with the certifying consultants to seek authorisation for an abortion. Her General Practitioner or a Family Planning clinic can provide a referral. Usually the second certifying consultant is the abortion provider. Where there is disagreement between two certifying consultants, the case can be referred to a third consultant for their opinion.[17] Upon authorisation being granted by the two consultants, certificates authorising the performance of the abortion are provided to the licensed institution carrying out the procedure.[18]

II BARRIERS TO ACCESS

A woman seeking an abortion can expect to make up to four visits before attending an abortion provider. These visits will include scans if required and blood tests. At each step of the process, there is potential for delay, paperwork and costs incurred by the woman. Such costs include travel, time off work and provision for childcare, but do not include the cost of the abortion itself, which is free for New Zealand residents. Women living away from major centres can be significantly impacted as abortion services are not necessarily provided close to home. For instance, women living in Taupō or Rotorua must travel to either a Waikato or Tauranga abortion provider to access services.[19]

12 CSAA, s 14(1)(b).

13 Section 14(1)(c).

14 Section 30.

15 Section 14(1)(k).

16 Sections 29 and 33(1).

17 Section 33(3).

18 Section 33(1) and (5).

19 See "Provider locations" Abortion Services in New Zealand <http://abortion.org.nz> for details of

Health practitioners are also permitted a conscientious objection to providing abortion services.[20] If such objection is raised, the practitioner must inform the woman that she can access abortion services, including referral, from another health practitioner or Family Planning clinic.[21] This is the only requirement imposed on the practitioner. The low threshold of assistance that practitioners are obliged to provide women following an objection can leave the woman vulnerable and uncertain, and can extend the length of the pregnancy (particularly if the practitioner suggests she delay making a decision rather than initiate a referral for consideration of an abortion).[22]

Domestic violence is a complicating factor when considering the extent of the barriers presented by the legislative requirements outlined above. Abusive and controlling partners could heighten a woman's fear about seeking an abortion, making it difficult to access abortion and contraception services. Requiring up to seven visits, including the visits referenced above and those with the abortion provider, undermines women's ability to pursue an abortion without their partner's knowledge. In light of this, the current legislation does not facilitate abortion access for women experiencing domestic violence.

The abortion regime is also expensive and inconsistent with other practices within the healthcare system. No other medical care for which a patient is able to consent imposes mandatory assessment and authorisation from two medical practitioners.[23] The annual cost funded by the Ministry of Justice for certifying consultants is estimated to be $3,716,766.[24]

Another significant concern is that a tension exists between New Zealand's abortion law as it appears on the statute books and how the law is functioning in reality. The prohibition of abortions under the legislation, except in a limited set of specific circumstances, is restrictive and punitive. The narrow breadth of these exceptions does not include the reasons for which many

abortion providers.

20 Health Practitioners Competence Assurance Act 2003, s 174.

21 Section 174(2).

22 Martha Silva, Toni Ashton, Rob McNeill "Improving termination of pregnancy services in New Zealand" (2011) 124 The New Zealand Medical Journal 1338; Martha Silva, Rob McNeill and Toni Ashton "Ladies in waiting: the timeliness of first trimester services in New Zealand" (2010) 7 Reproductive Health 19. In New Zealand only 57 per cent of abortions are performed before 10 weeks: *Abortion Statistics: Year ended December 2016* (Stats NZ).

23 Family Planning "Committee Report Calls for Abortion Law to be Reviewed" (press release, 3 February 2017).

24 Supervisory Committee Annual Report, above n 10, at 31.

women, in reality, seek an abortion. Consequently, there is a discord between the legislative controls over abortion, and the nature of how they are actually obtained. Grounds for a legal abortion for serious danger to the woman's health, for example, have been interpreted differently over the years. According to the Supervisory Committee, in the year ending December 2015, 97.4 per cent of abortions were approved under the ground of danger to mental health.[25] A further 1.6 per cent of abortions were approved with danger to mental health being one of the two grounds on which they were approved.[26] It is stressful for a woman to have to discuss her situation with two certifying consultants who are going to decide whether she is permitted to have an abortion. It is demeaning to be labelled as having a serious mental health problem to be able to access a service. This labelling contributes to and perpetuates the stigma that surrounds abortion. From a legal perspective, it is also a rule of law issue for a statute not to be applied in accordance with its text and purpose.

Calls for reform of the abortion legislation in New Zealand have been echoed by the Supervisory Committee.[27]

III APPLICATION BY THE COURTS

The current legislation governing abortions has remained fixed since the enactment of the CSAA in 1977. It has not benefited from substantial reform that would ensure it reflected shifts in public opinion and the significant changes concerning healthcare delivery, particularly technological advancements in medicine.[28]

This is illustrated with the example of early medical abortions (EMAs), which were not available at the time the Crimes Act and CSAA were introduced. These are available for women who are up to nine weeks pregnant. The patient is required to take two medications, which typically results in the loss of the pregnancy with bleeding, similar to a miscarriage. These pills can be safely taken at the woman's home and do not require any special medical facilities. Nevertheless, the CSAA specifies that abortions are to be performed in a

25 Supervisory Committee Annual Report, above n 10, at 23.

26 0.8 per cent were approved on the basis of danger to mental and physical health and 0.8 per cent were approved on the basis of a handicapped child and mental danger: at 23.

27 See, for example, Supervisory Committee Annual Report, above n 10, at 3 and Nicholas Jones "Not updating abortion law 'an indictment', supervising committee tells MPs" *The New Zealand Herald* (online ed, Auckland, 16 March 2017).

28 Supervisory Committee Annual Report, above n 10, at 3.

licensed institution.[29] This typically requires another, medically unnecessary, visit to the clinic simply to fulfil the requirement that both medications be taken on the licensed premises.

In *Right to Life New Zealand Inc v Abortion Supervisory Committee*,[30] the Court confirmed an interpretation of the CSAA that was consistent with recent advancements in science in respect of EMAs.[31] Right to Life, an anti-choice organisation, sought a declaration that a limited licence given to a Family Planning clinic to provide EMAs up to nine weeks was wrongly granted.[32] This was on the basis that nine week only EMAs were not authorised by the framework for the granting of limited licences in the CSAA.[33] The Judge held that the wording of the CSAA had room to accommodate the fact that EMAs were no longer significant procedures, undertaken only in the second trimester, as they were when the CSAA was enacted in the 1970s.[34] The CSAA therefore had to be "in accordance with the Interpretation Act … applied today to 'circumstances as they arise'".[35] However, on an argument relating to the provision empowering the granting of licences, the Judge recognised that the wording was prescriptive in only authorising the performance of abortions in the first 12 weeks of pregnancy (and not nine)[36] and granted declarations that the licences were ultra vires.[37] Ultimately, a reading of other provisions in the CSAA meant that the declarations would not affect the operation of the clinic.[38] It was therefore an empty victory for Right to Life. The case clearly highlights the inflexibility and unsuitability of abortion legislation in comparison to technological improvements in medicine and the demand for abortion services.

An earlier Supreme Court decision, *Right to Life Inc v Abortion Supervisory Committee* involved a claim by Right to Life that the Supervisory Committee

29 CSAA, s 18.

30 *Right to Life New Zealand Inc v Abortion Supervisory Committee* [2015] NZHC 2393 [*Right to Life* (HC)].

31 Supervisory Committee Annual Report, above n 10, at 5.

32 *Right to Life* (HC) at [1].

33 At [3].

34 At [52].

35 At [52].

36 At [74].

37 At [78]–[83].

38 At [78]–[83].

was misinterpreting its statutory powers under the CSAA by not taking into account the rights of the unborn child.[39] Right to Life had argued in the lower courts that the 'born alive' rule (that legal personhood is not conferred on a child until they are born alive) was modified by the CSAA to protect foetuses. This argument was rejected by the lower courts and the Supreme Court declined leave to appeal on the issue, confirming that the CSAA was clearly based on the 'born alive' rule.[40] This was in spite of the fact that the long title of the CSAA states that it is an "Act … to provide for the circumstances … under which abortions may be authorised after having full regard to the rights of the unborn child".[41]

The above case law illustrates the inconsistency of the legislation governing abortion with modern views about women's autonomy.[42] The prohibitions and restrictions implemented under the Crimes Act and CSAA curtail a woman's access to health services. They remove some of the responsibility and independence involved in a decision to have an abortion and instead give them to medical practitioners. The "convoluted abortion laws" that render women dependent "on the benevolent interpretation of a rule which nullifies their autonomy" are also a concern of the United Nations Committee on the Elimination of Discrimination Against Women.[43]

IV CONCLUSION

Sexual and reproductive health and associated rights are inextricably connected to other issues that impact women's overall health and wellbeing. Abortion laws must be reformed to reflect, protect and actively support women's rights to access abortion services, unencumbered from third parties' assessments and other barriers to the access of such services. Whether a woman continues with a pregnancy is a decision that she should be entitled to make independently.

39 *Right to Life New Zealand Inc v Abortion Supervisory Committee* [2012] NZSC 68, [2012] 3 NZLR 762.

40 At [24].

41 CSAA, long title.

42 See, for example, *Abortion Worldwide: 20 Years of Reform* (Centre for Reproductive Rights, New York, 2014); *Abortion Issues Poll — January 2017* (Abortion Law Reform Association of New Zealand, Curia Market Research — Wellington, 2017); Office of the United Nations High Commissioner for Human Rights "'Unsafe abortion is still killing tens of thousands [of] women around the world' — UN experts warn" (press release, 27 September 2016).

43 Committee on the Elimination of Discrimination against Women *Concluding observations of the Committee on the Elimination of Discrimination against Women*, New Zealand, (United Nations, July 2012) at 9.

Legislation that prioritises the opinions of others is detrimental for women. The law should reflect the values of self-determination and autonomy that are integral in our society and accord the same to women. Law reform is long overdue.

LEGISLATION NOTE

HARMFUL DIGITAL COMMUNICATIONS ACT 2015

Savannah Post*

I INTRODUCTION

The Harmful Digital Communications Act 2015 (HDCA) is a modern enactment for a modern problem.[1] The title of the Act is in some ways self-explanatory: the purpose of the HDCA is to "deter, prevent, and mitigate harm caused to individuals by harmful digital communications" and to "provide victims of harmful digital communications with a quick and efficient means of redress".[2] In order to achieve these ends, the HDCA establishes a comprehensive civil regime to manage complaints regarding harmful digital communications and creates a new offence that criminalises more serious misconduct. Early data suggests that the HDCA may provide a valuable tool for women who have been the target of harmful digital communications.

II BACKGROUND TO THE HARMFUL DIGITAL COMMUNICATIONS ACT 2015

The first reading of the Harmful Digital Communications Bill 2013 took place on 14 November and 3 December 2013.[3] Coincidentally, this was only a few days after the "RoastBusters" scandal broke in New Zealand, involving a group of young men who boasted online about their sexual activities with intoxicated and under-aged girls.[4] The close chronological connection between

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1 (30 June 2015) 706 NZPD 4850–4870.

2 Harmful Digital Communications Act 2015 [HDCA], s 3.

3 (14 November 2013) 694 NZPD 14747–14753 and (3 December 2013) 695 NZPD 15164–15173.

4 For a timeline of events, see Sophie Ryan "Roast Busters case: 'Where was the respect?' – police" *The New Zealand Herald* (online ed, Auckland, 29 October 2014).

those events and the introduction of the Bill led some commentators to believe that the HDCA represented Parliament's response to the scandal.[5]

In reality, the legislative process had been initiated more than three years previously when the Law Commission was asked to review the adequacy of the regulatory regime governing news media in the digital age.[6] In May 2012 the Minister of Justice, Hon Judith Collins, asked the Law Commission to fast-track the part of its report that would recommend solutions aimed at tackling the issue of cyberbullying.[7] This led to the publication of a Ministerial Briefing Paper titled "Harmful Digital Communications: The adequacy of the current sanctions and remedies" in August 2012 (Briefing Paper).[8] A draft bill named the Communications (New Media) Bill was included in the Briefing Paper and became the basis for the Harmful Digital Communications Bill the following year.

The Briefing Paper identified a number of concerns regarding the harms caused by digital communications and the inadequacies of existing remedies. These harms appeared in a variety of forms, including "attacks on reputation, malicious impersonation, sexual and racial harassment, and invasions of privacy".[9] This abusive behaviour amounted to more than simply "an extension of offline behaviours".[10] The characteristics of the online environment, including anonymity, permanence and ease of dissemination, created the potential for uniquely pervasive harms.[11] Additionally, the ubiquity of digital technology meant that cyberbullying and other abuse could cause significant, real life

5 See, for example, Nicholas Jones "Controversial cyberbullying law passes" *The New Zealand Herald* (online ed, Auckland, 30 June 2015) and "Cyberbullies face jail under new law" (1 July 2015) The Wireless <http://thewireless.co.nz>.

6 Law Commission *The News Media Meets 'New Media': Rights, Responsibilities and Regulation in the Digital Age* (NZLC IP27, 2011) at 3.

7 New Zealand Government "Govt to take stand on cyber bullying" (press release, 11 May 2012). The impetus for this request is unknown; however, earlier in the same week, the New Zealand Herald ran a series of articles discussing the harms caused by bullying, including an article in which the then Chief Coroner identified a link between cyberbullying and New Zealand's high rate of youth suicide: see Simon Collins and Vaimoana Tapaleao "Suicide link in cyber-bullying" *The New Zealand Herald* (online ed, Auckland, 7 May 2012).

8 Law Commission "Harmful Digital Communications: The Adequacy of the Current Sanctions and Remedies" (Ministerial Briefing Paper, 2012).

9 At [2.4].

10 At [1.35] and [2.96].

11 At [2.42].

detrimental effects. The Briefing Paper cited submissions from individuals describing fears for physical safety, harassment at work and via social media, loss of reputation and emotional turmoil.[12]

The Law Commission adopted the term "harmful digital communications" to describe these harmful interactions, which could occur via text, pictures and audio-visual content.[13] The term "harmful" was said to describe the "full range of serious negative consequences which can result from offensive communication including physical fear, humiliation, mental and emotional distress".[14] The Law Commission noted that this was a departure from traditional criminal and civil law approaches, which tended to focus on physical or financial harm rather than emotional harm.[15] Overall, the Law Commission determined "that when the level of emotional distress can be described as *significant*, the law has a role to play".[16]

III THE SCHEME OF THE HDCA

The HDCA passed its final reading on 30 June 2015.[17] Some provisions of the HDCA, including a new criminal offence provision, came into effect almost immediately on 3 July 2015.[18] The remaining sections of the HDCA came into effect on 20 May 2016[19] and 21 November 2016.[20]

The HDCA can be separated into four broad components. First, ss 6–21 establish and regulate a new civil complaints regime in respect of harmful digital communications.[21] Like the Privacy Act 1993, the civil regime is governed by

12 See [2.45]–[2.63] where the Law Commission identified a number of disturbing instances where digital communications had been used to cause harm.

13 At [15]–[16].

14 At [18] and [1.26].

15 At [4.66]–[4.69].

16 At [20]. See also at [1.27].

17 (30 June 2015) 706 NZPD 4850–4870.

18 Section 2(1) of the HDCA which provides that ss 22–25 and 29–41 would come into force the day after the Act received Royal assent. A number of key sections (including s 4, which defines "harm") did not come into force immediately. Sections 3–6 came into effect more than three months later on 27 November 2015 in accordance with the Harmful Digital Communications Act Commencement Order 2015, s 2.

19 Section 7 came into force on 20 May 2016 pursuant to s 2(2) of the HDCA and Harmful Digital Communications Act Commencement Order 2016, s 2.

20 Sections 8–21 and 26–28 came into force on 21 November 2016 pursuant to s 2(2) of the HDCA and Harmful Digital Communications Act Commencement Order (No 2) 2016, s 2.

21 "Digital communication" is defined as "any form of electronic communication" and includes "any text

a series of 10 principles that discourage harmful online behaviours.[22] The first stage of the complaints process will be conducted through a new Approved Agency, which will be empowered to receive and investigate complaints about harmful digital communications.[23] If the complaint cannot be resolved, or alternatively if the Agency determines that the complaint does not merit further investigation, the alleged victim may choose to refer the complaint to the District Court.[24] If there has been a serious or repeated breach of one or more communications principles resulting in harm to an individual, the District Court has jurisdiction to make a range of non-punitive orders against a defendant.[25] The District Court does not have the power to order compensation under the HDCA. However existing civil law causes of action, such as defamation, remain in place if a plaintiff wishes to recover financial damages in respect of a harmful digital communication.

The second component of the HDCA scheme is the new criminal offence provision, which is set out in s 22. Section 22(1) provides that a person commits an offence if:

i) the person posts a digital communication with the intention that it cause harm to a victim;[26] and

ii) posting the communication would cause harm to an ordinary reasonable person in the position of the victim; and

iii) posting the communication causes harm to the victim.

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message, writing, photograph, picture, recording, or other matter that is communicated electronically": HDCA, s 4.

22 Section 6(1). For example, principle 1 states that "[a] digital communication should not disclose sensitive personal facts about an individual". The Schedule to the Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996 also adopts a similar scheme.

23 Section 8. Netsafe was appointed as the Approved Agency under the Harmful Digital Communications (Appointment of Approved Agency) Order 2016.

24 Sections 8(5), 11(1)(a) and 12(1). The Police or the Chief Coroner may apply directly to the District Court without first making a complaint to the Approved Agency: ss 11(1)(d), 11(2) and 12(1).

25 Section 19(1). For example, the Court may require a defendant to take down or disable harmful material (s 19(1)(a)) or alternatively to give a right of reply in respect of the affected material (s 19(1)(e)).

26 "Posts a digital communication" means "transfers, sends, posts, publishes, disseminates, or otherwise communicates by means of a digital communication — (i) any information, whether truthful or untruthful about a victim; or (ii) an intimate visual recording of another individual": s 4. The definition also extends to attempts.

"Harm" is defined as "serious emotional distress".[27] In a recent case, *New Zealand Police v B*, the High Court considered the meaning of "serious emotional distress" concluding "the phrase … is a broad compendious expression that means what it says".[28] Factors that may be relevant when considering whether the victim has suffered "serious emotional distress" include "the nature of the emotional distress; its intensity; duration; manifestation; and context, including whether a reasonable person in the complainant's position would have suffered serious emotional distress".[29] A person who is convicted of an offence under s 22 of the HDCA faces a sentence of up to two years' imprisonment or a fine of up to $50,000.[30]

The third component of the HDCA scheme is the 'safe haven' regime, which protects content hosts from liability provided that they implement an approved complaints handling procedure as set out in the HDCA.[31] However, the procedure is not compulsory and it seems likely that larger content hosts such as Facebook and Google will continue to utilise their existing complaints mechanisms, rather than creating new online infrastructure that is specific to New Zealand.

Finally, the HDCA amends a number of other statutes.[32] Most of the amendments are minor changes to include electronic communications within the scope of existing laws. However, one significant amendment extends the offence of aiding and abetting suicide to include any instance of incitement to commit suicide, regardless of whether the victim actually acts on the incitement.[33]

IV LEGISLATION IN ACTION

As of 24 July 2017, Police had laid charges in 125 cases under the HDCA.[34] Of the 84 prosecutions completed to that date, 65 resulted in a conviction

27 Section 4.

28 *New Zealand Police v B* [2017] NZHC 526, [2017] 3 NZLR 203 at [25].

29 At [24]; see also HDCA, s 22(2).

30 HDCA, s 22(3)(a). Or, in the case of a body corporate, a fine not exceeding $200,000: s 23(3)(b).

31 Sections 23–25.

32 Sections 29–41.

33 Sections 29 and 30, amending the Crimes Act 1961, s 179.

34 Obtained under an Official Information Act 1982 request to the Ministry of Justice.

or discharge without conviction.[35] Nearly 30 individuals were sentenced to a community-based sentence, while four were sentenced to home detention. A further 14 individuals were sentenced to a term of imprisonment.

This early data shows that to date, offending under the HDCA has disproportionately been committed by males. Of the 56 individuals who have been convicted or discharged without conviction for offences under the HDCA, 49 were male. Information regarding the gender of victims is not publically available.[36]

The age distribution of offenders convicted or discharged without conviction under the HDCA is similarly revealing. Of the 56 individuals who have been successfully prosecuted under the HDCA, only one was aged 18 years or younger. Thirty defendants were aged between 18 and 29 years of age while 24 defendants were aged 30 years or older.[37] These figures may come as a surprise to some observers. While many will be aware of concerns regarding cyberbullying amongst children and young people, the issue of harmful digital communications between adults has received comparatively less attention.

Who, then, is the HDCA working to protect? Although charges have been proved in 65 cases, only seven of those cases are publically available on legal databases. Significantly, six of those cases concerned offending by a male against a former female partner.[38] These cases suggest that the HDCA may provide a valuable tool to protect women from harassment and/or abuse in the digital sphere.

The effects of age and gender are also evident in early data produced by Netsafe, the Approved Agency appointed to receive and investigate complaints under the civil complaints regime. Between 21 November 2016 and 21 May 2017, the HDCA service received more than 900 complaints of personal harm.[39]

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35 In other words, the charge was proved.

36 The Ministry of Justice referred a request under the Official Information Act in respect of this information to the Police for consideration. The request was subsequently refused on the basis that the Police did not hold the information under s 18(g) of the Official Information Act.

37 The age of the final defendant is unknown.

38 *Waine v R* [2017] NZCA 287; *Britten v New Zealand Police* [2017] NZHC 2410; *New Zealand Police v B*, above n 28; *R v Faulkner* [2017] NZDC 10417; *New Zealand Police v Kelly* [2016] NZDC 12912; and *New Zealand Police v Tamihana* [2016] NZDC 6749, [2016] DCR 240. In the remaining case, the defendant was convicted of causing harm by a digital communication after sending a text to the complainant over a drug debt: *New Zealand Police v Bust* [2016] NZDC 4391.

39 Netsafe "Online bullying, abuse and harassment services receives over 900 reports in first six months" (press release, 31 May 2017).

Of those complaints, 61 per cent were lodged by women, 36 per cent by men and three per cent by individuals identifying as gender diverse. Only 33 per cent of complaints were received from individuals 21 years of age or younger, while 36 per cent of complaints were made by individuals aged between 22 and 40 years old, and 27 per cent by those aged between 41 and 64 years of age. Unlike criminal offending, there is no way of knowing whether the complaints to Netsafe under the HDCA have been proven to be true. However, the age distribution of complainants, in particular, suggests that the harms caused by digital communications affect individuals of all ages, not only children and young people.

V CONCLUSION

The HDCA is a 21st century enactment for 21st century harms. Whether the HDCA will achieve its stated aim of deterring, preventing and mitigating harm caused by harmful digital communications remains to be seen. However, the early indications are that the HDCA is fulfilling its second purpose, to provide a quick and efficient means of redress for those who have been victims of such communications. The early data suggests that the HDCA regime may prove to be particularly effective in protecting the interests of female victims, including in the context of domestic violence.

CASE NOTE

CLAYTON v CLAYTON: ADDRESSING THE ELEPHANT IN THE ROOM

Caitlin Hollings*

I INTRODUCTION

Mrs Clayton's counsel, Deborah Chambers QC, began her submissions in the Supreme Court by arguing: "Mrs Clayton's case is that the [Property (Relationships) Act 1976] is sufficient in its subject, scope and purpose, to address the elephant in this courtroom, the often devastating effect of relationship breakdown on women and children."[1]

Which assets are available to a woman at the conclusion of a long-term relationship is of vital importance to her economic freedom and independence. This is particularly true where a woman has compromised her own income to support a partner or raise children. The statutory framework aims to recognise domestic contributions on an equal playing field with paid work.[2] However, that aim can be thwarted when the pool of assets available to be divided is artificially small due to the use of trusts.

The Supreme Court's decisions in *Clayton v Clayton* are of particular relevance to this issue because of the novel approach taken to trust property. The Court held that a bundle of powers under a trust deed amounting to de facto control was "property" under s 2 of the Property Relationships Act.[3] The Court also held that a trust settled during a marriage is prima facie a nuptial trust under s 182 of the Family Proceedings Act 1980.[4]

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1 *Clayton v Clayton* [2015] NZSC Trans 21 at 12 [*Transcript*].

2 The scheme of the Property (Relationships) Act 1976 is premised on this idea.

3 *Clayton v Clayton* [2016] NZSC 29, [2016] 1 NZLR 551 at [69] [*Vaughan Road Property Trust*].

4 *Clayton v Clayton* [2016] NZSC 30, [2016] 1 NZLR 590 [*Claymark Trust*].

The Court discussed other issues of importance, including developing the jurisprudence on sham and illusory trusts.[5] This case note will focus on the impact that the Supreme Court's decision has had and will have on relationship property law. This is important as relationship property has been an area of law that acutely impacts on women's economic rights. The *Clayton* decisions gave Mrs Clayton access to assets hidden by the economically and legally privileged party (Mr Clayton) in a decision that provided a much-needed step towards a more equal recognition of the traditional economic disadvantages faced by women.

II STATUTORY CONTEXT: THE PROPERTY (RELATIONSHIPS) ACT 1976

The Property (Relationships) Act (the PRA) is premised on couples who have a shared life together sharing the economic fruits of their partnership. At the end of their relationship, those fruits are divided equally.

The principles of the PRA are that men and women have equal status and their equality should be maintained and enhanced; that all forms of contribution are treated as equal; that a just division has regard to economic advantages or disadvantages to spouses arising from their marriage and that relationship property questions are to be resolved as inexpensively, simply and speedily as is consistent with justice.[6]

This statutory framework also expressly recognises that where, traditionally, a woman has undertaken childcare and other domestic work at the expense of paid work the law should value those contributions equally with paid work. It does this by applying a prima facie equal division of relationship property (50/50) regardless of whether one partner was in paid employment or making contributions in other ways such as in the home.[7]

Of crucial importance therefore, is what constitutes "relationship property", as defined in the PRA,[8] as that represents the pool available for division accessible by the Court. If the property is "separate property", or "trust property", it is not available for division.[9]

5 See *Vaughan Road Property Trust,* above n 3, at [108].

6 Section 1N.

7 Section 11.

8 Section 8.

9 Sections 9 and 10.

The increasing use of trusts as a means of safeguarding assets from claims by creditors and spouses had the effect of placing large amounts of relationship property beyond the reach of the courts, often to the detriment of one of the spouses or partners. The social purposes of a joint relationship property law were thereby lost. This was recognised nearly 30 years ago in the Ministry of Justice *Report of the Working Group on Matrimonial Property and Family Protection*.[10]

Trusts are often used for "business purposes" — segregating and protecting assets from other business ventures and creditors.[11] This was the overt purpose for which Mr Clayton used his trusts.[12] Often the partner who is in control of the couple's wealth and assets is the one who understands how the trust structures work, and where the real value is. That excludes the less financially literate partner from knowing the value of potential shared wealth that exists. The Court in *Clayton* was alive to these issues and, as will be discussed, took a novel approach to trust assets in the context of the PRA.

III THE SUPREME COURT DECISIONS

The Supreme Court dealt with issues relating to two separate trusts in two separate decisions: the *Vaughan Road Property Trust* decision,[13] and the *Claymark Trust* decision.[14] The decisions were released together. They were also, unusually, released after the parties had reached a settlement on 21 December 2015, due to the importance of the issues raised.[15]

A The facts

Mr and Mrs Clayton had a long marriage of 17 years during which they had two daughters.[16] At the outset of their marriage Mr Clayton was a small business owner in the timber industry in Rotorua.[17] By the end of their relationship their combined assets were, Mrs Clayton alleged, worth well in excess of $29 million.[18]

10 Ministry of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 28–31.

11 See *Claymark Trust*, above n 4, at [24].

12 *Vaughan Road Property Trust*, above n 3, at [11].

13 *Vaughan Road Property Trust*, above n 3.

14 *Claymark Trust,* above n 4.

15 *Vaughan Road Property Trust*, above n 3, at [3].

16 At [6].

17 At [8].

18 *Transcript*, above n 1, at 24.

They had a relatively traditional relationship. Mrs Clayton assisted Mr Clayton in his business ventures. She was the main childcare provider. She also did some book keeping and accounting work for the Claymark Trust.[19]

Mr Clayton had structured their assets into a number of discretionary trusts. There were four trusts established during the marriage and four trusts established post separation. The "web of companies and trusts"[20] was ostensibly for "business reasons".[21] Two trusts set up during the marriage were the subject of litigation; the Vaughan Road Property Trust (VRPT) and the Claymark Trust (Claymark Trust). The VRPT assets included the land that the Claymark businesses operated. The Claymark Trust owned other business assets.

B Litigation history

The Family Court Judge, Judge Munro, set aside the s 21 PRA agreement that stipulated that, should they separate, the maximum Mrs Clayton could receive on division of their shared assets was capped at $30,000.[22] That agreement was set aside under s 21J of the PRA, which empowers the court "to set aside such agreements if satisfied that giving effect to it would cause serious injustice."[23] Judge Munro also considered that the VRPT was an illusory trust and held that the majority of its assets were relationship property.[24]

Justice Rodney Hansen in the High Court upheld the setting aside of the s 21 agreement and, for different reasons, considered that the VRPT was an illusory trust.[25]

The Court of Appeal took the case in a different direction; the Court rejected the submission that the Trust was illusory.[26] It found, however, that the power of appointment that Mr Clayton held as Principal Family Member under the VRPT deed was "property" under s 2 of the PRA and that the value of the relationship property was the value of the assets of the trust.

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19 *Claymark Trust,* above n 4, at [76].

20 At [79].

21 At [40].

22 *Vaughan Road Property Trust*, above n 3, at [7].

23 At [9].

24 *MAC v MAC* FC Rotorua FAM 2007-063-652, 2 December 2011 at [85].

25 *Clayton v Clayton* [2013] NZHC 301, [2013] 3 NZLR 236 at [91].

26 *Clayton v Clayton* [2015] NZCA 30, [2015] 3 NZLR 293 at [85].

C The Vaughan Road Property Trust decision

The VRPT was a trust settled 13 years into the Claytons' marriage. The VRPT held, among other assets, land used for the Claymark timber business and operated as a banker, taking loans for the businesses.[27] Mr Clayton was the settlor and sole Trustee as well as being one of the discretionary beneficiaries in his capacity as the Principal Family Member along with his daughters and Mrs Clayton. His powers were "both broad and free from the normal obligations imposed on fiduciaries in family trust deeds".[28] In essence Mr Clayton retained total control over the assets of the trust.

Mrs Clayton sought to gain access to the trust assets for the purpose of her relationship property claim, and broadly argued that this was possible because either the VRPT was void ab initio as it was a sham or illusory, or the powers that Mr Clayton exercised amounted to control over the assets in the trust and that they should be valued as property under the PRA.

In summary, the Supreme Court held that: the bundle of rights and powers that Mr Clayton held under the trust deed did amount to property for the purpose of the PRA;[29] the value of the property rights was the value of the assets in the VRPT;[30] and the trust was not a sham.[31] The Court declined to make a finding on whether the trust was illusory.[32]

The most important finding by the Supreme Court was on the scope of "property" as defined in s 2 of the PRA. Property is defined broadly in the PRA to include "any interest in real or personal property … and any other right or interest".[33]

The Court considered that the purposes of the PRA, including the principles of equality between spouses, were important: "of particular note in the present context is the purpose [at s 1M of the PRA] of recognising the equal contributions of both spouses to a marriage partnership".[34]

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27 *Vaughan Road Property Trust*, above n 3, at [11].

28 At [14].

29 At [131].

30 At [131].

31 At [132].

32 At [133].

33 Property (Relationships) Act 1976, s 2.

34 *Vaughan Road Property Trust*, above n 3, at [15].

The Court accepted the submission for Mrs Clayton that "the property definition in s 2 of the PRA must be interpreted in a manner that reflects the statutory context", holding:[35]

> We see the reference to "any other right or interest" when interpreted in the context of social legislation, as the PRA is, as broadening traditional concepts of property and as potentially inclusive of rights and interests that may not, in other contexts, be regarded as property rights or property interests.

The Court then considered the rights and powers held by Mr Clayton and whether they came within the definition of property. The test that the Court applied was adopted from a Privy Council decision, *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd*, that considered powers of revocation in a trust deed were "tantamount to ownership" over assets in a receivership context.[36]

The Supreme Court said that *if* the VRPT had given Mr Clayton, as the Principal Family Member, the power of appointment to make himself sole beneficiary, the effect of that power would be analogous to the revocation of the trust and therefore tantamount to ownership of the assets.[37] However, the Court disagreed with the Court of Appeal that this was the correct interpretation of the trust deed, as in fact Mr Clayton did not have the power to remove the final beneficiaries of the trust, his two daughters.[38] The power of appointment alone was therefore not tantamount to ownership in the same way that the power of revocation was in the Privy Council decision of *Tasarruf Mevduati*.[39]

However, the Court did consider that when viewed together Mr Clayton's powers and entitlements under the VRPT deed gave him such a *degree of control* over the assets of the VRPT that it was appropriate to classify those powers as rights and interests under s 2 of the PRA. In particular, Mr Clayton was settlor, sole Trustee and Principal Family Member with the ability to transfer the power of appointment and to change any provision relating to the management and

35 At [38].

36 *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd* [2011] UKPC 17, [2012] 1 WLR 1721 [*TMSF*].

37 *Vaughan Road Property Trust*, above n 3, at [44].

38 At [46].

39 *TMSF*, above n 36, at [48].

administration of the trust.[40] The trust deed was to be interpreted in his favour, he could apply any part of the capital to himself, he could appoint a vesting day at any day of his choosing and effect a final distribution to himself (at the exclusion of the final beneficiaries, his daughters) and there was a very broad resettlement power.[41] Further, the trust deed expressly allowed Mr Clayton to exercise powers in his own favour without traditional fiduciary constraint.[42] These powers effectively amount to a general power of appointment in relation to the assets of the VRPT.[43] The powers, taking into account the statutory context, are properly classified as rights that give Mr Clayton interests in the assets of the VRPT and are therefore "property".[44]

The Court held that as the powers were acquired during the relationship they were relationship property.[45] Importantly, although not applicable in the *Vaughan Road Property Trust* decision, the Court did note that if some of the trust assets themselves were separate property (for example, if they were acquired prior to the relationship) it may be possible to use s 13 of the PRA, in relation to extraordinary circumstances, to adjust the presumption of equal sharing.[46]

The Court valued the property interest as being the value of the trust assets.[47] The powers of control over the assets were tantamount to ownership, by analogy with the powers of appointment cases, making this approach to valuation consistent.[48] The reality was that Mr Clayton could, without any impropriety, allocate the entire trust corpus to himself, and why would he not thereby attribute market value to the assets?[49]

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40 At [14] and [51]–[55].

41 See [51]–[55].

42 At [57].

43 At [68].

44 At [80].

45 At [86].

46 At [89]. Although Mr Clayton maintained that some of the assets in the VRPT were separate property, the Family Court Judge had made a global allowance of $500,000 for the value of the separate property, which Mrs Clayton did not challenge on appeal. Therefore, the Supreme Court did not consider it necessary to enquire further into the classification of assets in the trust.

47 At [107].

48 At [104].

49 Following *Walker v Walker* [2007] NZCA 30, [2007] NZFLR 722 at [60].

The Court then went on to discuss the submissions in relation to whether the VRPT was a sham or an illusory trust. The Court agreed with the lower courts that the VRPT was not a sham, as there was manifest subjective intent by Mr Clayton to create a trust.[50] The Court declined to make a finding on whether the VRPT was an illusory trust.[51] These interesting issues are not discussed further here.[52]

The *Vaughan Road Property Trust* decision is important for the broad inclusive approach taken to "property" for the purposes of the PRA. The Court found that the bundle of rights enjoyed by Mr Clayton did amount to property under the Act, and were acquired during the relationship.[53] They were therefore relationship property to be shared equally between the parties. The value of the rights was the value of the assets in the trust.

It is interesting to consider why the Court used this remedy in preference to the Family Court and High Court remedial route of declaring the trust to be illusory and a sham. One obvious benefit so to speak is that this "remedy" is only available in relationship property contexts, as was made clear by the attention paid to the social nature of the PRA. If the Court were to have followed the sham/illusory trust remedy path the implications for validity of trusts would have been far wider, and could potentially have undermined beneficiaries' rights substantively. It is also important to recall the unusual facts of this case — the powers that Mr Clayton held without fiduciary restraint over the assets of the trust were not, one would like to hope, a typical example of family trust drafting. In that sense the ratio of this decision could be seen as quite narrow.

D The Claymark Trust decision

The second decision released by the Supreme Court relates to the Claymark Trust which was another trust established during the marriage and connected to the timber business. The primary legal issue was the scope and application of s 182 of the Family Proceedings Act 1980 (the FPA). That section provides a historic discretion to courts to make orders where property is settled for the benefit of the parties or their children during the marriage (and now civil

50 *Vaughan Road Property Trust*, above n 3, at [117].

51 At [127].

52 See also, Jessica Palmer and Nicola Peart "Clayton v Clayton: a step too far?" (2015) 8 NZFLJ 114.

53 At [80], [86] and in conclusion [98(a)].

union) and the premise of the settlement is fundamentally undermined by the end of the relationship.[54] The section only applies to couples who have been married or in a civil union (not long term de facto relationships) and is not intended to subvert any s 21 agreements.[55]

Mrs Clayton argued that she should be entitled to compensation from the assets of the trust as it was a nuptial trust premised on the continuation of the marriage and from which she had had an ongoing expectation of benefiting.[56]

The Court agreed, finding that the Claymark Trust was a nuptial settlement.[57] Two points are worth expanding on: the Court's discussion of the two-stage methodology around s 182 decisions and the expanded view of what, on the facts, can constitute a nuptial settlement.

The Supreme Court held that the lower courts had erred in not overtly adopting a two-stage approach in applying s 182.[58] The proper approach is first, to determine whether there has been a nuptial settlement and, second, to determine how the Court's discretion ought to be exercised. Stage one requires construction of the settlement documentation with a "generous approach" to finding a nuptial settlement.[59] Stage two is a discretionary assessment that will require individual consideration but the exercise of the discretion is not predicated on showing need. Rather, it is to remedy a change in the fundamental premise of the settlement.[60]

The remedy that the Court would have granted, but for settlement, would have been to split the trust equally into two separate trusts to benefit Mrs Clayton equally.[61]

The second important point arising from the judgment is a broader approach to stage one — what constitutes a "nuptial settlement". The Supreme Court referred to the Court of Appeal's decision of *Ward v Ward*, which the Supreme Court said decided that:[62]

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54 *Claymark Trust*, above n 4, at [4]–[6]. The section's origins date back to s 5 of the Matrimonial Causes Act 1859 (UK) 22 & 23 Vict c 61.

55 Family Proceedings Act 1980, s 182(6).

56 At [21] recording her submission in the Family Court below.

57 *Claymark Trust*, above n 4, at [42] per Glazebrook J and at [133] per Elias CJ in a concurring judgment.

58 At [30].

59 At [88].

60 At [90].

61 At [83].

62 *Ward v Ward* [2009] NZCA 139, [2009] 3 NZLR 336 at [27].

> to come within the term "settlement" as used in s 182 of the FPA, any arrangement must be one which … makes some form of continuing provision for either or both of the parties to a marriage in their capacity as spouses, with or without provision for their children.

It was also made clear that discretionary family trusts can be settlements for the purposes of s 182.[63]

The Supreme Court in the Claymark Trust decision went on to say that:[64]

> … the requirement that the settlement be for both or either of the parties "in their capacity as spouses" as meaning only that there must be a connection or proximity between the settlement and the marriage. Where there is a family trust (whether discretionary or otherwise) set up during the currency of a marriage with either or both parties to the marriage as beneficiaries, there will almost inevitably be that connection.

The Claymark Trust was in part a business vehicle.[65] Importantly, the Supreme Court rejected a submission that the Claymark Trust could not be a nuptial settlement because it was set up for business reasons:[66]

> For a start, one of the purposes of the Trust was said to be to take assets out of the circle of bank guarantees related to the business. It seems to us that the separation of property from the risks associated with business assets must have the purpose of protecting assets for the family.

The nature of the assets is not determinative of whether it is a nuptial settlement.[67] This broadens the understanding of what a nuptial settlement is and prevents the argument that a trust is not so classified simply because it is used to control or segregate business assets.

IV CONCLUSION

The Court will not look through trusts, or 'trust bust' in a relationship property context without legal foundation. The legal avenues through which trust assets can be accessed presently include:[68]

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63 At [28]–[31].

64 *Claymark Trust*, above n 4, at [34] (footnotes omitted).

65 At [79].

66 At [40] (footnotes omitted).

67 At [87].

68 See also Kate Davenport and Tammy McLeod *Webinar Clayton – implications for Practitioners* (NZLS

i) a s 44C claim under the PRA;

ii) an equitable claim such as constructive trust in narrow circumstances;

iii) an argument that the trust deed (set up during the relationship) grants such a degree of control over the trust assets to a partner in the relationship that those rights are tantamount to an interest in the assets and are therefore property under s 2 of the PRA; or

iv) an argument that the trust was a nuptial settlement that created an expectation of ongoing benefit during the marriage which needs to be resettled following divorce under s 182 of the Family Proceedings Act 1980.

This case note has discussed the latter two avenues, which have been established and expanded on by the Supreme Court in its Clayton decisions.

The Supreme Court Clayton decisions have been discussed for their impact within relationship property law only. These decisions give further important support and legal redress to women seeking economic equality and independence at the conclusion of long-term relationships. The cases also have wider implications — raising questions about the rights of beneficiaries who potentially lose their beneficial interests, about the legitimate use or otherwise of trusts in business and/or family contexts and about the implications of trust rights as property in other areas of the law such as insolvency.

CLE, November 2016).

CASE NOTE

POWER PLAYS: THE MEANING OF GENUINE CONSENT IN *S (CA338/2016) v R*

Rosa Polaschek*

I INTRODUCTION

In the abstract, consent is straightforward: a person either has, or has not agreed to an action. In practice, the question of whether a person has agreed, and what is sufficient for genuine agreement to an action, is complicated by a number of factors, which can include the nature of the relationship between the relevant parties. When will, and should, the law intervene and determine that purported consent is insufficient to be 'true' consent?

A recent New Zealand Court of Appeal case, *S (CA338/2016) v R*, has grappled with the issue of when it is appropriate for the Court to withdraw the defence of consent in criminal law.[1] The question arose in that case because the defendant, an older man, argued that his partner, a younger woman, had consented to an assault. Although arguably a straightforward case for the withdrawal of the defence (in that there was no social utility to the assault), the case highlights the difficulties in understanding consent within abusive relationships. The Court addressed both the gender and power dynamics at play, but did not take the opportunity to make a more general comment about consent in such relationships. The judgment leaves the door open to future examination of the meaning of genuine or true consent.

II THE ABILITY TO CONSENT TO ASSAULT

The law venerates consent, most clearly in the civil context through respecting contractual autonomy.[2] Equally, in the criminal context, consent is a defence

* BA/LLB(Hons). This case note was written in August 2017, and reflects the law as at that date.

1 *S (CA338/2016) v R* [2017] NZCA 83.

2 The civil law presumes a signature or other assent to a contract is sufficient, subject only to limited

to both sexual and physical assault that would otherwise be a crime. The reification of consent in the law is based on the public policy rationale of promoting personal autonomy — simply, the belief that individuals are best placed to make choices about themselves.[3]

In the case of physical assault, the Court of Appeal in *R v Lee* (endorsed by the Supreme Court in *Ah-Chong v R*)[4] held that consent is a defence to assault either where no serious injury is intended and caused,[5] or in relation to intentional infliction of harm that is greater than "mere bodily harm", unless (i) there are good public policy reasons to forbid it; and (ii) those policy reasons outweigh the social utility of the activity in question and the value that society places on personal autonomy.[6] This test attempts to strike a balance between the protection of personal autonomy, and a paternalist intervention by the courts in essentially nullifying consent for certain activities. By necessity, the test invokes the personal views of judges about the value of particular activities to society, and when it is 'appropriate' to vitiate consent.

Unsurprisingly, the courts' views reflect societal values and biases, including gendered biases. The test set out in *R v Lee* evolved from the well-known House of Lords case *R v Brown*, in which a majority of the House of Lords held that homosexual men engaging in sadomasochistic sexual behaviour were unable to consent to those interactions.[7] The New Zealand adoption of (in essence) the minority view in *Brown* reflects a general presumption that people can consent to all activities, unless a Judge determines that allowing consent to an activity, in any particular context, would be inappropriate.[8] While the House of Lords' decision reflects the value judgements of the heterosexual Law Lords in respect of homosexual sadomasochism, the valorisation of consent and personal autonomy in New Zealand reflects a differing value judgment — one of non-intervention in personal decisions.

The non-interventionist approach has led to consent being examined on a case-specific basis, with a seeming aversion to defining categories in which the

exceptions. The development of "presumptions" about certain relationships in which undue influence is more likely than in others is one of the key exceptions to this principle.

3 See *Ah-Chong v R* [2015] NZSC 83, [2016] 1 NZLR 445 at [55].

4 At [50] onwards.

5 With an exception for fighting (also based on public policy reasoning).

6 *R v Lee* [2006] 3 NZLR 42 (CA) at [289]–[318], as summarised in *Ah-Chong*, above n 3, at [55].

7 *R v Brown* [1994] 1 AC 212 (HL).

8 See *Barker v R* [2009] NZCA 186, [2010] 1 NZLR 235 at [116].

presumption of consent is inappropriate. When *R v Lee* was applied in *Barker v R* — a case about whether two young girls aged 15 and 17 could consent to sexualised scarification by an older man — the Court of Appeal was divided on how to apply the test.[9] The division related to both a legal argument about whether the test in *R v Lee* applied to forms of harm lesser than mere bodily injury, as well as whether public policy in this case warranted the removal of the defence of consent. The (male) majority rejected Justice Glazebrook's view that there should be an across the board exception for scarification when done in a sexual context on a child who is under 16, based on an analogy with s 134 of the Crimes Act 1961.[10] The majority also rejected the view that public policy warranted removal of the defence of consent in respect of the older complainant.[11] Justice Hammond's support for allowing the defence of consent in relation to the older complainant centred on a concern about the Court acting paternalistically in removing the ability for individuals to make decisions about themselves,[12] even in respect of "exploitative and tawdry" behaviour.[13] The age of the complainants and the power dynamics of their "consent" were not discussed in any depth by the majority in coming to their conclusions.

III *S (CA338/2016) v R*

The Court of Appeal's decision in *S (CA338/2016) v R* directly addresses the role of power dynamics in consenting within a relationship. The case, an appeal against conviction, arose after the appellant was convicted of a number of charges arising from an abusive relationship.

The appellant was 38 and the complainant 17 — a significant age and power imbalance. He had become involved with the complainant after she had absconded from Child, Youth and Family's care. She began living with him after the appellant picked her up hitchhiking. The appellant was charged with wounding with intent to injure after he broke the complainant's finger with a hammer. The offending occurred after the appellant accused the complainant of sexually assaulting one of his children. The complainant told the Police that

9 *Barker v R*, above n 8.

10 See [119]–[121] per Hammond J and [41]–[143] per O'Regan J.

11 See [122]–[130] per Hammond J and [144]–[149] per O'Regan J.

12 At [125]–[130].

13 At [117].

she admitted to the offending after being drilled by the appellant about the issue. He told her that she would have to leave the house "unless they could work out some way in which she could pay for what she had done".[14] He described to the Police suggesting that he get a hammer and break the finger she had used to touch his child with, so that she would always have a reminder not to touch other people's children. He hit her finger with a hammer once, breaking it, and subsequently called an ambulance.

A High Court judgment

At trial, Justice Brewer withdrew the defence of consent, following *Lee*, on the basis that there were good public policy reasons to do so that outweighed the social utility of the act in question and the value society placed on personal autonomy.[15] His Honour identified four policy reasons to remove the defence: the problem of domestic violence in New Zealand; the significant power imbalance between the appellant and complainant; the complainant's vulnerability given her mental health issues; and finally, a "gender issue".[16] He noted: "It is against public policy to condone a mature man intentionally inflicting serious harm on a teenage female with whom he was in an intimate domestic relationship."[17]

The Judge concluded that the common law did not allow consent to be used as a defence to the intentional infliction of serious harm to a domestic partner where:[18]

> … the purpose of the infliction of serious harm is to punish the consenting partner and where the consenting partner is particularly vulnerable by age, financial reliance, psychological problems and gender.

The appellant was found guilty of a range of charges, including (inevitably) the wounding with intent to injure charge, as he had admitted to deliberately breaking the complainant's finger.[19]

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14 *S (CA338/2016) v R,* above n 1, at [8].

15 *R v S* [2016] NZHC 1185 at [25] [High Court judgment].

16 At [24(d)].

17 At [24(d)].

18 At [25].

19 At [27].

B Court of Appeal judgment

In the Court of Appeal, the appellant argued that the crime of wounding with intent to injure was insufficiently serious to allow the withdrawal of the defence of consent. He argued that the judgment in *R v Lee* only allowed for consent to be withdrawn for grievous bodily harm charges, and the offending he had been charged with did not reach that level.

The Court of Appeal rejected the view that *R v Lee* had created a sharp distinction between the approach for charges involving intent to cause grievous bodily harm and all other kinds of intended harm.[20] The defence of consent could be legitimately withdrawn, following the test set out in *R v Lee*, where the offence involved any harm that was greater than mere bodily harm. Examining the circumstances of the appellant's case, the Court held that the level of harm involved in striking someone's finger with a hammer was sufficient to warrant possibly removing the defence of consent.

The Court then analysed the relevant public policy reasons for removing the defence. It agreed with the trial Judge's conclusions, and stated that the circumstances in which the complainant had consented were "tantamount to duress".[21] Most strikingly, in contrast to *Barker v R* or *R v Lee*, there was no countervailing positive social utility associated with the act to be weighed up. The Court rejected the appellant's submission that allowing the defence to go to the jury would signal the value placed by society on personal autonomy:[22]

> SH's consent could not properly be described as an exercise of personal choice; she was in reality responding to a threat that the relationship would be over unless she submitted to what [the appellant] intended as a form of punishment.

However the Court of Appeal, like the High Court, considered that the decision did not "create a per se exception for cases of domestic violence".[23] The Court of Appeal considered its decision was focused on the particular facts of the particular case, applying *Lee* to that scenario.

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20 *S (CA338/2016) v R*, above n 1, at [41].

21 At [46].

22 At [48].

23 At [49].

IV IMPLICATIONS: THE MEANING OF CONSENT IN THE CONTEXT OF PHYSICAL ASSAULT

The relative ease with which the Court in *S (CA338/2016) v R* concluded it was acceptable to remove the defence of consent, in comparison with cases like *Barker v R*, is a reflection of the particular circumstances of the case.[24] As acknowledged by the Court, it is difficult to conceive of any social utility gained through violent assault for the purpose of punishment in a domestic relationship.[25] In particular, the open discussion by the Court of Appeal and High Court of the seriousness of domestic violence and the significant power imbalance in the relationship is to be welcomed. These statements reflect a societal value judgement about acceptable behaviour in relationships, through the boundaries of what the law will accept as valid consent. Although the Court of Appeal did not specifically endorse the High Court's comments about the "gender issue" as a public policy factor, the wider dimensions of the relationship and the complainant's vulnerable position vis-à-vis the appellant were clearly significant factors in both Courts' judgments.

The reluctance to make a general exception for abusive relationships, or even relationships, can be understood to some extent: there could be practical difficulties in determining when a relationship is sufficiently abusive for consent to be vitiated. However, the Court of Appeal's decision was clearly suffused with value judgements about the nature of the complainant's consent to the assault. The Court stated her consent was not "an exercise of personal choice; she was in reality responding to a threat that the relationship would be over".[26] Given this comment, and an earlier reference to the complainant being under duress, it is clear that the Court did not consider the nature of the complainant's consent to be genuine and worthy of protection. This assessment appears to have been based on an analysis of the overall power dynamics of the relationship (particularly the age difference and the complainant's reliance on the appellant), which meant that the complainant's ability to freely consent to the interaction was significantly impaired. That impairment is reflective of the wider position of other women and men in abusive relationships, and

24 *Barker v R*, above n 8.

25 *S (CA338/2016) v R*, above n 1, at [48].

26 At [48].

the growing understanding of the cycle of power that underlies patterns of domestic violence in relationships.

The Court's clear scepticism about the validity of the complainant's consent, linked but separate to whether it was appropriate to remove the defence of consent, makes it somewhat surprising that the Court was reluctant to draw any wider conclusions about the categories of relationship in which there might be an exception to the general presumption of consent. The concerns about the complainant's consent were based on factors that are common in abusive relationships, albeit in this case at the extreme. It is difficult to conceive of the risk to personal autonomy from the courts recognising that consent to physical assault as punishment, obtained in the context of an abusive relationship, is consent that will not meet the law's standard for rigorous protection. In the sexual assault context, the courts recognise that consent must be given freely by a person "in a position to form a rational judgement", and not obtained by pressure or persuasion.[27] It could be argued that explicit recognition of the effect that an abusive relationship has on someone's ability to genuinely consent to an assault reflects that principle. It is notable that in *Barker*, O'Regan J (agreeing with the view that the defence of consent was available) expressed concern about the genuineness of the complainant's consent, especially as to whether it was "true consent" to the level of harm that had been inflicted.[28] The language of "true consent", as with the Court of Appeal's focus in *S (CA338/2016) v R* on the lack of personal choice on the part of the complainant, appears to be aimed at an underlying issue in relationships with significant power imbalances: of what *quality* is the consent being obtained? In the context of physical assaults, this question has consistently been present in the courts' reasoning. The scene for more extended discussion about the nature of consent to physical assault (and potentially, exploration of the relationship between that consent and the positive consent required for sexual intercourse at law) has been clearly set by *S (CA338/2016) v R*.

V CONCLUSION

S (CA338/2016) v R strengthens the law on the meaning of consent in physical assaults and the context in which the validity of consent is to be judged. Although

27 *R v Cox* CA213/96, 7 November 1996 at 8.

28 *Barker v R*, above n 8, at [148].

the Court of Appeal did not establish abusive relationships as a definitive category in which the presumption of consent might be inappropriate, the judgment recognises the need to interrogate the legitimacy of claims of consent in relationships of unequal power. In this respect, the paternalism of the courts provides a specific and important policing function to protect against consent obtained by pressure and duress. Recognition of the role of gender and power dynamics in obtaining purported consent within relationships is a welcome analysis from the Court of Appeal.