NEW ZEALAND WOMEN'S LAW JOURNAL

TE AHO KAWE KAUPAPA TURE A NGĀ WĀHINE

VOLUME II
NOVEMBER 2018

LexisNexis®

Volume 11, November 2018

Published by LexisNexis New Zealand Limited
Level 1
138 The Terrace
Wellington 6011

The mode of citation of this journal is: [2018] NZWLJ (page).

New Zealand Women's Law Journal — Te Aho Kawe Kaupapa Ture a ngā Wāhine is a double-blind peer reviewed journal. Decisions as to publication are made by the Editors-in-Chief.

A catalogue record for this journal is available from the National Library of New Zealand.

ISSN 2537-9658 (Print)

ISSN 2537-9666 (Online)

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EDITORIAL — KŌRERO TĪMATANGA

> There are a number of people who are anxious to leave #metoo behind and move on, but I don't think people realize how short of a time we have been discussing this issue compared to how long this has been an issue.
>
> *Tarana Burke, Me Too Founder*[1]

We started the New Zealand Women's Law Journal — Te Aho Kawe Kaupapa Ture a ngā Wāhine to provoke conversations about how the law affects our wāhine in Aotearoa. In 2016 when we began work on the Journal, we did not quite anticipate just how relevant this platform would become for those within the profession.

With the reporting of sexual assault and harassment at Russell McVeagh in February of this year, public conversations began about the behaviour and experiences our lawyers face in their workplaces. These conversations were not new. In fact, they have been had many times before. But they seemed to be taking place with a new fervour. And everyone seemed to be listening.

Now that we are coming towards the end of 2018, we are extremely aware of the number of experiences shared, reports written, surveys conducted, policies changed and public discussions had. Some might say they are 'tired' of these relentless discussions and they 'just want to get on with their work'. But we are not done talking and the time for real change to occur has only just begun. We want policies to turn into everyday standards that are upheld, we want changes to regulation to lead to accountability and we want surveys to turn into ideas that are actioned. We want you to keep listening.

This Journal can provide one platform by which these conversations are continued and ideas put forward. We are honoured to present this edition of the Journal, which we believe does just that. We want to thank everyone who has contributed to this edition and to this dialogue. We are proud to be sharing their experiences and their whakaaro (ideas) with you. Volume II of

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1 Tarana Burke, as quoted in Courtney Connley "#MeToo founder Tarana Burke has big plans for the movement in 2018" (19 January 2018) CNBC <www.cnbc.com>.

the Journal not only discusses the mahi (work) we need to undertake in our own profession, but it also discusses how we can best serve the women in our communities and how the law can be a source of protection and change in our society.

Thank you to those who have continued to tautoko (support) the work of this Journal, by providing contributions, advice, editing prowess, time and passion. We could not produce this without you and it has been an honour to work with you. We also thank our family, friends and colleagues who have enabled us to do what we do.

We are now proud to present this second edition of the New Zealand Women's Law Journal — Te Aho Kawe Kaupapa Ture a ngā Wāhine. We hope it may provide a platform for those who are often silenced to be heard. We hope it becomes part of the impetus for change we so desperately need.

We have had these conversations before. This time, let's ensure we create the change that means we do not need to have them again.

Ana Lenard and Allanah Colley

Editors-in-Chief

29 October 2018

FOREWORD — KUPU WHAKATAKI

This year New Zealand has celebrated a gender equality milestone: it is 125 years since New Zealand women won the right to vote.

From this vantage point it is clear that some significant gains have been made towards gender equality. We have our third woman prime minister; the number of women practising law outnumbers men; and we have a majority of women sitting on the Supreme Court. We are proud of these achievements.

Despite these outward signs of progress, it has also been a year in which misogyny in the legal profession has been in the spotlight; a year in which sexual misconduct, bullying and harassment has been exposed as commonplace.

Culture is the hardest thing to change. The feminist revolution has achieved much, but "revolution is not a one-time event".[1]

Sexism is like an iceberg. Overt sexual or sexist misconduct is the visible, exposed tip: easy to recognise but harder to challenge — maybe impossible if you are the one who suffers it. Lurking beneath are problems that are harder to identify: unconscious bias, double-standards, cultural ideas about what it means to be feminine or masculine; you can no doubt think of more.

The system we have inherited gives the greatest rewards to the lawyers who sacrifice their home and family life to long hours at the office; who may even behave badly towards colleagues but so long as they deliver the results, this is overlooked.

Wouldn't it be transformational to rebuild the system so that it respects all individuals equally and values collective effort and collaboration, while allowing space for lawyers to have equally rewarding professional and home lives?

To achieve this we need to examine how we educate, train and promote lawyers, and how we measure success in our profession.

We need to revisit how we define "fit and proper person", and the regulatory systems that promote and protect the high standards of professionalism we expect.

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1 Audre Lorde *Sister Outsider: Essays and Speeches* (Crossing Press, New York, 1984).

Meaningful change will require buy-in from all parts of the profession: educators, regulators, judges, partners in firms, chief executives in agencies, practising lawyers.

Leadership must come from the top but leaders also need to be open to advice from a diverse range of viewpoints, not least from the new generation of lawyers.

The insights and the challenges offered in this second volume of Te Aho Kawe Kaupapa Ture a ngā Wāhine will help guide us towards change. Whether through embracing concepts of tuakana/teina (Bernadette Arapere and Kate Tarawhiti, at 22), promoting gender-neutral language to advance gender equality (Ruby King and Jasper Fawcett, at 107) or understanding the history of women lawyers in order to transform women's experiences in the future (Dr Anna Hood, at 249).

I look forward to the challenges ahead, to standing strong alongside the women and men of the profession who are committed to this mahi, and making our profession a safer place where everyone can thrive and reach their full potential.

Una Jagose QC

Solicitor-General

Crown Law Office — Te Tari Ture o te Karauna

29 October 2018

AN INSPIRATIONAL CAREER

Keynote Address to the 'An Inspirational Career' Conference held by the New Zealand Law Society CLE Ltd on 21 September 2018

Rt Hon Lady Brenda Hale DBE*

What an auspicious time to be having this conference! This week you are celebrating 125 years since the women of New Zealand got the right to vote. In the UK we have been celebrating 100 years since *some* women got the right to vote and *all* got the right to sit in the House of Commons. Those of us in the know have also been celebrating 60 years since women got the right to sit in the House of Lords.

At the Peers' entrance to the House of Lords, there is a remarkable cloakroom, rather like a school cloakroom but without the shoe-boxes and a great deal grander. The pegs are named in alphabetical order. For a while there were no less than four peers 'of Richmond' side by side — Lord Hague of Richmond (William Hague, former MP for Richmondshire, leader of the Conservative party and foreign secretary), Baroness Hale of Richmond (me), Baroness Harris of Richmond (Angela Harris, prominent liberal democrat Parliamentarian and deputy Speaker of the House of Lords), and Lord Houghton of Richmond (Nick Houghton, former Chief of the General Staff). The Richmond in question is the Richmond in North Yorkshire, the first of 60 odd Richmonds all around the world, after which they are all indirectly named (including the Richmond in the South Island of New Zealand). It is a very beautiful medieval town with a Norman castle, a cobbled market place, quaint old buildings, a ruined abbey down the road, with a splendid setting in lovely

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* Rt Hon Baroness Hale of Richmond DBE, President of the Supreme Court of the United Kingdom. This speech was delivered at the 'An Inspirational Career' Conference held by the New Zealand Law Society CLE Ltd in Auckland, New Zealand on 21 September 2018. It has not been updated for publication in this Journal.

landscape. It is remarkable that a small town with around 8,500 inhabitants should have four members of the House of Lords choosing to include it in their titles. Every peerage has to have a unique title — so if there is or has been another Hague, Hale, Harris or Houghton you have to be 'of' somewhere. Why, I wonder, did we all choose Richmond? I know why I did.

I was born in 1945 in Leeds, a large industrial and commercial city in West Yorkshire, centre of the wool trade. My parents were then living in Redcar on the North Yorkshire coast, but my mother's family came from Leeds. When I was three, they moved to a village near Richmond. My school teacher father had been appointed headmaster of a small independent boys' boarding school, re-opened after it had been requisitioned by the RAF during World War II. I went to the tiny local Church of England primary school and then to Richmond High School for Girls. I was the youngest girl in the school while my older sister was the oldest and head girl. My younger sister joined the school two years later. We all became head girls but I was least satisfactory of the three — perhaps because the school wanted me to concentrate on my academic studies, perhaps because my qualities of leadership were deemed inadequate.

Only years later did it occur to me how unfair the system was in those days. Children were sorted into academic and non-academic by the 11-plus exam. The academic went to grammar schools, the non-academic went to secondary modern schools which were anything but modern. In my area, there were less than half the grammar school places for girls than there were for boys; and there were roughly half the number of grammar school places for boys and girls in the predominantly rural North Riding of Yorkshire than there were in the prosperous commuter belt counties of Cheshire and Surrey. So we were all disadvantaged, but the girls more than the boys. I don't believe that there were fewer clever enough people in the county — but the need for education was differently perceived both by the parents and the local politicians. One of the most important early cases under our Sex Discrimination Act 1975 decided that providing fewer grammar school places for girls than boys was unlawful, even though it was the product of the number of schools available rather than conscious policy of discriminating against girls.[1]

The High School was very good for me. There were only about 160 girls. Because it was such a beautiful place, there was a stable population of very able

1 See *R v Birmingham City Council, ex parte Equal Opportunities Commission* [1989] AC 1155.

teachers, mostly unmarried. We were mostly local girls, with a smattering of army daughters from Catterick Garrison nearby, now the largest army camp in the UK, who only stayed for two years. It had a wonderful building — a pioneer of modern school architecture, opened in 1939, single storey, mainly stone and glass, with large windows looking out over wonderful views towards the Cleveland Hills — indeed, looking out across fields to the house where we now live.

Disaster struck when I was 13 and my younger sister 12. Our father died very suddenly at the age of 49. Our mother had trained as a teacher in the 1930s but had been forced to give up work when she married our father in 1936. The marriage bar was suspended temporarily during the Second World War and abolished by the Education Act 1944 — apparently because it was recognised that married women 'had certain qualifications for teaching which are not offered by either men or spinsters'[2] — knowing something about children, perhaps? But the women had to wait until 1955 before the Government agreed to adopt a policy of equal pay and even that would take until 1961 to implement in full.

But how fortunate we were that our mother had trained as a teacher. When our father died she picked herself up, dusted off her Froebel teacher training certificate and became the head teacher of the village primary school where my younger sister and I had been pupils (and our best friend the vicar was chairman of the governors). This meant that we could stay at the same school, in the same area, with the same friends, rather than starting afresh with my mother's family in Leeds. I have a horrible feeling that I fared better as a big fish (academically — not in other ways) in a small pond than I would have done the other way around. It only occurred to me years later what a wonderful role model our mother was.

It was taken for granted in the family and at school that we would go to University if we could — preferably to Oxford where our father had been or to Cambridge where our mother's father had been. Those days we could apply for both, so I did. I applied to read law, despite knowing very little about it and having no lawyers in the family, because our head mistress thought that I wasn't a natural historian (not clever enough to read history). She suggested economics. I suggested law because I preferred the constitutional history of the

2 *Report of the Royal Commission on Equal Pay 1944–1946* (HMSO, Cmd 6937, October 1946).

17th century to the economic history of the 18th and 19th centuries. Another factor was that I did not want to end up a school teacher like my parents — ironic therefore that I went into university teaching. To her credit, the head did not protest that girls don't do law or at least not unless it's in the family — although that was largely true at the time. Luckily, I was already doing Latin A level — although I had to go down to the boys' grammar school to do so — it was a good way of missing sport.

It turned out that we were both right. I went up to Cambridge, the first from the school to do so and the first to read law. There again there was built-in sex discrimination — three colleges for women, and 21 for men. Women had only been allowed to take degrees 15 years earlier. Before that they could take the Tripos examinations and know their results but had to call themselves BA (tit) — for titular.

I had low expectations of myself when I went. I expected to be a small fish in a big pond, to get an average degree and return to the north to become a solicitor in a small-to-medium sized firm. In fact, much to my surprise, I got first class marks in all three years. That, plus encountering confident — even arrogant — young men with a profound sense of their own entitlement to top jobs, but with no more legal aptitude than mine, changed my ambitions. But I still didn't think of becoming a judge.

This would not have been realistic. The Sex Disqualification (Removal) Act 1919 had enabled women to join the legal profession, previously denied to them, to hold public office and eventually to become judges. But only a handful joined the profession between the First and Second World Wars (on average 16 a year going to Bar). The first woman stipendiary magistrate, Sybil Campbell, was appointed in 1945 — but significantly, magistrates were then appointed by the Home Secretary while judges were appointed by the Lord Chancellor. A handful of women sat as ad hoc deputies in the county courts and quarter sessions and in 1956, Rose Heilbron QC was appointed the first woman Recorder — this was a part-time appointment to preside over the Burnley quarter sessions and I suspect (though I don't know) that the borough rather than the Lord Chancellor was principally responsible for the appointment. Elizabeth Lane QC was the first woman to be appointed a full-time County Court Judge in 1962, the year before I went up to Cambridge. She was promoted to the High Court in 1965, the year before I graduated. She was joined in the High Court by Rose Heilbron in 1974. Both were assigned

to the Family Division, despite both having had very successful Queen's Bench Division practices.

I was put off the Bar by a bad experience when applying to one of the Inns of Court for a scholarship in my first year. I don't blame them for turning me down — I was very immature and had not really thought things through. But I do blame them for giving the scholarship to the son of a High Court judge who eventually got a third class degree. I spent my long vacations working in a small firm of solicitors in Richmond and in a large magic circle firm in London. I didn't really fancy either or doing another round of exams so soon after Tripos.

Those days one could get an Assistant Lectureship in law straight after graduation if you had a good enough degree. I was offered jobs by both Bristol and Manchester Universities. I chose Manchester, partly because they wanted me to take the Bar exams, to do pupillage and to practise part-time. One could do that then — I took a self-tuition correspondence course over the long vacation after my first year of teaching and passed the exams in September 1967. It is much harder and more expensive now — attendance at a course which costs many thousands of pounds is compulsory.

I had to wait until 1969 to be called to the Bar, because I had to eat two years' worth of dinners first — in those days, as well as passing the exams, you qualified by 'keeping term' four times a year for three years, and you 'kept term' by eating three dinners a term in the Inn. (Things are different now — they have to complete 12 educational 'qualifying sessions' at an Inn of Court in addition to taking and passing the Bar Professional Training Course.) After call, I practised part-time at the common law Bar in Manchester — doing small civil, criminal and family cases all over Lancashire and Cheshire. I was the second woman in the Chambers I joined and I am so grateful to her for not drawing up the drawbridge after her or frightening the horses.

I was married by then and eventually I had to choose. My teaching commitments got in the way of my practice and my practice took up the time which should have been devoted to academic research and writing. I chose the University — for three good reasons. First, my first husband had started at the Bar at the same time and was definitely going to stay there. We had already narrowly avoided being on opposite sides of the same case. Second, it seemed a good idea that one of us had a steady salary — University teachers are not paid much but they are paid. And third, we wanted children — which

is much easier to combine with University teaching than with the provincial common law Bar. Our daughter was born in 1973 (so she is 45 this week) and once again I was lucky to be the second woman law lecturer in Manchester to have a child — so the precedent was established that I could have three months' maternity leave and then return to teaching half-time for another three months.

But the 1970s were a time of rapid change. The Equal Pay Act was passed in 1970 and the Sex Discrimination Act in 1975, both to some extent motivated by the European Economic Communities' commitment to sex equality. Other legal developments improved women's status in relation to their husbands and in relation to their children. The Guardianship Act 1973 meant that I had equal rights and authority with my husband. Our Family Law professor then thought that such things did not matter until there was a death or a divorce but of course they matter at any time.

Having chosen an academic career, I certainly had no thought of ever becoming a judge, but I had to get my academic show on the road. Curiously, each of the main things that I did led one way or another to a public appointment.

My first book was on mental health law — written as an easy-read textbook for social workers and psychiatrists who had to put it into practice (but now in its sixth edition and no longer an easy read).[3] This led to my first judicial appointment as a presiding member of Mental Health Review Tribunals in 1979, deciding on whether patients should remain detained in hospital.

Then I helped to found a new learned journal, the *Journal of Social Welfare Law* — welfare law was a brand new subject in the egalitarian world of the 1970s. This led to my being appointed a member of the Council on Tribunals in 1980. The Council was a statutory body supervising the myriad administrative tribunals mainly dealing with disputes between citizen and state, as well as planning and other public inquiries. I was there for my expertise in social welfare and mental health law — the lawyer members were much grander QCs.

This is what I think led to a 'tap on the shoulder', inviting me to become an Assistant Recorder in 1982. Assistant Recorders were part-time Judges in the Crown (criminal) and county (civil) courts. Someone in the Lord Chancellor's

3 Brenda Hoggett *Mental Health (Social work and law)* (Sweet & Maxwell, London, 1976).

Department had the bright idea of diversifying the bench — not so much by appointing women but by appointing some professionally qualified academics.

Then I co-authored a large and innovative book of cases and materials on the *Family, Law and Society* in 1982.[4] I think that this led to my being invited to apply for, and then being appointed to, the post of Law Commissioner in 1984. The Law Commission, as you will know, is a statutory body set up in 1965 to promote the reform of the law — principally then 'lawyers' law', the sort of law which needs modernisation but which government departments don't want to bother with. This then included family law. I think I made a decent job of that: the Children Act 1989, the Family Law Act 1996 and the Mental Capacity Act 2005 all resulted from the work of my team, plus many other smaller projects. These included a joint project with the criminal law team on *Rape within Marriage*, which I am convinced helped the higher courts to realise that they would not be undermining the institution of marriage by making marital rape a crime.

After more than nine years — during which I had become a full Recorder and a QC — they eventually plucked up courage to invite me to become a High Court Judge in 1994. I was the tenth woman to become a High Court judge, but we had all been assigned to the Family Division, until Ann Ebsworth became the first woman appointed to the Queen's Bench Division in 1992 and Mary Arden the first woman appointed to the Chancery Division in 1993.

You may have read Ian McEwan's novel, *The Children Act*. You may even have seen the film starring Emma Thompson, which has just been released. The book gives a reasonable picture of life as a Family Division judge, but the life and death decisions he describes are comparatively rare. It's mostly taking children away from their families (in practice their mothers), sending runaway mothers back to the Antipodes or wherever else they came from, trying to get reluctant children to see their fathers, trying to get reluctant husbands and fathers to provide for their families, etc, etc.

The stand out example of a case I decided in the Family Division concerned an Australian Aboriginal young man, who had been removed from his mother at birth with a consent form she had signed within two days of giving birth,

4 Brenda Hoggett and David Pearl *The Family, Law and Society: Cases and materials* (Butterworths, London, 1983).

and was then adopted as a young child by an English family. They eventually returned to England, where he had a partner and young child. His Australian family had been able to establish contact with him when he was a young man — the law having swung from one extreme to another. He was killed in a road accident and his English and Australian families were in battle about where he should be buried — in England alongside his adoptive father, where his daughter and her mother could visit the grave, or scattered over the ancestral homeland of his Australian family. What would you have done?

After five years in the High Court I was promoted to the Court of Appeal — the second woman to serve there. Unlike the first, I did not have to fight to be called 'my lady' rather than 'my lord' — though it is amazing still how many advocates fail to realise that they are addressing a woman, even in my court where we do not wear uniform. Our Court of Appeal is much like yours, a collegiate court where we sit in twos or threes to hear all sorts of cases — family, property, contract, commercial, and public law. But we do have two divisions — civil and criminal — and I only sat in the civil division, although I did a little crime in the Divisional Court.

The stand out examples of cases decided in the Court of Appeal concerned two women who never meant to have a child but became pregnant as result of medical negligence — failure to warn that male sterilisation might not be permanent in one case and a failed female sterilisation in the other. The House of Lords had already decided that having a healthy baby is a blessing and a joy, so that it was not 'fair, just and reasonable' for the doctors to have to pay the costs of bringing one up. But what about the extra costs if the baby is disabled? We held unanimously that these could be recovered and the defendants didn't appeal. I contributed a lengthy account of what having a baby and a child means to a woman — not money but a life-long commitment to care.[5]

So the next case concerned the extra costs if the mother herself was disabled — in that case she was blind — and had sought a sterilisation precisely because she did not feel able to bring up a child. The Court of Appeal, by a majority, held that she could recover the extra costs.[6] But this time the defendants did appeal. The House of Lords was divided. Three Law Lords said that she could recover; four said that she could not, but that she could have a more than negligible

5 *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530, [2002] QB 266.

6 *Rees v Darlington Memorial Hospital NHS Trust* [2002] EWCA Civ 88, [2003] QB 20.

sum — £15,000 — to compensate her for the injury to her bodily integrity and loss of autonomy caused by the negligence.[7] Their lordships did not refer to my account of this in *Parkinson*, but I think that it must have had some effect.

Not long afterwards, I was promoted to the House of Lords. The appellate committee of the House of Lords was then the top court for the whole United Kingdom, not just England and Wales. Originally any peer could hear and decide a case, whether or not he was legally qualified. But it was established in the mid-19th century that only those who held or had held high judicial office could do so. There were not enough of them to handle the work in the House of Lords and Judicial Committee of the Privy Council, then the top court for the whole of the British Empire. So in 1876 the Appellate Jurisdiction Act created life peers called Lords of Appeal in Ordinary, known as Law Lords.

It took them until 2004 to appoint the first woman Law Lord. In 1876, women were not considered 'persons' or able to gain the legal qualifications required, so they could not have been appointed. The Sex Disqualification Removal Act 1919 meant that we could qualify for the professions and public office. But in Viscountess Rhondda's case in 1922, the House of Lords Committee of Privileges held that a female hereditary peer was not merely disqualified but incapacitated from sitting in the House of Lords. The first woman peers were only allowed under the Life Peerages Act of 1958. Presumably that overrode the contemporary definition of 'persons' in the 1876 Act? Anyway, no one has ever challenged my appointment as a Law Lord.

Law Lords were full members of the House and could take part in Parliamentary business if they wanted to. But mostly we did not, except sometimes on legal policy issues. In 2000, the Law Lords issued a self-denying ordinance, saying that they would not take part in matters of strong party political controversy and would also bear in mind that they might disqualify themselves from sitting on a case concerning new legislation. Two of my colleagues disqualified themselves from sitting on three fascinating cases challenging the Hunting Act 2004 because they had voted against it: one case argued that it was not law at all,[8] another argued that it was contrary to the Human Rights Act 1998, and another argued that it was contrary to the free

7 *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52, [2004] 1 AC 309.

8 *R (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262.

movement of goods and services within the European Union.[9] These were the most entertaining and possibly the stand-out cases from my time in the Lords — although there was also the famous 'Belmarsh' case, holding that the power of the executive to order the indefinite detention of foreign suspected terrorists was incompatible with the Human Rights Act;[10] an asylum case holding that the risk of female genital mutilation was persecution within the meaning of the Refugee Convention;[11] and *Miller v Miller*, on the principles governing financial settlements on divorce.[12]

Things changed dramatically under the Constitutional Reform Act 2005.

The first innovation was a new system of judicial appointments. Previously all were made or recommended by the Lord Chancellor — a politician and senior member of cabinet although also a senior lawyer and Head of Judiciary. Senior appointments were made by the traditional 'tap on the shoulder' although applications were gradually introduced. He relied heavily on so-called 'secret soundings' from serving judges and leaders of the legal profession — a recipe for cloning even if only subconscious. Now all recommendations are made by an independent appointments commission operating transparent procedures based solely on merit. One recommendation is made per vacancy, leaving the Lord Chancellor only three choices — yes, no or please think again — rather than a list from which he or she can choose.

There has been a dramatic increase in gender diversity in the judiciary and there is beginning to be an effect on other dimensions — for example in 2003, less than 10 per cent of the senior judiciary were women; in 2017, 22 per cent in the High Court and 24 per cent of the Court of Appeal were women. Last year we also doubled the number of women in the Supreme Court — from one to two — and we shall have a third next month.

The second innovation was the creation of the Supreme Court. It was always an anomaly that the top court in the UK was a committee of the upper House of Parliament, but there was also a view that we were actually more independent under the umbrella of Parliament than we would be under a different arrangement. All the serving Law Lords moved across Parliament

9 These last two cases were heard together as *R (Countryside Alliance) v Attorney General* [2007] UKHL 52, [2008] AC 719.

10 *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68.

11 *Fornah v Secretary of State for the Home Department* [2006] UKHL 46, [2007] 1 AC 412.

12 *Miller v Miller* [2006] UKHL 24, [2006] 2 AC 618.

Square to the former Middlesex Guildhall to become Justices. Now there are only two of us left who can return to the House of Lords when we retire. I missed a feminist trick when it was decided that new Justices would have courtesy titles of Lord or Lady, although not being members of the House of Lords. Their Lordships' wives are still entitled to call themselves 'Lady' whereas our husbands are not entitled to call themselves 'Lord' — an ancient example of discrimination against women.

I was promoted from Justice to Deputy President in 2013 and from Deputy to President last year: on each occasion by an independent appointments commission and a transparent application-based process — a strain but obviously the right thing to do.

The third change was the abolition of the traditional role of the Lord Chancellor as Speaker of the House of Lords, Head of the Judiciary and a senior spending member of the government. It was too complicated to abolish the Lord Chancellor altogether, but he is no longer Speaker or Head of the Judiciary. He no longer has to be a lawyer and as Secretary of State for Justice he has responsibility for prisons and the probation service, as well as the administration of the courts and legal services. As head of a major spending department, he now sits in the House of Commons. He also has a statutory duty to preserve the independence of the judiciary, but some fear that this is not always well understood. The Lord Chancellor did not leap to the defence of the Judges in the High Court when they were labelled 'enemies of the people' by a mass circulation newspaper after their decision in the case of *R (Miller) v Secretary of State for Exiting the European Union* — which was not about whether we should leave the European Union but about the constitutional process for doing so.[13] (The Mrs Miller in question is the third Mrs Miller, married to the Mr Miller whose second wife brought the claim in the famous family law case of *Miller v Miller*, above.[14])

That was undoubtedly the most important case we have had in the UK Supreme Court but by definition all our cases involve points of law of general public importance. Some of the most difficult involve devolution — whether the Parliaments or governments of Scotland, Wales or Northern Ireland have exceeded the powers granted them by the UK Parliament. A current example

13 *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61.

14 *Miller v Miller,* above n 12.

is whether the Scottish Parliament can make its own arrangements for the continuity of European Union law after Brexit or whether the UK's Act must take precedence. Other difficult issues involve human rights — and the proper distribution of power between government, legislature and the courts. A recent example is the Northern Ireland Human Right Commission's challenge to abortion law in Northern Ireland, which is much more restrictive than the current law in Great Britain and the proposed law in the Irish Republic. This led to the curious result that a majority of the Court held that the law was incompatible with the convention rights in three respects (rape, incest and fatal foetal abnormality) but another majority of the Court held that the NIHRC did not have standing to bring the proceedings.[15] And a third stand out case was quite different — what is the meaning of cheating at cards? Does it involve dishonesty? If it does, what is the meaning of dishonesty in criminal law?[16]

For a long time, I was different from my fellows in more ways than one. I was the only woman until last year. I was state school educated — and I am not sure that any of the others were, except possibly one Scot, until a Welshman joined us last year. Most went to independent boys' boarding schools. I made my career as an academic and public servant rather than a top barrister — and I'm still alone in that. I specialised in poor folks' law — family, social welfare and equality law — rather than commercial and property law. But this year four out of the 12 began their full-time judicial careers in the Family Division. But I am like the others in that I do not come from a visible minority and I went to Oxbridge — until recently only two of our Justices had not, and one was our Irish Justice, who went to Queen's University Belfast.

So my career has been most unusual. What are the lessons — if any — we can learn from it?

First, I was lucky in my timing. There were plenty of 'first woman' posts still to be had. This was just at the time when the powers-that-be within government were beginning to recognise that the lack of gender diversity was a problem and looking for suitable women to appoint. Things have improved greatly since then but we still have to keep up the pressure — we cannot be complacent and there is much still to be done to ensure that talented women are recognised and appointed.

15 *Re Northern Ireland Human Rights Commission's Application for Judicial Review* [2018] UKSC 27, [2018] HRLR 14.

16 *Ivey v Genting Casinos UK Ltd* [2017] UKSC 67, [2018] AC 391.

Second, pioneers and role models are important. I have been the second woman as often as I have been the first: the second permanent full-time woman member of the academic staff in the Law Faculty at Manchester University — so the first softened them up and forced them to have a maternity policy; the second woman member of my Manchester chambers — so the first by her quiet competence and good sense did not put them off having another; the second woman Lord Justice of Appeal — so the first had got them used to it and fought the battle to be called 'my lady'.

Third, we need to be flexible and seize our opportunities when they come along, however great our trepidation about them: it was right to go to Manchester rather than to Bristol, although Bristol is in many ways the more agreeable place, because it gave me the opportunity of going to the Bar as well as some great academic role models; it was right to take up the offer of becoming an assistant recorder even though it was by then ten years since I had been in court; it was right to apply to the Law Commission even though it meant a move to London which had consequences for my family life; and it was right to turn down the suggestion of appointment as a circuit judge and to hold out for the High Court, though I knew some anxious moments when my Law Commission appointment was coming to an end but I didn't know that the powers that be had already decided to appoint me to the High Court.

Fourth, and hardest of all, we all have to ask ourselves the baby question: whether, when and how? It's very important that clever young women have children. But it's very hard to combine a career and motherhood unless you have a lot of support — an understanding work environment, the resources to provide for good childcare, and above all a supportive partner who will not only support you in what you want to do but will also shoulder some of the responsibility himself. But one of my biggest beefs is that our family law should recognise and compensate the sacrifice made by women (or men) who take time off to bear and raise the next generation.

It is an enormous privilege to do the job I now do. It is wonderful to think that for one term last year the top Judges in New Zealand, Canada, Australia and UK were all women — Sian Elias, Beverley McLachlin, Susan Kiefel and me. I try hard to live up to the example set by wonderful women such as Beverley McLachlin in Canada and your own Sian Elias. But Beverley has retired and been replaced by a man. Sian will retire next year. And I shall retire in 2020. Let's hope that we are not all replaced by men.

STATE OF THE NATION — TAUĀKĪ O TE MOTU

This piece brings together the voices of five wāhine toa whose voices are often missed from our conversations. They discuss 2018, and what it has meant for them, for women in the law and for the profession at large. They challenge us to change the ways of old, to change our culture and to turn our conversations into action.

Speaking for Me
— Bridget Sinclair*

I MY EXPERIENCE

It is difficult as a young female lawyer who suffered sexual assault in my first legal job not to feel defined by that moment. I have never concealed my assault because I am not the one who should be ashamed, nor is it something I want to hide. But that honesty comes at a cost.

Women who stand up and speak to their experience with sexual harassment[1] risk being reduced to only that experience. It is a sacrifice to make your experience a learning lesson for others. It is exhausting to allow one of the worst moments in your life to become a "disruption"[2] or a conversation starter in a staffroom kitchen.

Survivors are expected to be perfect, to have all the answers, and to articulate the perspectives of an entire movement. Perfection is demanded in the most imperfect situation. At times, I am asked to be a moral compass; "I like the dress you are wearing today … Is it ok to say that?" I am a benchmark, a litmus test as to whether a statement is sexist. I am expected to be angry,

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1 For the purposes of this article I use the term sexual harassment generally to encompass both sexual harassment and sexual assault in all its forms. My own experience was one of sexual assault. It is unfortunate that conversations around sexual harassment in the profession have used the term in a way which minimises the type of conduct and level of harm perpetrated on survivors.

2 Letter from Kathryn Beck (President of the New Zealand Law Society) to all New Zealand lawyers regarding the results of the Workplace Environment Survey (30 May 2018).

but only at times and in ways that are palatable to others. I must manage my frustrations. I have to make sure that no-one's feelings are hurt. I have bitten my tongue in fear of embarrassing people, been asked to empathise with my oppressors, and to forgive friends that have put their career ambitions before my hurt.

My character has been called into question many more times than that of the man who assaulted me. I have been asked what I was wearing and how much I had to drink. I was petrified of being labelled "that girl", but I was more scared of being silenced. I was terrified of what it would mean for people to know I was assaulted, and yet I was afraid not to discuss it because that would render my experience redundant. In the end, I decided that it was better to be labelled and for the injustice to be discussed, than it was for it to fade from the conversation.

It is commonly thought that to disclose sexual harassment in the workplace you must be brave. I don't believe that it comes down to courage, or that only those that discuss their experiences are brave. I believe individuals disclose their experiences when they are supported and feel they will be heard. Only empathy can empower survivors to share their stories. I have been fortunate enough to move on from the place of my assault to work at an outstanding firm. The kindness provided by my colleagues has enabled my confidence to grow at a time of vulnerability. That experience has shown me that the legal profession is, for the most part, made up of thoroughly decent individuals who joined its ranks to assist others and enable justice. I have been provided the space and support to see my previous experience was an outlier. At my current firm, I have never needed to be brave.

II THE EVIDENCE AND THE RESPONSE

On 28 February 2018, Zoë Lawton set up a #Metoo blog to enable a safe platform for members of the legal profession to share experiences of sexual harassment, bullying, and discrimination in the profession.[3] In one month, Lawton received over 200 posts revealing incidents of sexual harassment. The powerful stories shared, one after the other, highlighted the power imbalance present in the legal profession that allows such conduct to take place and hinders complaints about and reporting of sexual harassment.

3 Zoë Lawton "#Metoo Blog" (2018) <www.zoelawton.com>.

The New Zealand Law Society confirmed in a recent survey that one in every three female lawyers has been sexually harassed.[4] One in 10 women can recall five or more incidents. Nearly 40 per cent of lawyers who were sexually harassed said the experience affected their emotional and/or mental wellbeing and 32 per cent said it affected their job or career prospects.[5] Not only is the scale of harm significant, but speaking from experience, its effects are devastating.

On 5 July 2018, Dame Margaret Bazley provided a report outlining issues with Russell McVeagh's culture.[6] The report detailed incidents ranging from bullying and exploitation to sexual assault. Dame Bazley connected the harm to wider cultural and management issues, including a "work hard, play hard" culture, poor leadership, excessive drinking, and a lack of systems in place to adequately address the harm reported at the time. The report revealed systemic and cultural issues that Russell McVeagh, and the profession more broadly, must promptly address.

Lawyers are, quite rightly, people who focus on evidence, fact-finding, and detail. Loose accusations are repugnant to us. Ideas of due process, natural justice, and the presumption of innocence are at the very heart of our profession.

However, what we have seen this year is the shield being used as a sword. Threats of defamation are used to silence survivors, made by the wealthy, powerful, and well-connected to oppress the young and vulnerable. The standard for criminal conviction, "innocent until proven guilty", is used as a cloak of protection. If the events at Russell McVeagh concerned fraud and allegations of mishandling funds, would the focus on fact-finding and evidential proof have been so stringent? Partnership responsibility appears firmer and more responsive on matters such as health and safety liability, financial misconduct, and even a partner not meeting their budget, than it does on issues of sexual harassment.

Finally, in the year 2018, evidence has been provided to support the statements which women in the legal profession have been making for decades. The Law Society can no longer claim "shock" at the facts.[7] Action must now follow.

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4 Colmar Brunton *Workplace Environment Survey* (New Zealand Law Society, 28 May 2018) at 16.

5 At 24.

6 Dame Margaret Bazley *Independent Review of Russell McVeagh: March – June 2018* (5 July 2018).

7 "New Zealand Law Society 'shocked' at scale of sexual harassment and bullying" *The New Zealand Herald* (online ed, Auckland, 4 June 2018).

As of now, not nearly enough has been done to address what has been a significant year of upheaval for the legal profession. Lawyers sell time, so human capital is the single most important resource a law firm can have. Upon discovering the scale and significance of sexual harassment, many firms and organisations have stayed silent. Data has been gathered, policies adjusted, and staff consulted.[8] However, practically, law firms continue to operate in the exact same way. Solutions proportionate to the harm are necessary. Structural change is required. After the year the legal profession has had, I expected an overhaul in standards. Perhaps that was naive, but, if not now, then when?

III WHAT NEXT?

Surviving sexual assault in my first legal job has given me a strength that I can draw upon for the rest of my life. It has not defined me, but it will inform the kind of lawyer, person, and, one day, employer that I will go on to be. I learnt, just as the legal profession is learning now, to be cautious of power imbalances, protect the vulnerable members of our profession, and to speak out when necessary. For those who have been forced to learn these lessons early, the experience has left an imprint that will motivate us to pursue change in the years to come. I only hope that for the first time in the legal profession's history, those of us calling for fundamental change will be going with the grain, rather than against it.

Significant challenges remain. Survivors are expected to have the answers, and, although I do not purport to have them all, there are some measures that I believe are required before meaningful change can occur. Culturally, the legal profession should not demand bravery and self-sacrifice to access justice. A survivor should not have to compromise their career prospects in order for someone who is not fit and proper to be held accountable for their failings.

Lawyers have the immense privilege of self-regulation. We are supposed to hold ourselves to a higher threshold, distinct from the criminal standard. If we, as a profession, cannot exercise this privilege to protect those in need, then we do not deserve to have it. Sexual harassment, bullying and other unacceptable behaviours must be acknowledged as misconduct and addressed. In turn, in order for that to have any real effect, there must be consequences for failing to report misconduct.

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8 "What has been changing in the largest law firms?" LawTalk (31 August 2018).

Finally, we must believe those who do come forward. Empathy, belief, and understanding the personal cost of disclosing an assault, must be offered to survivors. A survivor should only need to tell their story once.

I am hopeful that this year will see the start of a change that all lawyers can contribute to. Every lawyer is expected to act decently and to meet our ethical obligations. It is as simple as acting appropriately and reporting those who do not. Those who are responsible for bringing the profession into its current state of disrepute — perpetrators, those who protected them, the enforcers who failed in their duties — need to hear that harmful behaviour will no longer be tolerated in our profession.

Me aro koe ki te hā o Hineahuone — Pay heed to the mana and dignity of Māori women[*] — Kate Tarawhiti and Bernadette Arapere[**]

In the inaugural issue of this Journal, Deputy Chief Judge Caren Fox wrote of the future of Māori women in the law and the particular challenges facing Māori women lawyers.[1] She identified many challenges, some exclusive to Māori women and some facing all women in the profession. These included race barriers and a general failure within the legal profession to understand the importance of Māori culture and perspectives; a lack of role models and role modelling for Māori women; adverse gender perceptions of women in the law; inflexible working arrangements and a failure to accommodate motherhood. The counter-factual position is that wāhine Māori in senior roles are required

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* Hineahuone was the first woman, shaped from red earth by Tānemahuta with the guidance of his mother Papatūānuku. Tānemahuta breathed life into Hineahuone through hongi and she replied "Tihei Mauriora" (I sneeze, therefore I live). This whakataukī recognises the status and importance of wāhine Māori. See Ani Mikaere *Colonising Myths Māori Realities: He Rukuruku Whakaaro* (Huia Publishers and Te Tākupu, Te Wānanga o Raukawa, 2011) at 209. See also Janette Hamilton-Pearce "Mana Wāhine in Information Technology: Ngā Kaiwhatu Kākahu Me Te Kākahu (Doctor of Philosophy School of Computing and Mathematical Sciences, Thesis, AUT University, 2009) at 2–3.

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1 Deputy Chief Judge Caren Fox "The future of Māori women in the law" [2017] NZWLJ 16 at 16–17.

to be all things to all people in the workplace, in the community and at home.

In an effort to overcome the barriers identified by Judge Fox and decolonise the structures which we practice in, more Māori women are speaking up and creating spaces of their own. As discussed by senior Māori lawyer, Annette Sykes, the entry of Māori women into the legal profession is a chance to "rebel against being made invisible as we are too oft to find ourselves in the colonising realities that most of us were born and raised into".[2]

Have Māori women lawyers been made invisible in the legal profession? Are Māori women lawyers rebelling — claiming our own spaces and places in the face of a profession that is, arguably, in crisis?

I MADE INVISIBLE?

Since Judge Fox's article, a bright light has been shone on the culture of sexual harassment and bullying in the legal profession. There have been a range of responses from the profession and from tauira (students). The New Zealand Law Society commissioned a review of the adequacy of its regulatory framework in respect of harassment and inappropriate workplace behaviour.[3] Law firm Russell McVeagh commissioned an independent review of the firm's response to complaints by summer clerks of sexual harassment and bullying.[4] Throughout the profession, seminars have been held on sexual harassment, diversity and inclusion.

However, the voices of Māori women lawyers have been largely absent in the mainstream discussions about necessary cultural change in the profession. Despite te Tiriti o Waitangi/the Treaty of Waitangi and the principles of partnership that purport to underpin much of our public law (and inform the way in which more institutions in this country are supposed to operate), the legal profession itself appears to not yet have opened its eyes to the reality of the Treaty partnership, including in decision-making.

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2 Annette Sykes "Te Miina o Papatūānuku — Te Mana o te Wahine" (2015) October Māori LR 33 at 34.

3 The regulatory working group was established by the New Zealand Law Society and must consider "whether the existing regulatory framework, practices and processes enable adequate reporting of harassment or inappropriate workplace behaviour within the legal profession, along with how better support can be provided to those making reports of sensitive issues, and the adequacy of the regulatory framework to enable effective action to be taken where such conduct is alleged". See "Law Society announces regulatory working group membership" (19 April 2018) New Zealand Law Society <www.lawsociety.org.nz>.

4 Dame Margaret Bazley *Independent Review of Russell McVeagh: March – June 2018* (5 July 2018).

This view is borne out of the fact that there were no Māori women on either the New Zealand Law Society's Women's Advisory Panel,[5] or the regulatory working group reviewing the New Zealand Law Society.[6] The recent NZ Lawyer Women in Law Summit (held in Auckland in September this year) was marketed with taglines such as: "Celebrate women, celebrate diversity" and with the goal of building a "more inclusive future for law".[7] That event did not include any Māori women speakers.[8] Similarly, profession-wide seminars on bullying and harassment have had few, if any, Māori speakers.[9]

Dame Margaret Bazley's report on Russell McVeagh lacked any consideration of the place of Māori in that firm except for noting that Māori make up a very small minority of staff. Yet the report opened with an extract from one of the most well-known whakataukī in te ao Māori.[10] Māori legal academic, Khylee Quince, highlighted the misappropriation of this whakataukī in the report and noted that:[11]

> Despite several mentions, the Somewhat Elusive Other Diversity Groups … are never given any sunlight — a two page section on "The Place of Women and Diversity" describes gender issues at some length, without going on to tell us what the "and Diversity" part was referring to.

'Diversity' as an idea has been heavily promoted but lacks impact when the conversation doesn't recognise and provide platforms for wāhine Māori or other underrepresented groups to speak. This has been a common critique of the #Metoo movement globally, that is, there has been a lack of recognition of the experiences of women of colour, separate to those of white women. The impact of this is perfectly captured by Leah Whiu:[12]

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5 The Women's Advisory Panel members are Chris Moore (Chair), Ann Brennan, David Campbell, Anita Chan QC, Tiana Epati, Stephanie Mann, Phillipa Muir and Liesle Theron.

6 See above n 3. Dame Silvia Cartwright chairs the working group. The other members are Jane Drumm, Philip Hamlin, Joy Liddicoat and Elisabeth McDonald.

7 The Women in Law Summit 2018 was organised by Key Media Pty, the Australian based publisher of *NZ Lawyer* magazine, with sponsorship from a number of large New Zealand law firms.

8 "Schedule" (18 September 2018) *NZ Lawyer* Women in Law Summit 2018 <www.womeninlaw.co.nz>.

9 For example, the Law Society webinar on workplace harassment and bullying and harassment, held on 4 April 2018. The speakers were Steph Dyhrberg, Susan Hornsby-Geluk, and Hamish Kynaston.

10 *He aha te mea nui o te Ao?…he tāngata, he tāngata, he tāngata*. See Bazley, above n 4, at i.

11 Khylee Quince "It's not people but kaupapa, Russell McVeagh" (6 July 2018) *Newsroom* <www.newsroom.co.nz>

12 Leah Whiu "A Māori Woman's Experience of Feminist Legal Education in Aotearoa" (1994) 2 Waikato

> It seems to me that my struggle necessarily takes account of your struggle. I can't ignore patriarchy in my struggle. Yet you can and do ignore the "colour" of patriarchy, the culture-specificity of patriarchy. And in doing so you ignore me.

II TAKING OUR PLACE AND SPACE

The experiences of Māori women lawyers may have been that they are invisible or made invisible in the mainstream. However, Māori have always rebelled against or ignored this construct by claiming our own place and space. In particular, Māori women have created spaces for dialogue and support of each other over the years. This is no surprise given the importance in te ao Māori of the collective — whānau, hapū and iwi.

Moreover, in tikanga Māori, mana wāhine and mana tāne are strong and complementary constructs.[13] Ani Mikaere describes these complementary constructs as:[14]

> The roles of men and women according to tikanga Māori can be understood only in the context of a Māori worldview, which acknowledges the natural order of the universe, the interrelationship or whanaungatanga of all living things to one another and the overarching principle of balance. Both men and women are essential contributors to the whakapapa that connects Māori people back to the beginning of creation. Women play a key role in linking the past with the present and the future. The survival of the whole is absolutely dependent upon everyone who belongs to it, with the result that every individual within the group has their own intrinsic value. All are part of the collective; it is therefore a collective responsibility to see that their respective roles are valued and protected.

Accordingly, responses from Māori lawyers have involved both women and men.[15] As Ani highlights, it is critical that the collective takes responsibility

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Law Review at 161–164.

13 Ani Mikaere "Māori Women: Caught in the Contradictions of a Colonised Reality" (1994) 2 Waikato Law Review 125.

14 Ani Mikaere *Colonising Myths Māori Realities: He Rukuruku Whakaaro* (Huia Publishers and Te Tākupu, Te Wānanga o Raukawa, 2011) at 208.

15 For example, the working group of Te Hunga Rōia Māori o Aotearoa includes Tavake Afeaki, Ophir Cassidy, Marcia Murray, Bernadette Arapere, Horiana Irwin-Easthope and Te Puea Matoe and the plenary session on culture and values in the profession at this year's Hui-ā-Tau (national conference) includes Tavake Afeaki, Pierre Tohe, Carwyn Jones, Ophir Cassidy, Khylee Quince and Jazmine Cassidy.

for initiatives of change and to ensure mana wāhine are valued and protected. Accordingly, the burden should not be placed solely on the shoulders of women to fix the broken structures of the legal profession, nor should the solutions focus on the behaviour of just one gender.

As part of the response, we have seen incredible leadership shown by our tauira who have stood up to harassment and bullying. In particular, Ngā Rangahautira (the Māori Law Students' Association at Victoria University) led the way by declining sponsorship from Russell McVeagh in 2016 when made aware of issues of sexual harassment of summer clerks at the firm. Support in the form of sponsorship was declined on the basis that Ngā Rangahautira's values did not align with Russell McVeagh's.[16]

In April this year, Te Hunga Rōia Māori o Aotearoa[17] launched the *Ngā Wāhine Rōia Māori o Aotearoa* Mentoring Programme. The programme pairs Māori women lawyers and senior tauira together and is intended to tautoko (support) the growth and career development of wāhine Māori lawyers. Based on concepts of tuakana-teina,[18] the programme aims to prepare and support lawyers and senior law students for success in the workforce, establish networks for mentees with senior practitioners and strengthen networks between Te Hunga Rōia members. The programme also helps to address one of the barriers identified by Judge Fox; a lack of role models and role modelling for Māori women. To date there are more than 70 wāhine from Northland to Dunedin signed up to the programme.

Local branches of Te Hunga Rōia Māori have also run various mentoring and resilience events in their rohe (regions). For example, in Wellington, Māori women lawyers and judges have set up a network and have met regularly over the last year to discuss issues of interest as well as to support and encourage each other in their professional and personal lives.

Te Hunga Rōia Māori has also developed initiatives to support members who may be experiencing workplace bullying or harassment. A working group has been established to particularly address these issues in the profession

16 Melanie Reid and Sasha Borissenko "The summer interns and the law firm" (14 February 2018) *Newsroom* <www.newsroom.co.nz>

17 Te Hunga Rōia Māori o Aotearoa is a national Māori body whose membership includes Māori members of the judiciary, members of parliament, legal practitioners, legal academics, public servants and law students. See Te Hunga Rōia Māori o Aotearoa — The Māori Law Society <www.maorilawsociety.co.nz>.

18 An older or more experienced tuakana helps and guides a younger or less experienced teina.

and within Te Hunga Rōia Māori. *Ngā Hoa Aroha*, a panel of senior Māori practitioners, modelled on the New Zealand Law Society's National Friends Panel but based on tikanga Māori, has been launched. Members of the panel will be available to tautoko any members of Te Hunga Rōia Māori experiencing professional, ethical or legal problems. The kaupapa of culture and safety in the legal profession was the topic of a plenary session at this year's Hui-ā-Tau (national conference) for Te Hunga Rōia Māori. And wāhine Māori comprised more than two thirds of the speakers at the Hui-ā-Tau. It is notable that the work and initiatives of Te Hunga Rōia Māori are carried out on an entirely voluntary basis by its members: none of the fees paid by practitioners to the New Zealand Law Society are apportioned to Te Hunga Rōia Māori.

Māori women lawyers are also increasingly rejecting the traditional law firm culture and structure and many are starting their own law firms that have tikanga Māori at the centre of how they practise law. Tukau Law and Consultancy, Kaupare Law & Consultancy, Whakamana Consultancy Ltd, Te Aki Ture and Consultancy, Whaiā Legal and Dixon & Co Lawyers are recent examples of law firms established by and for Māori women lawyers with the aim of empowering whānau, hapū and iwi through legal practice. This trend was also true in the early 2000s with firms such as Tamatekapua Law and King Alofivae Malosi and tuakana such as Annette Sykes paving the way.

We also take the time to recognise some standout achievements by Māori women in law over the past year or so: Jacinta Ruru was appointed the first Māori Professor of Law at Otago University in 2016; three wāhine Māori rōia, Kiritapu Allan, Willow-Jean Prime and Harete Hipango were elected to Parliament at the 2017 election; and Crown prosecutor, Tini Clark, was appointed to the District Court bench earlier this year.

However, many Māori lawyers are struggling. The 2018 Law Society national survey of the legal profession and current workplace environment indicated that experiences of bullying behaviour and sexual harassment are more prevalent among Māori lawyers, and that Māori lawyers perceive aspects of their workplace wellbeing less favourably.[19] Specifically:[20]

19 Colmar Brunton *Workplace Environment Survey* (New Zealand Law Society, 28 May 2018).

20 At 7, 13, 18, 39; and "Legal Workplace Environment Survey — Summary of Findings Relating to Māori lawyers", provided by the Law Society to Te Hunga Rōia Māori o Aotearoa (20 September 2018).

i) The prevalence of sexual harassment in the past five years is significantly higher than average for Māori lawyers (16 per cent of Māori compared to 10 per cent on average). A higher proportion of Māori women lawyers have experienced sexual harassment in the past five years than average (22 per cent compared to 17 per cent).

ii) In terms of types of harassment, Māori women lawyers were more likely than average to have experienced unwanted sexual attention and inappropriate physical contact.

iii) Māori lawyers' reasons for not seeking support or making a complaint about bullying or harassment tend to mirror those given by other lawyers, but Māori lawyers were significantly more likely than average to say they were too scared, frightened or worried. Twenty eight per cent of Māori lawyers who did not seek support, advice, or make a complaint about sexual harassment said they were too scared or frightened, versus 15 per cent of all lawyers who did not seek support, advice or make a complaint.

iv) Māori lawyers have higher than average overall scores for having experienced bullying.

v) Māori lawyers are more likely than average to feel they work to unrealistic time pressures.

vi) Physically intimidating bullying is more common among those who work in family law or Māori / Treaty of Waitangi law — areas of law in which a lot of Māori lawyers practice.

Despite the achievements of many Māori lawyers and the work by Te Hunga Rōia Māori, it is clear there is much to be done so that Māori women lawyers overcome the barriers highlighted by Judge Fox and for all Māori lawyers in the profession to be safe and supported.

III WERO

So what is the challenge to the profession and to Māori women lawyers in particular? The working group of Te Hunga Rōia Māori is continuing to consider these issues and develop responses so that Māori lawyers, wāhine and tāne, are able to work in a safe and rewarding profession. However, this is not just a job for Māori lawyers. All those who hold power and privilege need to recognise and call out that privilege. That includes the professional bodies that

represent us, the firms large and small that we may choose to work for and those who are developing regulations and policies that affect us. Māori lawyers must be part of the conversations about cultural change in the profession. In Māori terms, our success as a profession can only be judged by measuring the wellbeing and success of the collective, especially the most vulnerable and those in need of support and a voice.

Ehara taku toa i te toa takitahi, he toa takitini
My strength is not mine alone, it is the strength of many

Red stickered: a profession on notice — Monique van Alphen Fyfe*

I have been meaning for some time to update an essay hastily written in the first year of my law degree.[1] That essay focused on the position of women lawyers 100 years after Harriet Vine became the first woman to graduate in law from what was then Victoria College. At the beginning of 2018, five years later and having spent a small measure of time practising, the time appeared ripe. 2018, however, had other ideas, leading the profession on a painful but much needed journey revealing sexual abuse and harassment, and a lack of cultural leadership by key personnel and critical institutions. This piece, therefore, mixes a cursory update with reflections on what has affected me most throughout the year.

In my earlier essay, I noted that structural sexism, coupled with its close friends structural racism and classism, is much harder to identify than overtly discriminatory practices. I suggested a seismic shift was needed to dislodge its remaining components. I welcome 2018 proving me wrong on the first point and, on the latter (I hope), proving me right.

Newsroom's publicity of sexual assault at Russell McVeagh illuminated contradictions in the value the profession places on women in law.[2] Abuses of

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1 Monique van Alphen Fyfe "100 Years On, How Many More to Go? Challenges Facing Women in Law in 2013" (2014) 45 VUWLR 437.

2 For example Sasha Borissenko and Melanie Reid "The summer interns and the law firm" (14 Febuary 2018) *Newsroom* <www.newsroom.co.nz>.

power by a partner and others at Russell McVeagh had been an open secret amongst many students and young lawyers in Wellington. Russell McVeagh's poor handling of it was almost equally well known, as was that of the Law Society. I was surprised that many young women who had studied in other parts of the country were not aware of it at all. That we are not always solely valued for our promise in legal expertise hit them particularly hard. Bubble burst. Structural sexism, and the sense of entitlement and awful behaviour it can normalise, is now a visible and undeniable part of our profession, and an undeniable part of what it is to be a woman lawyer.

This could well be the needed seismic shift. Publicity of (some of the) dreadful conduct by senior men in the profession has provoked so many other lawyers to establish and take part in various events to maintain the brightness of this newly found disinfecting sunshine and ensure cultural change — much vaunted, often unachieved — really does happen. We are all on notice.

The harassment and assault at Russell McVeagh itself has been traversed in sanitised form elsewhere. In this piece, I will focus instead on aspects of the responses to those and other events, and how that response reinforces that these matters require an adjustment in thinking at a level not yet contemplated.

I NOT A DISRUPTION, BUT AN EARTHQUAKE

As with most seismic shifts, this one has considerable energy, particularly among younger lawyers and lawyers to be, and among women who have long advocated for women's rights in the profession. It has been expressed in a variety of ways. Some of the most powerful include a rally of hundreds of students to protest Russell McVeagh's handling of the sexual assaults, a panel discussion entitled *Making Law a Safe Space* which was so oversubscribed it had to change venues twice, and the 214 submissions made to Zoë Lawton's #Metoo blog documenting harassment experiences in legal workplaces.[3]

There is a risk that this energy could be dissipated by a profession whose senior levels are still largely male-dominated, and by institutions that have not yet grappled successfully with their own unconscious bias and structural sexism. The key is in the words unconscious and structural. It is part of how we relate to others, how we manage difference, and how we shape our working lives. It is in the way we make small, ostensibly decorative, decisions

3 Zoë Lawton "#Metoo Blog" (2018) <www.zoelawton.com>.

and dismiss criticisms for want of seeing how it shapes the larger edifice. I will focus on a few examples to illustrate that point, but I preface this by noting these examples are not intended to be scapegoats. Each and every one of us has responsibility for examining our biases to ensure the potential of this momentum is not lost.

A Visible defects: some data

Despite representing over half of law graduates and over 60 per cent of those admitted to the bar, recent research by the Bar Association shows women appear as lead counsel in only 30 per cent of hearings.[4] That figure reduces for the Court of Appeal and Supreme Court, where women appear as lead counsel less than 20 per cent of the time. It reduces again when counsel appearing for the Crown are excluded. Women make up only 19 per cent of QCs, who appear in court less than one tenth as frequently as their male counterparts.[5] We are simply not being heard in court by our peers to the degree that we ought to and, worse, according the Bar Association, there is "no discernible trend of improvement".[6]

There is improvement on the bench. In 2010, 26 per cent of judges were women and, in 2012, 27.7 per cent. That leapt to 31.7 per cent in 2017.[7] However, at that rate of change and given parallel increases in the total number of judges, it could take 50 years to equalise the balance. Studies concerning the ethnicity of judges, their sexuality, or their socioeconomic background are scarce, if they exist at all. Representative diversity is not only important in its own right, but also in ensuring legitimacy of the courts (the judiciary is seen to reflect the population it serves), and relevance of its decisions (the judiciary makes decisions based on a broader understanding of diverse experiences). Representative diversity is some distance away.

The problem is not just lowly percentages of women progressing in the profession. The New Zealand Law Society recently completed a sexual

4 Jenny Cooper and Gretta Schumacher *Gender Ratio of Counsel Appearing in Higher Courts: Report of the New Zealand Bar Association* (September 2018) at 3.

5 At 4.

6 At 4–5.

7 Human Rights Commission *New Zealand Census of Women's Participation 2012* (Wellington, 2012) at 72; Geoff Adlam "New Zealand's Judiciary and Gender" (11 November 2015) New Zealand Law Society <www.lawsociety.org.nz>; and "New Zealand judiciary statistics at 1 January 2017" New Zealand Law Society <www.lawsociety.org.nz>.

harassment and bullying survey of lawyers' workplaces.[8] That survey suggested one fifth of lawyers have been sexually harassed in their working life (31 per cent of women and five per cent of men), and 20 per cent of women lawyers have been sexually harassed in the last five years. But a closer reading of the survey methodology suggests our workplaces are even more prone to accommodating this poor behaviour.

The survey took its definition of sexual harassment from the Human Rights Commission (itself not coming out of this year untarnished).[9] That definition was taken from the Human Rights Act 1993,[10] summarised by the Human Rights Commission as:[11]

> … any unwelcome or offensive sexual behaviour that is repeated, or is serious enough to have a harmful effect, or which contains an implied or overt promise of preferential treatment or an implied or overt threat of detrimental treatment.

The survey called this the "Human Rights Commission definition". The Human Rights Commission provides examples of what constitutes sexual harassment.[12] The examples include, for instance: inappropriate staring or leering that made the victim feel intimidated; sexually suggestive comments or jokes that made the victim feel offended; implied or actual threats of differential treatment if sexual activity was not offered; and actual or attempted rape or sexual assault. The survey called these the "behavioural definition".

The survey treated the Human Rights Commission definition and the behavioural definition as distinct, failing to comprehend that the latter provides examples of the former. The more widely publicised statistics cited above concerned the Human Rights Commission definition and are, therefore, too low.[13] When using the behavioural definition, the percentage of women

8 A summary of the survey findings can be found online: Colmar Brunton *Workplace Environment Survey* (New Zealand Law Society, 28 May 2018).

9 At 15. For more on the controversy at the Human Rights Commission, see for example Harrison Christian "Human Rights Commission finance boss sexually harasses young intern, keeps job" (11 February 2018) *Stuff* <www.stuff.co.nz>. See also Coral Shaw *Ministerial Review of the Human Rights Commission in relation to the internal handling of sexual harassment claims and its organisational culture* (May 2018).

10 Section 62.

11 Human Rights Commission "Sexual Harassment: What you need to know" at 2.

12 At 3.

13 In addition, if a respondent answered yes to any of the behavioural definitions, but later said they did

who reported sexual harassment in the last five years jumps from 20 to 40 per cent.[14] *Forty* per cent. The survey also noted that prevalence of harassment is higher for younger lawyers (up to 58 per cent). It is also more prevalent amongst those practising at the criminal bar (55 per cent). Although the results do not mention whether ethnicity affects prevalence of sexual harassment, in the context of bullying they do show that Māori, Pasifika and Asian lawyers are more likely to be targeted. An intersectional critique indicates the same is also true for sexual harassment.[15]

The most common types of harassment were crude or offensive behaviour, such as sexually suggestive comments or "jokes", experienced by almost 90 per cent of women who have been sexually harassed. (Locker room talk.) Unwanted sexual attention was next, with 68 per cent of women who have been harassed reporting intrusive questions into their private life or physical appearance that were offensive. (Our bodies are public property.) Sixty six per cent reported inappropriate staring or leering that made them feel intimidated. (We are here for your visual gratification.) Unwelcome touching, hugging, cornering or kissing managed 59 per cent. (RIP bodily autonomy.)

The survey results make for unhappy reading. The report and communications about it lauded the fact that 77 per cent of women indicated their jobs gave them a great deal of satisfaction.[16] I confess to being suspicious of that figure. Have women merely set the bar low to cope with experiences that we should not have to? What would retention rates and proportions of, for example, women QCs look like if we did not have to contend with the additional stress of such experiences?

What the results do provide, however, is a concrete foundation to which we can point to suggest poor retention and promotion rates are not of our own making, and upon which we can build strategies for more positive outcomes. We know now, without being able to deny it, the extent of the symptoms we

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not consider it harassment, this was not counted in the survey's harassment tally. This affected 136 responses, or 3.9 per cent of a sample size of 3,516: Colmar Brunton, above n 9, at 15.

14 At 18.

15 See the breakdown provided in Bernadette Arapere and Kate Tarawhiti "State of the Nation — Tauākī o te Motu: Me aro koe ki te hā o Hineahuone — Pay heed to the mana and dignity of Māori women" [2018] NZWLJ 22 at 28.

16 Colmar Brunton, above n 9, at 11; and Geoff Adlam "The 2018 Legal Workplace Environment Survey" (29 June 2018) New Zealand Law Society <www.lawsociety.org.nz>.

need to be rid of. What is next needed is a careful appraisal of the way in which we and our institutions respond.

B Hidden defects: some examples

The Law Society itself is undertaking a commendable exercise in self-reflection of late. There are, however, troubling features in the way it has approached some matters and its failure to identify those unconscious elements of its bias, illustrated here in two examples.

First, disciplinary proceedings. The Law Society oversees the primary regulatory bodies for lawyers: the Standards Committee and the Disciplinary Tribunal. Failures in recent decisions of the Standards Committee to address material aspects of structural sexism are cause for concern. In one instance, the Committee determined that bullying, intimidation and sexual harassment by John Eichelbaum amounted to serious unsatisfactory conduct.[17] It censured him and imposed substantial fines. Olivia Wensley, who enjoys considerable freedom to critique the legal profession having left on account of its sexism, criticised the Committee for providing an "extremely sanitised account" of Eichelbaum's behaviour.[18] That sanitisation, quite possibly the result of structural sexism, led the Committee to make a decision with the potential to damage the integrity of and trust in disciplinary procedures.

The Committee declined to refer the matter to the Disciplinary Tribunal as it did not consider the behaviour to have reached the level of misconduct. Misconduct includes behaviour that would "reasonably be regarded by lawyers of good standing as disgraceful or dishonourable".[19] Effectively, the Committee's decision says that a lawyer who, in the course of professional meetings, exhibits bizarrely inappropriate behaviour (including hanging women's underwear on a fence), deliberately seeks to make a woman lawyer uncomfortable, insists she bend over through a window when she is wearing clothing inappropriate for doing so, laughs at her and makes derogatory comments, is not engaging in conduct regarded as disgraceful or dishonourable by lawyers of good standing.[20]

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17 "Lawyer's disrespect towards another practitioner" (29 March 2018) New Zealand Law Society <www.lawsociety.org.nz>. I note, with some disquiet, that the Committee refrained from calling Eichelbaum's behaviour sexual harassment.

18 Cecile Meier "Lawyer who was told to bend over by senior barrister speaks out" (29 March 2018) *Stuff* <www.stuff.co.nz>.

19 Lawyers and Conveyancers Act 2006, s 7(1)(a)(i).

20 Apart from that in parenthesis, these facts are drawn from the Standards Committee's "extremely

It should be obvious I wholeheartedly disagree.

In another instance, the Committee proceeded with an own-motion investigation of comments by lawyer Catriona MacLennan about a sitting Judge.[21] In discharging a defendant on domestic violence charges without conviction, the Judge had made remarks diminishing the culpability of the defendant due to the actions of his victim. Ms MacLennan had condemned those remarks and the decision as victim blaming and contributing to a lack of domestic violence reporting. She suggested the Judge ought not to continue on the bench.[22] Although the Committee ultimately determined it need not proceed to a full hearing, both its decision to investigate and its decision not to proceed were subject to forthright criticism. The critics, inter alia, questioned the Committee's focus on Ms MacLennan over condemning the Judge's comments, described the final decision as an exercise in self-justification, suggested the Committee apologise to Ms MacLennan, and called for members of the Committee and the President of the Law Society to step down.[23] None of these suggestions has been pursued.

These two proceedings show how important it is for the Committee to carefully consider the implications of structural sexism in all aspects of its decision-making. Failure to do so risks undermining trust in an important disciplinary institution. Instead of being seen as a fair and impartial arbiter, that institution can be criticised for failing to identify and condemn sexual harassment in a manner commensurate with its seriousness, and for failing to reflect on the structural aspects of sexism and domestic violence and its own complicity in perpetuating assumptions about them. In the wake of these decisions, those who suffer sexual harassment and wish to lay a complaint might be less likely to turn to the very institution that is supposed to ensure

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sanitised" account.

21 *Own Motion Investigation by the National Standards Committee concerning Catriona MacLennan* (Notice of Decision, 11 May 2018); and "Standards committee takes no further action after criticism of judge" (13 June 2018) New Zealand Law Society <www.lawsociety.org.nz>.

22 Anna Leask "Police reviewing judge's decision to discharge man who assaulted wife" *New Zealand Herald* (online ed, Auckland, 13 December 2017).

23 Criticism has been levelled by the Auckland Women Lawyers' Association, Tim Murphy "Women lawyers blast Law Society inquiry" (7 May 2018) *Newsroom* <www.newsroom.co.nz>; retired Supreme Court Judge Sir Edward Thomas, Tim Murphy "Law Society ends inquiry over judge criticism" (15 May 2018) *Newsroom* <www.newsroom.co.nz>; Jim Farmer QC "Criticising Judges" (7 May 2018) *James Farmer QC* <www.jamesfarmerqc.co.nz>; and Benedict Tompkins "'Repugnant' committee pursuing female lawyer must go" (16 April 2018) *Newsroom* <www.newsroom.co.nz>.

lawyers treat each other with courtesy and respect. As Bridget Sinclair notes, it is an immense privilege to self-regulate.[24] I would add that women would like to place trust in the Law Society to do so. In order for that to happen, we need it to change to reflect the seismic shift that is upon us: we are women, we are here, we are serious about rebuilding this culture and we need the Law Society to keep up.

Secondly, framing. The Law Society has made admirable efforts to gather data on sexual harassment and bullying, but it made disappointing comments when announcing the results. The President's letter to the profession,[25] which later became a public press statement, undermined the cautious optimism harboured by many young women lawyers. Myself and others were incredulous at the surprise expressed at the data,[26] and of the claim the Law Society knew nothing of the allegations.[27] More distressing was the characterisation of the experience of those who had endured sexual assault and harassment at Russell McVeagh as a "disruption", and thanking them by saying they "kicked this off". I was taken aback by this choice of words. I felt it did not reflect the gravity of the harms victims have suffered or the empathy those harms ought to educe. I was not alone. Language matters.

If we are to tell our stories and imbue the profession with a cultural foundation of diversity and understanding, those stories need to be received with respect, addressed with empathy and followed by careful self-reflection. This is particularly important in the context of the Law Society's taskforce for culture change being chaired by the same President whose own responses to

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24 Bridget Sinclair "State of the Nation — Tauākī o te Motu: Speaking for Me" [2018] NZWLJ 18 at 21.

25 Letter from Kathryn Beck (President of the New Zealand Law Society) to Lawyers regarding "Embracing the power of real disruption" (30 May 2018).

26 The Law Society was furnished with reports in 2015 and 2016 that documented the prevalence of sexual harassment in New Zealand and Australia: RT Michalak "Causes and Consequences of Work-Related Psychosocial Risk Exposure: A Comparative Investigation of Organizational Context, Employee Attitudes Job Performance and Wellbeing in Lawyers and Non-Lawyer Professionals" (2015); and Josh Pemberton "First Steps: The Experiences and Retention of New Zealand's Junior Lawyers" (New Zealand Law Foundation, 2016).

27 When approached by one of the women who had been assaulted well in advance of the President's letter, a senior official at the Law Society stated an investigation could not be initiated without a complaint. That advice was incorrect. As demonstrated by Ms MacLennan's experience discussed above, the Standards Committee may initiate own-motion investigations: Lawyers and Conveyancers Act 2006, s 130(c).

these issues leaves room for improvement.[28] We are *all* on notice.

II THE REBUILD

The soundness of any structure rests on its foundations. Excavation following the earthquake has revealed ours to be deeply flawed and in need of rebuilding. The way forward is to acknowledge and eliminate the microaggressions and sexist assumptions that are the foundation upon which major assaults are normalised; accept our own complicity in laying that foundation; develop deep empathy and strong support for women in law; and address the complacency of both individuals and institutions in failing to protect and nurture them.

I left architectural practice in 2013, disillusioned with many things, not the least of which was unacknowledged structural sexism and racism. I am pleased to see some progress taking hold in that field, but I am far more confident of meaningful progress being made in the legal profession. When studying law, I was delighted to discover a large number of extraordinary young women, none of whom shied from critiquing the ways in which the law and the profession failed to address sexism and other forms of discrimination. This struck me as a marked change from my earlier university experience, and I hoped it would continue when entering legal practice.

I am extremely privileged and grateful to be able to say that for me it did. Sadly, for others, it has not. My principal hope for meaningful change lies in the bedrock of young women who will expect and demand the transformation of our institutions and culture, it lies in the support of their peers who will echo their calls, and in the leadership of the senior members of our profession who will listen, reflect, and stand by them to expect and demand the same.

28 "Law Society Taskforce focused on culture change" (25 September 2018) New Zealand Law Society <www.lawsociety.org.nz>.

The culture of the profession from a student's perspective — Indiana Aroha Christbelle Shewen*

This year the New Zealand Law Society announced that New Zealand officially has more women lawyers than men lawyers.[1] Alongside this, revelations about the pervasiveness of sexual harassment and bullying in the legal profession began to unfurl. In light of all of this, there has never been a more important time to address the issues of equity, inclusion, and the retention of women leaders in the legal profession.

As a law student in my penultimate year, a question which I have asked myself on a daily basis is "where am I going to start my career?" After five years of studying the law, and with the support of my whānau and friends throughout this time, I have felt that I should be well-equipped to answer this question. Unfortunately, I, along with many of my peers, found myself in a position where I battled with the idea of entering the legal profession at all. I need to qualify, that when I refer to my "peers" in this context, I mean those who are of gender, ethnic, sexual and other minorities. The common concern among my peers is that they would not fit in at a law firm — and when I asked who had applied for roles within bigger law firms, the most frequent answer was that they had not submitted an application at all. I think this is a devastating loss for the legal profession.

One of the most rewarding experiences I have had while at law school has been studying alongside our future lawyers; witnessing their determination, intelligence, empathy, and passion for justice helps me to know that with these leaders at the forefront, the future of the legal profession will be in safe hands. It is for this reason that I believe it is a huge loss for us all when our students say that they are hesitant to practise in the profession. These are the very people that the legal profession will need the most.

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* Current LLB/BA student at Victoria University of Wellington. Ngāti Mutunga, Te Āti Awa, Rangitāne o Wairau.

1 "Women lawyers now in the majority" (24 January 2018) New Zealand Law Society <www.lawsociety.org.nz>.

I SUPPORTING AND PROMOTING YOUNG LAWYERS ENTERING THE PROFESSION

A Zero Tolerance for Harassment and Bullying

The revelations about the pervasiveness of sexual harassment and bullying has been the most prevalent issue discussed among my peers at law school this year. For many of us students who already knew about the allegations, the media releases provided an opportunity for us to publicly stand in solidarity with survivors of sexual harassment and bullying. At Victoria University of Wellington, this was largely demonstrated through the *March on Midland* rally, which saw over 400 students, faculty staff and members of the legal profession join together to call out the problematic culture of the legal profession. It was clear that people wanted to take a stand on this issue, and so long as we continued to draw attention to the issue people couldn't ignore it any longer. Zoë Lawton's blog illustrated the ugly details, and stressed the need for a real change.[2]

The New Zealand Law Society has played a role in supporting lawyers to come forward in making complaints, and to encourage employers to develop policies geared towards making change in the culture of the profession. The formation of robust policy is the first step, but moving forward we need to ensure that our lawyers are educated as to what constitutes sexual harassment and bullying. This means upholding a culture where we can call out inappropriate behaviours for what they are, and continue to provide a voice for those who need support. Dare I say, it might not be the worst idea to have mandatory ethics training that focuses on behaviour within our workplaces, instead of solely on our interactions with clients, before one is deemed fit to be admitted to the Bar.

B Diversity and Inclusion

The debate around sexual harassment and bullying to date has largely involved Pākehā women speaking out, and there has been a focus on the larger and primarily corporate law firms. I must qualify this argument with the fact that it is very important that we encourage all wāhine to speak out on these issues,

2 Zoë Lawton "#Metoo Blog" (2018) <www.zoelawton.com>.

as our experiences of sexual harassment and abuse are widespread.[3] But it must be said that the absence of diversity within this debate does not address the wider extent of the issue.

The New Zealand Law Society's Survey illustrates that Māori and Pacific lawyers are much more highly represented in statistics of bullying — with 34 per cent and 35 per cent respectively having experienced bullying in the last six months.[4] It also illustrates that Māori, Asian and Pacific lawyers have higher than average experiences of bullying.[5] I believe that the inclusion of people from all different cultures and backgrounds within these discussions is of vital importance for all of our law students looking to enter into the legal profession.

In my personal experience, the support and guidance of wāhine Māori rōia around me has been a source of inspiration when I have needed it the most. For me, having role models such as Kate Tarawhiti, Kiritapu Allan and Marcia Murray has helped me to know that there is a place for me, as a wāhine Māori entering the legal profession. I have often looked at these wāhine and thought "If she can do it, then so can I". By paving the way through a profession that isn't always on our side, I know I can rely on my tuakana to ground me when I lose my way.

C Challenging Unconscious Bias

The statistics alone establish that major progress is needed in order to mitigate the unequal realities for women lawyers. The hourly charge out rate for women lawyers is lower than males by an average of 7–10 per cent in all sizes of firm and virtually in all areas of the country.[6] Women lawyers only make up 31 per cent

3 The results of the Colmar Brunton survey commissioned by the Law Society show that Pākehā women lawyers are actually more likely to experience sexual harassment over the course of their working lives than non-Pākehā (33 per cent compared to 24 per cent): see Colmar Brunton *Workplace Environment Survey* (New Zealand Law Society, 28 May 2018) at 16. However, a higher proportion of Māori women lawyers have experienced sexual harassment in the past five years than average (22 per cent compared to 17 per cent). In terms of types of harassment, Māori women were more likely than average to have experienced unwanted sexual attention and inappropriate physical contact: "Legal Workplace Environment Survey — Summary of Findings Relating to Māori Lawyers", provided by the Law Society to Te Hunga Rōia Māori o Aotearoa (20 September 2018).

4 Colmar Brunton, above n 3, at 33

5 At 39.

6 "By the numbers" New Zealand Law Society <www.lawsociety.org.nz>.

of partners and directors within law firms with more than one practitioner.[7] Research from 2016 has also shown that two thirds of women lawyers in their first five years of practice felt that their gender had a bearing on their prospects or future in the legal profession.[8]

The Law Society's Gender Equality Charter encourages law firms to conduct regular gender pay audits, to review practices with a gender equality and inclusion lens, and to conduct training on unconscious bias.[9] These changes are important indicators of the direction we want to go in. However, more work in this area is needed to challenge unconscious bias and hold employers accountable as well as to change our culture and these statistics.

If I could wave a magic wand and look into the future of our profession I would hope that it would be one where female lawyers are enabled to reach the top of the ranks within firms by way of initiatives such as paid parental leave, flexible working hours and of course equal pay between men and women.

II FOSTERING AN ENVIRONMENT FOR CHANGE

We as students have felt that our law firms are finally recognising the inherent value in our diversity. Many of my peers have been asked to be photographed for our universities and for law firms during their recruitment processes — there seems to be a demand to pull in law students from all different backgrounds, and this occurred to me once I saw my face plastered all over the Faculty handbooks at University. Initially I felt uneasy about this situation, almost as if I was being used to promote a level of diversity within the Faculty of Law that did not necessarily exist — but I eventually grasped the importance of appealing to rangatahi Māori, and encouraging them to enter the legal profession. My reasons for this are that firstly, for many family and criminal lawyers the reality is that their clients will be mostly tangata Māori, as these are the people who bear the harshest realities of social and economic disparities in Aotearoa. Moreover, in our legal careers we as future lawyers will be asked to give consideration to aspects of tikanga Māori within our legal practice.

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7 "By the numbers", above n 6.

8 Josh Pemberton *First Steps: The Experiences and Retention of New Zealand's Junior Lawyers* (The New Zealand Law Foundation, June 2016) at 39.

9 "Gender Equality Charter" New Zealand Law Society <www.lawsociety.org.nz>.

The issue remains however, that many tauira Māori like myself are still not engaging in the profession. Earlier this year I met with a partner from one of the large law firms in Wellington; he wanted my insight as to how his firm might better cater their recruitment processes for Māori law students at Victoria University of Wellington. It was difficult for me to illustrate that the change required an overhaul of the culture of the legal profession and simply putting more diverse students on recruitment posters will not be enough to change our culture. Firms need to make more of a commitment to increase their diversity in the graduates that they employ. Most firms recognise the value in diversity, but it is rare to see firms change their standards in any meaningful way in order to increase diversity. For most firms this is often academic, as the graduate recruitment process is designed in a way that considers the academic transcript of an applicant before considering a student's personal circumstances and work experiences. Based on this, we know that the first applications to go are those of tauira Māori, and other ethnic, gender and sexual minorities, as these are the people who suffer the most disparities throughout their law school careers.

We all recognise that it is time we create a profession that can foster and nurture lawyers of all different backgrounds. Through initiatives such as the Gender Equality Charter, and with woman champions such as Steph Dyhrberg at the forefront, I feel reassured that change is occurring which will spark the necessary culture shift to engage with and retain our leaders of tomorrow. I wait impatiently for the day that I talk to a group of rangatahi Māori who are fearless, and eager to enter the legal profession, a profession which enshrines the same values that they encapsulate as Māori.

I think that is the true measure of a shift in culture — in the way our legal profession is viewed through the eyes of tauira Māori. Ehara taku toa i te toa takitahi, he toa takitini.

BE JUST & FEAR NOT[**]

Gill Gatfield[*]

Almost four decades of unequivocal evidence proves the systemic discrimination and sexual harassment of women in New Zealand's legal profession. From 1981 to 2018, comprehensive reports and surveys, commissioned and conducted by law societies, women lawyers' groups and independent scholars, have demonstrated the ongoing and pervasive pattern of unlawful and unethical discrimination and harassment. Throughout that same period, law society working groups, consultative groups and taskforces have been formed. The profession has been lectured by its leaders, and ethical rules discussed and reviewed.

In 1982, two major district law societies proposed that a specific rule on discrimination be added to the New Zealand Law Society (NZLS) rules of professional conduct.[1] That ethical rule contained a hard-won explanatory note acknowledging the difficulties faced by women in the law. Its breadth was sufficient to cover sexual harassment. The 1982 ethical rule gave comfort to the major law societies, pushed into action by women lawyers' groups to form working parties to investigate the experiences of women in the law. Their rationale is documented in *Without Prejudice*:[2]

> The Wellington working party, like the Auckland working party, placed considerable reliance on the 1982 ethical guideline as an answer to the

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** 'Be Just & Fear Not' is the inscription on the New Zealand Law Society Coat of Arms. This comments on the Law Society's governance and response to recent reports of sexual harassment and discrimination. Further scrutiny is warranted of legal employers and other legal bodies' actions. This is dedicated to the women in law who bravely face adversity and act in the pursuit of justice.

* LLB, MFA(Hons). After working in legal practice and as a senior advisor on human rights law, Gill founded Equity Works Ltd as a barrister advising corporates, professional bodies and government on discrimination practices. She is an internationally recognised artist, a human rights advocate and author of *Without Prejudice: Women in the Law 1896–1996* (Brookers, Wellington, 1996; Heritage Title, 2011; Thomson Reuters, Auckland 2018) See <www.gillgatfield.com>

1 Gill Gatfield *Without Prejudice: Women in the Law 1896–1996* (Brookers, Wellington, 1996; Heritage Title, 2011; Thomson Reuters, Auckland 2018) at 108–109.

2 At 114.

> problem of discrimination in the profession. In effect, the law societies saw the 1982 ethical rule and explanatory statement as "a confirmation of the place of women … and, as such [it] would be of considerable support to them".

The Working Group's optimism was misguided. Widespread legal workplace discrimination and harassment continued to go unchecked. The rule was in name only. By 1994, twelve years after the rule had been introduced, the Auckland Law Society had received only two complaints of sex discrimination, and neither were referred to the Disciplinary Tribunal. The three other major law societies received no complaints. Again, the background was explained in *Without Prejudice*:[3]

> Despite the New Zealand Law Society's explanatory statement, there was no intention on the part of the law societies that a breach of the rule against discrimination would lead to disciplinary proceedings. On the contrary, the national president, Bruce Slane, told the 1983 Conference of Law Societies in Surfers Paradise that the new ethical guideline was "not suggested with the aim of fostering formal complaints". Discrimination, he said, was widely believed to be "notoriously difficult to establish" [and] there was a "natural reluctance" on the part of those who experienced it to publicise the fact.
>
> No consideration was given to a complaints procedure or enforcement mechanisms that might overcome that "natural reluctance" or ensure that discrimination was fairly established — the ethical guideline had a purely educational purpose.

Ten years after the ethical rule was introduced, I commenced my research on women in the law. To establish a baseline, I conducted a 1992 national survey with sociologist Alison Gray, the first national survey of the legal profession.[4] The results were clear-cut. I presented the findings at the 1993 National Law Conference to a room packed with lawyers, QCs and judges. Evidence showed prevalent sex discrimination (reported by 82 per cent of women lawyers), pay inequity (20 to 30 per cent pay gap), and unlawful sexual harassment (reported by 32 per cent of women lawyers). Women lawyers were leaving the profession at nearly three times the rate of men. At the end of my presentation, the audience was silent.

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3 At 114.

4 Gill Gatfield and Alison Gray *Women Lawyers in New Zealand: A Survey of the Legal Profession* (Equity Works, Wellington, 1993).

Law societies and women lawyers' groups rallied in a frenzy of activity reminiscent of the early 1980s. Education, equal employment opportunities practices, sexual harassment procedures were developed and promoted, and in many cases delivered. Yet the problems persisted. A 2012 survey of 300 lawyers by Natalya King revealed similar results to those in the 1992 survey.[5] A 2016 study by Josh Pemberton of 800 junior lawyers found almost two-thirds of women lawyers reported that their gender impacted negatively on their prospects in the profession.[6] Reasons given included — pay inequity, discriminatory hiring practices, conscious and unconscious bias in the workplace, client bias, poor promotion prospects, sexism, and sexual harassment. And again, in 2016 a study of Auckland law students by Julia Tolmie and Anna Hood contained further evidence of sex based discrimination in the profession.

Explicit findings on the extent of bullying and sexual harassment of legal professionals was outlined in an Australian study shared with the NZLS. The 2015 report by Dr Rebecca Michalak found that around half of all survey respondents were exposed to at least some form of sexual harassment, consisting of three dimensions: gender harassment, unwanted sexual attention and sexual coercion.[7] The recommendations included:[8]

> Given a) incivility, interpersonal deviance and mistreatment behaviours are culturally pervasive, b) mistreatment can escalate into bullying, and c) gender harassment can escalate into unwanted sexual attention and sexual coercion, a culture of "zero tolerance" should be established and effectively maintained in all workplaces, including targeted policies to promote prevention, enable reporting of and effectively discipline any deviation from zero tolerance.

In early 2018, the Law Society's own data on the profession confirmed an ongoing problem with retention of women lawyers. Despite entering the profession in greater numbers for the previous 25 years, the Law Society reported as at 1 February 2018 "There was a big difference between female and

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

6 Josh Pemberton *"First Steps: The Experiences and Retention of New Zealand's Junior Lawyers"* (New Zealand Law Foundation, 2016).

7 Dr Rebecca Michalak *Causes and Consequences of Work-Related Psychosocial Risk Exposure: A Comparative Investigation of Organisational Context, Employee Attitudes, Job Performance and Wellbeing in Lawyers and Non-Lawyer Professionals* (PsychSafe Pty Ltd, 2015) at 46.

8 At 50.

male lawyers, with female lawyers in practice for an average of 13.3 years and male lawyers for an average of 21.8 years."[9]

The body of quantative evidence and qualitative analysis is comprehensive. The reports are published, presented at seminars and conferences, promoted in *LawTalk*, held in law libraries, and listed on the Law Society's website. Yet, when the two-year old complaints of sexual harassment and sexual assault involving five law clerks in the Wellington office of Russell McVeagh surfaced in national headlines, the Law Society and employers were caught off guard. Queenstown former lawyer Olivia Wensley spoke up about her experiences. Others followed. Coupled with the testimony of over 200 mostly women lawyers on a #Metoo blog set up by legal researcher Zoë Lawton,[10] and on other media platforms, the previously paper-based testimony became digital, and the word spread.

Despite decades of overwhelming proof of an endemic problem, the law's leaders were asleep on the job. NZLS President Kathryn Beck was caught by "surprise".[11] The new Minister of Justice Andrew Little claimed he had never heard stories of sexual harassment in the profession until February 2018. He was, he said "absolutely stunned".[12] What then was the point of all the reports and surveys? To whom were the members of the profession reporting? Thousands of women and men have ticked boxes to carefully drafted questions, their collective reporting clearly falling on deaf ears.

Confidentiality and non-disclosure agreements muddy the waters. Kathryn Beck claimed the Society could not know of the problem because no one had formally complained. Dame Margaret Bazley noted, up to 2016, no sexual harassment or sexual assaults in the context of an employment relationship had been reported to the Law Society.[13] The Standards Committee, empowered to initiate "own motion" investigations, had undertaken none. Yet women lawyers and law clerks claim they brought complaints to the attention of the

9 Geoff Adlam "Snapshot of the Profession" LawTalk (March 2018, Issue 915) at 47.

10 Zoë Lawton "#Metoo Blog" (2018) <www.zoelawton.com>.

11 Alison Mau "Why is buck stopping with Kathryn Beck on culture change at legal firms?" (26 September 2018) *Stuff* <www.stuff.co.nz>.

12 Cherie Howie "Andrew Little's warning to the New Zealand Law Society" *New Zealand Herald* (online ed, 10 March 2018).

13 Dame Margaret Bazley *Independent Review of Russell McVeagh: March – June 2018* (5 July 2018) at 31.

Society.[14] The Wellington Women Lawyers Association's position was reported by New Zealand journalist Alison Mau:[15]

> The Association's members have known about the problem for "all of our careers" said WWLA Convenor Steph Dyhrberg. They've held seminars, workshops and panels, written articles, pleaded and cajoled, even written a draft sexual harassment policy which the Law Society declined to formally adopt.
>
> The Association is scathing about Kathryn Beck's claim to have learned through media reports about the situation at Russell McVeagh, pointing out that the Law Society's executive director was told by one of the survivors two years ago.
>
> "No investigation was initiated until the scandal became public," says Dyhrberg. "We owe the media a debt of gratitude for forcing the Law Society to act."

In the midst of the harassment and sexual assault disclosures, the NZLS disciplinary process did go into motion — to censure a woman advocate for speaking out about sexism and unconscious bias. Barrister and journalist Catriona MacLennan was subjected to a National Standards Committee investigation for public comment on a judge whose sexist remarks in a domestic violence judgment gave cause for legitimate concern.[16] This time, the voices of men lawyers were clearly audible, in her defence.[17] The Chief District Court Judge, the Police, the Crown and the High Court "had all criticised or objected to either the Judge's comments or sentence".[18] The Law Society backed down.[19]

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14 Melanie Reid and Farah Hancock "What Russell McVeagh told its summer clerks" (13 March 2018) *Newsroom* <www.newsroom.co.nz>.

15 Alison Mau "How much proof does Law Society need of sex pests in ranks?" (3 June 2018) *Stuff* <www.stuff.co.nz>.

16 Catriona MacLennan "Lawyer: I will not be silenced" (21 April 2018) *Newsroom* <www.newsroom.co.nz>.

17 Belinda Feek "Probe called 'repugnant': High court barrister calls for Law Society committee to be sacked" *New Zealand Herald* (online ed, 15 April 2018).

18 Emma Hurley "Lawyer facing discipline for criticising judge's controversial domestic violence comments" (13 April 2018) *Newshub* <www.newshub.co.nz>.

19 Nikki Preston "Lawyers are free to speak out against the judiciary, NZLS president says" *New Zealand Herald* (online ed, 17 April 2018).

To ascertain the extent of the problem in April 2018, the NZLS surveyed the profession.[20] Again, it was demonstrated nearly one third of female lawyers have been sexually harassed during their working life. Two-thirds of lawyers who had experienced sexual harassment reported unwanted physical contact.[21] Only seven per cent of lawyers who had experienced harassment within the last five years made a complaint.[22] They fear for their careers, do not trust the process or the people, nor believe anything good will come of making a complaint.[23] In addition, 52 per cent of lawyers reported being bullied at work.[24] The New Zealand Bar Association added its own research to the pool, with equally concerning results.[25]

A flurry of largely Law Society led responses have again stilled the waters. Two major initiatives aim to address the big picture.[26] Led by Dame Silvia Cartwright, the NZLS Regulatory Working Group will address the complaints process and the disciplinary regime, and the NZLS Culture Change Taskforce is charged with considering that report, and finding systemic and cultural solutions. Progress will be slow. The Taskforce is set up for a three year term, with its initial draft strategy and action plan not due until November 2019.[27] This will feel like a lifetime for those facing harassment and discrimination today. A faster track is needed.

To the extent solutions are premised on members of the profession having shared values and interests, caution is due. Proven constant values are those that have enabled the perpetuation of discrimination, harassment and bullying. Power, self-interest, profit, professional reputation, among other drivers, motivate action and inaction. Paternalism continues — the professed need to "protect" young lawyers, yet women lawyers have been young and entering the profession en masse for decades without effective protection. A motive of protection has a double edge, it confirms the status of women

20 Colmar Brunton *Workplace Environment Survey* (New Zealand Law Society, 28 May 2018).

21 At 17.

22 At 28.

23 At 29.

24 At 33.

25 Jenny Cooper and Gretta Schumacher *Gender Ratio of Counsel Appearing in Higher Courts: Report of the New Zealand Bar Association* (New Zealand Law Foundation, 3 September 2018).

26 "Bullying and harassment in the legal profession" New Zealand Law Society <www.lawsociety.org.nz>.

27 "Law Society Taskforce focused on culture change" (25 September 2018) New Zealand Law Society <www.lawsociety.org.nz>.

and young women in particular as powerless, while the protectors remain in control.

Within the legal profession, which is small by international standards, there are multiple potential conflicts of roles and interests. Perpetrators of sexual harassment and discrimination are quite likely to be among those the NZLS has already looked to, to act, report, and educate on sexual harassment and discrimination. What tools will they need to lead future cultural and systemic change? In the 1990s, as in the 1980s, partners and employers were most likely to harass women lawyers, being named by 49 per cent of women lawyers surveyed in 1992. The same abuse of power is recounted in the 2018 survey, and in studies in between. Currently, in 52 per cent of the reported cases of unlawful harassment, the perpetrator is a manager/supervisor/partner/director.[28] For the women lawyers harassed, 98 per cent of the harassers are men. When will those lawyers be held to account? An immediate plan of action is needed to stop and manage perpetrators, and give their targets support and redress. In situations of professional "misconduct" or "unsatisfactory conduct",[29] professional action and discipline should be invoked.

Inevitably the Law Society and the profession will seek to refocus internally. There is much work to be done. Throughout, it is essential that diverse voices and especially those of complainants are valued and heard. Their testimony stands at the heart of the profession's response. Wider public debate and dissenting views serve to better inform the work ahead. In earlier eras, retreating behind closed doors and requiring others to conform only caused further harm. Against a track record of under-performance, criticism of employers and professional bodies within context is expected. Recent comments in the media that the Law Society was protecting vested interests were labelled "irresponsible", and challenges to Kathryn Beck's suitability to lead the Culture Change Taskforce were met with a closed response. Explaining Beck's appointment as Chair, the NZLS observed:[30]

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28 For the male lawyers who experienced sexual harassment (12 per cent of men surveyed), the harasser was more likely to be a woman (74 per cent).

29 These tests trigger disciplinary action under Lawyers and Conveyancers Act 2006 and Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

30 "Law Society statement supporting appointment of Culture Change Taskforce chair" (28 September 2018) New Zealand Law Society <www.lawsociety.org.nz>.

> The Law Society asks that the Taskforce be measured by the actions it takes and that it be given the opportunity to begin its vital work. It will need the support and collaboration of the entire legal community to change the culture of our legal workplaces. Now is the time for us to all work together.

Caution is needed when categorising problems and solutions in "cultural" terms. In previous rounds, this rationale, like conscious and unconscious bias, was labelled a problem of 'attitudes'. These frameworks can be a slippery slide, providing easy excuses and opportunities to deflect. Andrew Little proved the point when he observed, "If I put my Minister of Justice hat on, [sexual violence in the legal profession] is a cultural thing that we need to address as a nation."[31] Sexual harassment and sexual assault may be enabled by cultural contexts but where unlawful and unethical they need effective legal pathways and redress. Cultural change will not change the outcomes inside workplaces without inclusive leadership and structural change.

Sexual harassment also must be considered within the context of discrimination. In the workplace, it forms part of a system of discrimination where access to employment opportunities (jobs, client briefs, client social functions) can be predicated on tolerating sexual comments or advances, or complaints are not made for fear of disadvantage (pay, promotions, client briefs). Where decision makers focus on harassment only, and ignore other forms of discriminatory behaviour, the full extent of the problem will remain unchanged, and actions taken will be limited in scope and outcomes.

Assessing the extent of wider discrimination in the survey will enable the profession to address the now pressing need for an intersectional approach. Seminars on diversity and unconscious bias are not enough. All forms of discrimination compound sex/gender discrimination, and occur alone. The 2018 NZLS survey established that 35 per cent of Pacific lawyers and 34 per cent of Māori lawyers reported bullying behaviour in the last six months,[32] but gave no statistical breakdown of the experience of sexual harassment by ethnicity. If the wider framework of discrimination is not targeted at the same time then the profession will address only part of the problem and the solutions fashioned will work predominantly for white, heterosexual women and men.

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31 Sasha Borissenko "Students to march on Russell McVeagh" (15 March 2018) *Newsroom* <www.newsroom.co.nz>.

32 *Workplace Environment Survey*, above n 21, at 33.

Again, as recommended in *Without Prejudice*, the experiences and needs of women clients and of non-professional staff, and of those who have been forced to leave the profession due to harassment and discrimination need to be uncovered. Where health, wellbeing, careers and opportunities have been undercut by the adverse actions of lawyers, the profession has a duty to act.

Overlooking the economic framework within which discrimination thrives will do further disservice to those adversely impacted. In the 1880s when the colonial law societies supported the legal exclusion of women from legal practice, they did so on moral and economic grounds — women would be paid less, undermining the value of legal services, and were potential competitors. If the profession allowed women to practice, a "flood" was predicted. Entry was hard won. The Female Practitioners Act 1896 undid 15 years of legislative effort to re-enforce the law against women lawyers.

Conversely now, and for the past 20 years, the business case for change is advanced as a primary reason for legal employers to eliminate barriers to women's entry and progression in the law. Again, education, policies and practices have been promoted and in many cases delivered. Women lawyers and law societies have run seminars, penned articles and issued a Gender Equality Charter. "Signing up" was assumed enough. Effectiveness was not monitored.

From here, the Law Society's reach inside places of work is crucial to the ability to self-govern. In the case of harassment and discrimination, the disciplinary system has been set up to fail. Lawyers, law societies and law firms have proven their inability to prevent and discipline unethical and unlawful conduct. Successive law societies have been seen as unwilling or unable to investigate and discipline individuals, firms and other legal employers, despite having power to do so. Justice has been deferred and bravery is in absentia. Instead, the focus remained resolutely on education, voluntary uptake of policies, and yet more reliance on more time and numbers, while the ever steady stream of new graduates replaced those who leave.

Finally, after 122 years, a flood of women into the profession has occurred. For the past 25 years, from 1993 on, the number of female law graduates admitted exceeded the number of male graduates. On 1 February 2018 the Law Society reported that women made up 62 per cent of law graduates admitted

as barristers and solicitors.[33] Ironically, just as the number of women in the profession exceeded the number of men, the lid blew off the profession's exceptionally well documented "secret". Fuelled by the #Metoo movement, the internet, and social media, and under the persistent spotlight of the Fourth Estate, the balance has finally tipped. Reports of sexual harassment and assault captured the public's attention. For the first time, women law students marched in protest. Women lawyers, law clerks and students are again audible and, in many cases, angry. Within a few months since the publicity "erupted", the NZLS received 14 complaints.[34]

Sexual misconduct and other forms of discrimination are not confined to one law firm nor to the legal profession but there are distinct cultural and systemic reasons why these forms of power abuse persist within the practice of law. To unpick these, the law's leaders need to reflect on the issues in the legal profession within the wider historical, economic and cultural contexts. Lessons can be learnt from the channels presently chosen for complaints. In terms of disclosures and documenting, external systems (social media/media) and anonymous surveys have been the most effective methods to date. In each case, these methods may better serve the needs of complainants and reduce subjective bias and risks encountered when dealing face-to-face with people and systems. Complainant inclination towards objective reporting mechanisms lends support to the potential for new online platforms to aggregate and manage complaints, such as Callisto and Vault. Supplemented with complainant support systems, this approach can enable natural justice and empower complainants. Where people continue to run complaints processes or have related roles, they need "fit and proper person" testing and training in handling sensitive claims. Outcomes and standards should be set and monitored through audits and reporting, including where complaints processes are outsourced.

If the profession cannot effectively regulate itself, what action should be expected from the Government? Targets, audits and an independent external complaints process need to be considered. Is it time the Human Rights Commission is given real teeth? Is Law Society and legal employer inaction a future cause of action? What steps is the Minister of Justice taking to monitor and

33 "Snapshot of the Profession", above n 9, at 48.

34 Interview with Kathryn Beck, President of the Law Society (Kathryn Ryan, Radio New Zealand, 30 May 2018).

evaluate the effectiveness of the Law Society's work? Disclosure of timeframes and mechanisms is a minimum. At earlier points in time, governments have stepped in and reviewed the legal profession and its self-regulation. This action may be warranted again to achieve just outcomes for women and minorities in the law and to restore public faith in the legal profession and its role as a conduit for justice. At the core of any sustainable solution will be recognition, remedies and redress for the thousands of women in law whose careers and lives have been derailed or curtailed, and for whom the only redress is for the profession or someone, now, to be just and fear not.

The following chapter is reproduced in an abridged form from Gill Gatfield's work Without Prejudice: Women in the Law.[1] *This text was originally published in 1996 to discuss issues facing women in the legal profession, including discrimination and sexual harassment. Gatfield has recently republished the book under a new title,* Without Prejudice: Women in the Law – Same Issue New Cover 1896–2016.[2] *The issues and solutions Gatfield discusses are just as relevant today as they were in the 1990s.*

CHAPTER II: SEXUAL HARASSMENT

Although "sexual harassment" did not exist as a concept before the early 1960s, women law students' and women lawyers' sexuality was certainly a subject of discussion. Male politicians and lawyers in the late 1800s expressed concerns that the entry of women into law offices would result in unnecessary "flutter and flirtation". They thought that women barristers would charm judges and juries with their physical presence. One solution proposed was for law firms to employ only plain and uninviting women lawyers. No one suggested that the men could change their behaviour.

In the 1950s, when more women were in practice, "blue jokes" were being told at Bar dinners and law students' functions. Women present at these events generally considered the behaviour objectionable. However, the majority of women who practised law from the 1950s to the 1960s pointed out that they did not experience unwanted sexual attention during their careers. The few who said they did, added that it was nothing they could not cope

1 Gill Gatfield *Without Prejudice: Women in the Law* (Brookers, Wellington, 1996).

2 Gill Gatfield *Without Prejudice: Women in the Law — Same Issue New Cover 1896–2016* (Gill Gatfield, Auckland, 2016; Thomson Reuters, Auckland, 2018).

with. One woman, for example, described an experience in her first job where one of her bosses chased her around a table a few times but, she pointed out, he did not resent the fact that she refused his overtures. She did not complain because she felt she could cope and, in any case, was moved to other duties eventually.

A number of women lawyers noted that they did receive compliments from colleagues. Nadja Tollemache, who was admitted to the Bar in 1960, recalled that male colleagues were very gentlemanly — it was only "the odd judge" at social parties who made comments which, she thought, were "probably intended to be 'gallant'". In this context, there was no need to seek assistance in dealing with the attention. She simply handled it by herself.

However, since the 1970s, at the same time that more women entered the law schools and the workforce, social expectations about interactions between women and men changed. Women lawyers, exposed to the new ideas about women's rights to control their bodies and their sexuality, were more inclined to be suspicious of or object to behaviour that emphasised their physical attributes. They were more likely to pride themselves on their academic ability, professional skills and expertise than on their hairstyles or clothing. Compliments about beauty or clothing seemed inappropriate and irrelevant and raised concerns about the intentions of the person commenting.

Despite the changing social climate, harassment of women law students still occurred. At a law lecture at Canterbury University in the early 1970s, when one of the female students came in late, the lecturer stopped what he was doing, and very obviously drew the other students' attention to her. When she sat down with great embarrassment, he said with sexual overtones: "Oh, I've lost my concentration now." In response the male students began to call out: "We lose our attention too when she comes into the room." In reply, the lecturer invited the men students to "Come and see me afterwards about a cold shower". Another woman law student at Canterbury University was experiencing constant comments of a sexual nature in a tutorial where she was the only woman. One day a comment was made by a lecturer about what she was wearing and she was invited to get on to the table and parade in front of the men so they could eye her clothing.

Women appearing in court were also subjected to unwarranted sexual attention. When Silvia Cartwright made her first appearance as counsel in the

High Court, she encountered the premeditated antics of the Crown Prosecutor who, she said: [3]

> … decided to make something of an occasion out of this particular event. There was a jury in the Court waiting for my appeal to finish so they could resume a jury trial. Within the sight of the jury, but so the Judge could not see, of course, the Crown Prosecutor drew this large picture out of his bar jacket and held it up … It depicted a woman barrister with the correct wig and gown on, except the gown stopped at thigh level.

In July 1985, sexual harassment in the male-dominated legal system, possibly for the first time, was placed under scrutiny in the public arena. The year before, an Auckland woman lawyer seeking to interview a client at Christchurch Police Station had reluctantly agreed to be strip-searched. After the search she was shocked to find that a male police officer had been watching her undressing on a series of monitors in another room. On the advice of a senior colleague she "let the whole thing drop and [did] not make a fuss about it". Almost a year later, she was approached during a court recess by two prominent Auckland men lawyers who told her they had seen a video of her being strip-searched. They claimed that there were four copies of the video; the one they had watched was at the Crown Law Office premises in Auckland.[4]

The woman lawyer, despite her colleague's threats of adverse publicity, immediately complained to the Minister of Justice, the Minister of Police and to the New Zealand Law Society (NZLS). She demanded that the videos be located and destroyed. Although the Auckland lawyers' detailed account accurately described the Christchurch strip-search, the police denied there was any substance to the report. According to Deputy Assistant Commissioner of Police John Jamieson there was no capacity to videotape at the Christchurch Police Station: "this was just a joke between two lawyers."[5] Presumably, he was referring to the men.

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3 Interview with Silvia Cartwright (*First Lady in Law*, TVNZ documentary, 19 January 1988).

4 "Report of the strip-search" (Morning Report, National Radio, 12 July 1985) transcript provided by Radio NZ Sound Archives.

5 "Police response to the report" (Midday Report, National Radio, 12 July 1985) transcript provided by Radio NZ Sound Archives.

I RESEARCH REVEALS WIDESPREAD PROBLEM

From 1981, research on the status of women in the legal profession demonstrated that sexual harassment was common. Where, previously, there had been only anecdotes of harassment, there was now evidence of it being widespread.[6]

The first study, by the Auckland District Law Society in 1981, found that 42 per cent of women lawyers surveyed said they had been "subjected to discrimination in the form of belittling or embarrassing talk or conduct".[7] The Wellington District Law Society survey the following year found that 23 per cent of women surveyed had experienced sexual harassment; 54 per cent had experienced derogatory or belittling comments directed at them personally; and 70 per cent had been subjected to belittling talk or derogatory remarks directed at women in general. In all types of harassment, colleagues and employers were the main culprits.[8]

In the 1987 Auckland study, over half the women practitioners surveyed had experienced some form of sex-related harassment in the course of their employment or practice. For example 54 per cent of women had personally experienced derogatory remarks from partners and 51 per cent had this experience from colleagues.[9] Over 10 per cent of women said they were experiencing offensive sexual talk from clients and partners. Another eight per cent of women, mainly employed solicitors, were being subjected to unwanted sexual advances from clients at the time of the survey.[10]

During this time, sexism also occurred in social interactions between men and women lawyers. In Wellington in 1982, women lawyers referred to the "maleness" of law society functions as a deterrent to them attending.[11] In Auckland in 1987, the law society working party reported that social interaction between the sexes was still occurring largely on male terms. Men gathered in clubs or bars where women could not attend or did not wish to

6 Letter from Frances Joychild (legal adviser, Human Rights Commission) (2 September 1993).

7 Auckland District Law Society *Report of the Working Party on Women in the Legal Profession* (1981) at [4.4.3].

8 Wellington District Law Society *Full Report: Women in the Legal Profession* (1983) at [10.1]–[10.4].

9 *Tabulations, Women in the Legal Profession: Vol 3* (Heylen Research Centre, Auckland, 1987) at 211.

10 *Tabulations*, above n 9, at 54 and 212; Jeannine Cockayne (ed) *Women in the Legal Profession: The Report of the Second Working Party on Women in the Legal Profession* (Auckland District Law Society, Auckland, 1989) at 32.

11 Wellington District Law Society *Full Report*, above n 8, at [7.1] and [7.2].

attend. Social talk was considered "exclusionary", centring on "stereotypically male pursuits" such as rugby and cricket and involving coarse, sexist jokes. Women remained outside the social circle "unless they participated as 'one of the boys'".[12]

In 1988, a similar conclusion was reached by Stephanie Knight in her research on the use of alcohol by Auckland women lawyers. She found that the women were cautious drinkers, constantly striking a balance between being accepted as "one of the boys" and maintaining respect. They had little scope for letting their guard down, particularly when drinking with colleagues.[13]
[…]

A Harassment of women lawyers

By the early 1990s, an estimated one-third of the women lawyers in practice and half the women judges have experienced some form of sexual harassment during their careers.[14]

Men lawyers have also been subjected to sexual harassment. Of the 685 men surveyed in 1992, six per cent had experienced sexual remarks and sexual innuendo; four per cent had experienced deliberate touching; three per cent had experienced unwanted advances; and a striking 19 per cent had experienced misuse of position or power.[15] However, women lawyers are much more likely to have personally experienced sexual harassment.

From the comments made by women lawyers, and especially younger women practitioners, harassment is very much a current reality.[16] The most common form of harassment recorded in the 1992 national survey were sexual remarks and sexual innuendo: 38 per cent of women lawyers had personal experience of this type of harassment. Over a quarter had experiences where another person misused their position or power; 18 per cent had experienced

12 Cockayne, above n 10, at 60.

13 Stephanie Knight "The place of alcohol in the lives of women in the legal profession living in Auckland" (BA(Hons) Thesis, University of Auckland, 1988) at 21–23.

14 Gill Gatfield and Alison Gray *Women Lawyers in New Zealand: A Survey of the Legal Profession* (Equity Works, Wellington, 1993) at table 29; Gill Gatfield W*omen Judges in New Zealand: A Survey* (Equity Works, Auckland, 1996) at table 17.

15 Gatfield and Gray, above n 14, at table 29.

16 In 1996, equal employment opportunities and sexual harassment consultants in Auckland and Wellington confirmed that they were aware of current sexual harassment incidents in law firms. See also Ruth Arcus "Sexual harassment in the workplace: the responsibilities of law firm partnerships" *LawTalk* (7 August 1995, issue 440) at 16.

unwanted advances; 16 per cent had experienced deliberate touching; and 5 per cent had either received requests for sexual favours or been told that a promotion depended on a sexual favour.[17]

Sexual harassment in the early 1990s was experienced by women lawyers regardless of their position in the profession or type of workplace. Women lawyers were subjected to harassment regardless of their age and women partners were as likely as women employees to have been exposed to harassment.[18]

Status, however, may reduce exposure to harassment for women who are appointed to the Bench. Before appointment, six of the ten women judges surveyed in 1993 had been subjected to harassment in the form of misuse of position or power, sexual remarks or innuendoes, unwanted advances, or being deliberately touched or brushed up against. After appointment, only two women judges had experienced harassment — in the form of sexual remarks and innuendo.[19]

As in the 1980s, male lawyers were the group largely responsible for sexual harassment of women lawyers and women judges. Partners and employers were most likely to harass women lawyers, being mentioned by 49 per cent of women lawyers surveyed in 1992. Second to bosses were other colleagues, mentioned by 29 per cent of women, and then clients, mentioned by 17 per cent of women. Staff solicitors, who are in most cases the workmates of women lawyers, were said to be responsible for only 14 per cent of sexual harassment.[20] The pattern was the same for women judges. Harassment had been from partners or employers and from other colleagues, but also from other judges. In no instances had women judges been harassed by court staff, clients, offenders, witnesses, plaintiffs or defendants.[21]

Men lawyers and judges, it seems, do not inadvertently harass women lawyers and judges. Of the six women judges who had experienced sexual harassment none said that the behaviour was completely unintentional: three said there was a mixture of intentional and unintentional behaviours, while two said it was simply intentional.[22] This corresponded with women lawyers'

17 Gatfield and Gray, above n 14, at table 29.

18 Gatfield and Gray, above n 14, at [8.3].

19 Gatfield *Women Judges*, above n 14, at [4.1].

20 Gatfield and Gray, above n 14, at table 30.

21 Gatfield *Women Judges*, above n 14, at table 18.

22 Gatfield *Women Judges*, above n 14. The sixth judge did not answer that part of the question.

experiences of discrimination in general.[23]

Sexism is not confined to the office or to social interaction between colleagues. According to women judges surveyed in 1993, it also features in courtrooms. Seven of the ten judges surveyed had experienced inappropriate or disrespectful comments or behaviour on account of their sex in the courtroom. For three of the judges this occurred while they were on the Bench. Another four judges had encountered inappropriate comment or behaviour towards women counsel, women victims and other women in the courtroom. One judge explained: "Women counsel appear to attract more derogatory comments than men and more comments on appearance." Another referred to "deliberate sexist jokes or barbs about women".[24]

Again those responsible for this behaviour were more likely to be lawyers than lay people. All seven of the judges who had experienced gender bias pointed to practitioners or counsel as those responsible. Four women judges referred to other judges as the source of inappropriate gender-related comments or behaviour toward either women counsel, women victims, women judges, or other women in the courtroom.[25]

Again, as with the sexual harassment, in no instance was the behaviour unintentional. All of those who behaved or commented negatively toward or about women did so with an element of intention.[26]

B Appearance and body shape

In the 1992 national survey, 43 per cent of women lawyers said that appearance and body shape discrimination occurred in the profession. Twenty-six per cent of the men lawyers surveyed agreed. […]

It is apparent that for many women lawyers there is an emphasis on their appearance unrelated to any professional dress standard. "Appearance and body shape" are in fact criteria applied to women lawyers in a way that differs considerably from the criteria applied to their male colleagues. In some cases, what may have been referred to or dismissed as "a personal compliment" in the past is now considered a form of discrimination. Where a comment is unwelcome or offensive, and is either repeated or of such a significant nature

23 Gatfield and Gray, above n 14, at [8.2].

24 Gatfield *Women Judges*, above n 14, at table 22 and [5.1].

25 Gatfield *Women Judges*, above n 14, at [5.2].

26 At [5.3].

that it has a detrimental effect on an employee, a "compliment" will be considered unlawful sexual harassment.[27]

There is also a discernible link between appearance and sexuality or race. The resulting "impression" clearly influences whether some women lawyers get jobs, promotions and unwanted sexual attention.

With regard to employment prospects, the comment of one newly-admitted woman solicitor working in a large Wellington law firm was typical of many: "How one looks seems to play a huge part in job prospects — especially for women. Comparing young female solicitors to young male solicitors, looks seem to play quite a large part. I cannot think of one overweight woman lawyer." The same double standard was referred to by a city-based woman solicitor who pointed out: "While it is acceptable for male lawyers to be balding, grey and pot bellied, women are not forgiven any flaws in their appearance." Another newly-admitted woman lawyer put the problem this way: "If you are not a white middle class male you have problems! A fat middle-aged Tongan lesbian is highly unlikely to be hired by a mainstream big firm."

Comments by employers confirm that women's "appearance and body shape" are relevant factors at entry, promotion and partnership levels. A man partner in a small Wellington firm said: "I think that women, homosexuals, plain, fat and short people are discriminated against. A short, plain, fat lesbian would have no chance of employment or partnership." For other employers, however, women's appearance can strengthen their preference to recruit women lawyers. One man partner with twenty-five years' experience in the law said: "I would rather employ a woman because they are better workers in my experience — they are also visually more appealing most times."

Just as Ethel Benjamin was expected to charm judges and juries with her sexuality,[28] some women lawyers today are still said to owe their successes to their looks or their sexuality. When a newly-admitted woman lawyer reported her success in court to a male partner in a large Auckland firm, he winked and asked if she had smiled at the judge. A senior partner in a provincial law firm, when speaking with a client, observed how a newly-employed woman lawyer was "a beautiful woman" and that this was "advantageous to the firm in that it enhanced [her] ability to create a client base". Silvia Cartwright (later

27 Human Rights Act 1993, s 62; Employment Contracts Act 1991, s 29.

28 See Gatfield *Without Prejudice: Women in the Law*, above n 1, ch 4.

Justice Dame Cartwright) had a similar experience after obtaining her first law position. She recalls her first employer telling everyone, in humour, that she got the job over the other contenders because of her legs.[29]
[…]

Stereotypically "beautiful" women lawyers are frustrated by the fact they repeatedly receive unwanted comments and attention. One solicitor who describes herself as "young, blonde and small in stature" was repeatedly told by colleagues that she appeared to be "a blonde bimbo" — until she opened her mouth. An Otago woman lawyer observed: "If you're 'pretty' you are either dumb or there for another purpose." That other purpose is sex, or at least sexual gratification.

Many women lawyers are offended by comments about their appearance where the same comments would not be made to men. As one woman lawyer put it: "Other solicitors and police comment on my appearance — they would not do so if I were a male lawyer." An Otago-based woman lawyer recalled her experience where a High Court judge approached her at a function, tipped her under the chin and said: "Let me have a close look at you." Her physical appearance was the first point of scrutiny and from this examination she could be summed up. It is difficult to imagine a male High Court judge measuring a male lawyer in this same way.

Understandably some women lawyers feel they have had no choice but to play the part. An Auckland associate partner described how the appearance and body criteria were "particularly insidious" because "young female solicitors fall for appearances at all costs — which in turn reinforces 'empty-headed' stereotypes". The American television show *LA Law* is blamed for perpetuating the "model" image required of women lawyers. According to a Christchurch-based solicitor: "in the *LA Law* mould a woman lawyer must look under 30 and dress impeccably." Failing to do so means she does not meet the standard.

Age is another appearance-related factor that affects women and men lawyers differently. Social convention holds that women's beauty dissipates with youth, hence the mass of beauty products to disguise aging and the wide range of plastic surgery options aimed at women so they can regain youthful

29 Interview with Silvia Cartwright (Part 3 of *Standing in the Sunshine*, TV3 documentary series, 25 November 1993).

looks. By comparison, maturity in men is much admired — particularly where those men are dispensing wisdom as in the legal profession. But for women who have been valued at least in part for their appearance, aging is a scourge to be avoided.

For many women lawyers, unwanted and inappropriate comments about their appearance and body rankle and undermine confidence. The clear implication is that women do not succeed in the profession on their merits or, even worse, that their sexuality is part and parcel of their professional merit.
[…]

C But women don't complain

From 1981, sexual harassment has been clearly defined and has been prohibited by law — a fact arguably better known to women lawyers than any other group of women in society. Yet, in over two-thirds of the cases of harassment reported by women lawyers in the 1992 national survey, no action was taken.[30]
[…]

In addition, women lawyers have not hesitated for lack of avenues for complaint, as three formal avenues exist. First, sexual harassment is grounds for a personal grievance complaint under the Employment Contracts Act. Secondly, they could have made a complaint to the Human Rights Commission, requesting an investigation or (failing settlement) initiating proceedings before the Equal Opportunities Tribunal (now the Complaints Review Tribunal). Thirdly, women lawyers could have made a complaint to their district law societies on the basis that sexual harassment would be covered by the ethical rule on discrimination.

A number of firms also offered an in-house alternative: 21 per cent of those surveyed in 1992 worked in law firms which had formal written procedures for dealing with sexual harassment. Regardless, the existence of the procedure did not affect the likelihood of action being taken.[31]

So, why don't women lawyers complain? The answer is found in the stories men and women lawyers have told.

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30 Gatfield and Gray, above n 14, at [8.3].

31 Gatfield and Gray, above n 14, at [8.4].

D Men's view

1 The problem is exaggerated

According to a considerable number of men lawyers, the problem of sexual harassment is exaggerated. Men in the profession are more inclined to dispute the existence, the extent and the seriousness of sexual harassment than of discrimination generally.[32]

Typical comments by men lawyers in the 1992 survey included:

> I believe the issue of sexual harassment is now over-exaggerated. A lot of situations can be taken out of context.
>
> In spite of *LA Law* I do not believe that this happens as often as is reported or represented but who am I to comment?
>
> I have yet to see sexual or other harassment in a legal office. Maybe I lack sensitivity! Or are others overly sensitive?

When commenting on in-house harassment procedures, one man, a partner in an Auckland firm, commented: "None needed. It does not happen." Harassment, according to another male partner, is "an unlikely event".
[…]

In categorising sexual harassment as inconsequential, men lawyers are reinforcing the idea that women fabricate or exaggerate the problem. This reaction is not unique to women lawyers' complaints but is also a tactic used by lawyers in the courtroom.

Women judges have observed for example that some prosecutors and defence counsel "speak down to women witnesses and belittle their experiences and reactions".[33] One judge described the inappropriate comments made by defence counsel when dealing with women victims as including "put down comments or suggestions that no harm was done or that the parties were reconciled therefore she was not serious in making a complaint in the first place".[34] In effect this strategy belittles the complaint and the complainant. It

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32 One-third of the men who commented on sexual harassment downplayed the seriousness or the existence of the problem: Gatfield and Gray, above n 14, "Questionnaire comments summary paper", question 36.

33 Gatfield *Women Judges*, above n 14, at [5.1].

34 Gatfield *Women Judges*, above n 14.

is also reminiscent of the historical argument used to keep women out of the legal profession: that women cannot be trusted to tell the truth.

2 "But some women like the attention"

Many of the men who doubt or minimise the existence of sexual harassment have been in practice for more than twenty years. The social conventions with which this generation were most familiar dictated that men should notice and compliment women on their appearance and that women would be flattered by this attention. As Auckland barrister Kevin Ryan observed: "males of my generation often think women are fair game."[35] Younger men in the profession are also aware that the attitudes of older men lawyers, often senior partners, are problems in their firms. As a Wellington-based partner in a national firm pointed out: "In the case of unintentional innuendo (which happens all too often) older partners, in particular, simply refuse to acknowledge the reality of the situation."

That women lawyers consider their colleague's sexual attention as harassment has been well documented in surveys and studies since the early 1980s. Arguably men lawyers — of any generation — have been on notice long enough that sexual innuendo is inappropriate in the work context.

3 It's just a joke

Regardless of age, men lawyers have frequently responded to suggestions or complaints of sexual harassment by saying: "It was just a joke." This was the response, in 1985, from the Deputy Assistant Commissioner of Police John Jamieson, when the Auckland woman lawyer lodged a complaint with the Minister of Police, the Minister of Justice and the NZLS about the video-taping of her being strip-searched.[36]

Likewise when a Māori woman lawyer complained of racism and sexual harassment in 1990, her concerns were "treated as a joke". A woman lawyer in the 1992 survey commented: "In a semi-social business setting a client persistently tried to kiss me. I told one of the partners and he laughed about it." Another woman who complained of harassment by a colleague brought this to a manager's attention — he thought she was joking.

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35 Interview with Kevin Ryan, barrister (Radio NZ, 12 August 1993).

36 "Police response to the report", above n 5.

E Women's realities

1 It's not a joke

The reality for women in the legal profession is that very few think that sexual harassment is a joke. Of the women who commented in the 1992 survey on the nature of the harassment experienced, less than 20 per cent said that incidents were of a humorous nature and were not intended to offend.[37] For the majority, the behaviour is offensive hence the use of negative descriptions such as "unwanted advances" and "misuse of position or power".

Even women lawyers who thought that what looked like sexual harassment could sometimes be genuine attempts at "humour" had their doubts. They still referred to feeling uncomfortable about the "underlying innuendo" or the times when the humour was "carried away beyond normal conversational banter". Even the few who thought that women can and do "exploit our femaleness" by using sexual remarks in fun recognised they, in turn, were being exploited also. As one Auckland woman lawyer in a large national firm explained: "The difficulty is often that it is not a particular instance of harassment but the creation of an environment where you feel that you shouldn't take these things too seriously — if it happens, it should be laughed off."

Failing to see the "humour" in the harassment opens women lawyers to criticism from their male colleagues. The most common criticisms are that they take things too seriously, they are not "good sports" or they are radical feminists. One woman associate partner in a national firm who complained of sexual harassment was told that she was "an uptight frigid feminist" while others point out that they refrained from complaining for fear of attracting a negative label such as "strident feminist".[38]

The overwhelming reality of the joke is that it is on women. By failing to take complaints of sexual harassment seriously, employers and partners have effectively silenced the problem. In every case where the incident of harassment was treated as a joke by the employer or the firm, no action was taken.

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37 Of 94 voluntary comments on the type of sexual harassment, 17 women referred to the humorous nature of the incident: Gatfield and Gray, above n 14, "Questionnaire comments summary paper", question 36.

38 These labels were also referred to by five women lawyers surveyed in Auckland in 1987. Assertive women were labelled "aggressive", "feminist", "radical" and "stroppy", while assertive men were referred to as "strong- minded", "firm" or simply "assertive": Cockayne, above n 10, at 59.

2 *Complaining is career suicide*

Another way in which potential sexual harassment complaints have been silenced in the legal profession has been by ensuring the repercussions of complaints are, or are perceived to be, so severe that women lawyers cannot afford to take action. Ironically, it is the women who are in line for punishment rather than the perpetrators or the firms.

The publicly reported experience of the Auckland woman lawyer in the 1985 strip-search video case was instructive. When she told the "two prominent male lawyers" who had volunteered to her that they had seen the video that she intended to make a complaint, one was reported to respond: "I wouldn't even think of laying a complaint if I were you, because *Truth* will get hold of this. They'll probably get hold of the video as well, and then you'll be splashed in your underwear right across the front page of that newspaper."[39] Whether or not the advice was genuine, the message was clear: she would be the loser if she made a complaint.

In the 1990s, women lawyers have received the message loud and clear that speaking out about sexual harassment is a bad career move. A woman barrister who had received requests for sexual favours and been told that her opportunities in a firm would depend on her providing sexual favours said, quite simply: "It would be suicidal to speak out — both career wise and personally." Women fear they will be forced out of the firm as a result of the complaint and this message is learnt fast. One newly-admitted Wellington woman lawyer wryly observed: "You can't take action against a partner in your firm — realistically, you'd probably be fired. In this economic climate that's not a good idea." Lawyers are also expected to be ferocious in their defence if personally "accused" of harassment. Frances Joychild, a legal adviser at the Human Rights Commission, pointed out that for women who are sexually harassed in law firms:

> … there is an extreme fear of making a complaint … because the person they are complaining against is a lawyer who they believe will 'know every trick in the book' and will pull out every legal defence and create every legal obstacle to make it very difficult to establish their case.

For this reason, one woman employed by a barrister who approached the

39 "Report of the strip-search", above n 4.

commission for help concluded she had no option but to leave her job. The daily harassment was making her ill but the barrister concerned was so aggressive on behalf of his clients, she feared "he would be even more so if he was the accused".[40]

The worse cases of sexual harassment are veiled in secrecy. Women lawyers, from personal experience or otherwise, know of severe incidents of sexual harassment but are sworn to confidentiality. One women lawyer, for example, commented: "I know of a 'rumoured' case where a woman partner was raped by the Office Manager. Eventually he was dismissed. She was told (effectively) to shut up about it." A first year lawyer noted: "Rumours abound about women receiving requests for sexual favours and stories of promotions depending on sexual favours. I don't know if these are true."
[…]

On some occasions, the action taken by an employer in response to sexual harassment has the unintended effect of damaging the woman lawyer's career. Women who have suffered sexual advances from supervising partners are sometimes relocated in the firm to another department or team. The objective is to minimise their contact with the harasser but, particularly in small or medium sized firms this relocation will also mean the women lawyers are now working outside their areas of expertise. Not only do they need to deal with the personal effects of the harassment, professionally they have to start again.

3 A heavy burden of proof

Although ignoring harassment is a common response, at the other extreme some men lawyers claim that any incidents of sexual harassment warrant severe legal penalties. The emphasis on the legal consequences suggests that to some extent male lawyers, and employers in particular, are mindful of the legal implications and want to be seen to be taking harassment seriously or perhaps are simply concerned at the potential for bad press.

Some lawyers, partly as a result of their training, have an excessive fixation with the legal implications of sexual harassment complaints. They often talk in terms of the "guilty party" and "proving" the harassment occurred. This has a strong deterrent effect on women who have experienced harassment and are

40 Letter from Frances Joychild, above n 6.

concerned at the effect on them and their careers. Women comment that "it is virtually impossible to 'prove' harassment … therefore nothing is done".

Treating harassment in a strictly legal sense can also act as a deterrent to accepting the validity of complaints. Some employers jump the gun and assume that harassment, where proved, warrants severe penalties. Employers make comments like: "If real sexual harassment is proved to have occurred I would support severe action to remedy it" and "I would regard harassment of a sexual nature as being a fireable offence."

Assuming that only the severest penalties would be warranted is an indication that there is little appreciation that sexual harassment occurs in degrees and that the penalty must be matched to the problem.

4 Ineffective procedures

Predictably, the negative stance on sexual harassment taken by men lawyers surfaces in the procedures implemented within law firms. Since the mid-1980s, women lawyers have been faced with non-existent or ineffective procedures for handling sexual harassment complaints.

At best, an estimated 20 per cent of New Zealand law firms had sexual harassment procedures in 1992,[41] and even then 11 per cent of lawyers in those firms are likely to believe the procedures are inadequate.[42] Even more of a concern is the fact that in 1992, the existence of a written sexual harassment procedure in the workplace made no difference to whether any action had been taken in response to an incident of harassment.[43] Doubts about the efficacy of procedures were more likely to come from women than men and usually related to the attitudes of partners or their involvement in the complaints process.

Many law firms have no management structure and so partners are apparently considered the best people to receive and act on complaints of sexual

41 Twenty-one per cent of lawyers surveyed knew that their firms had formal written procedures for sexual harassment complaints, 20 per cent were unsure and 50 per cent said their firms did not. Some of those who definitely knew of procedures would be working in the same firms so it is likely that the proportion of firms having procedures would be less than 21 per cent: Gatfield and Gray, above n 13, at [8.4].

42 Gatfield and Gray, above n 14.

43 Gatfield and Gray, above n 14.

harassment. Where firms employ management staff, they too are frequently involved in handling complaints.

With good reason, women lawyers express doubts that a partner-based complaints procedure will work impartially. Partners, according to women lawyers, are involved as the perpetrators in half of the cases of sexual harassment, so why would a victim of harassment seek assistance from the harasser? The same problem can arise where management staff are involved. In one firm where the office manager was sexually harassing women staff, he was a central figure in the proposed procedure to deal with the problem.

Even where the harassing partner is not the person receiving complaints, experience has taught women lawyers that partners will close ranks. A woman lawyer with three years' experience was "stunned" when she received deliberate touching and unwanted advances from a partner in a large national firm. She immediately told her supervising partner who, she said, "initially tried to 'downplay' the incident". Only when he saw how serious she was did he take "the matter more seriously although he didn't do anything about it as far as [she knew]". In a similar case of partner harassment, again involving a woman with three years' post-admission experience, the woman said: "All the partners were aware of the behaviour (the partners were all men) and the behaviour was approved by all the partners."

[…]

The negative attitudes of some partners present real difficulties for those who advocate the introduction of procedures or harassment prevention education. Regardless of firm size and location, women lawyers relay similar experiences:

> We had completely inadequate procedures — it has taken a full year to get changes made — even after we showed the partners a survey taken of all female solicitors in the firm, which clearly demonstrated an urgent need for change. You would think the benefits would have been obvious to the partners but they preferred to deny that there was a problem.

[…]

Only a minority of women lawyers described confidence in their firm's sexual harassment procedures. One Wellington woman lawyer commented that as a result of what she considered "good procedures" in her current firm, "the atmosphere is positive for women". Another woman working in a large

firm that has recently formulated a sexual harassment procedure said: "I would feel confident that if I had a legitimate complaint about sexual harassment there are people I could go to and it would be dealt with."
[…]

In some firms, the partners believe that they will know when harassment is occurring. This was the view of a partner in a medium sized Auckland firm where a staff solicitor had made unwanted advances and requests for sexual favours of others in the firm. There was no sexual harassment procedure except, as the partner said: "We are watchful and would act if aware [sexual harassment] occurred."

While it may be reassuring to the staff members that the partners are on the look out for harassment, this alone is insufficient. Those who harass can be very clever and manipulative about disguising their behaviour, and those harassed, for the reasons mentioned above, are unlikely to disclose the harassment unless the workplace has an open attitude to dealing with incidents as they arise. The publication and implementation of a procedure is a significant statement that complaints will be taken seriously and dealt with properly.

F Women's real choices

Given the inadequacies of the procedures within law firms and the very real disincentives to taking action via the available legal channels, women lawyers' real choices when faced with sexual harassment are limited. Their most common responses are to ignore, avoid, counter or deflect the behaviour, or to resign.

1 Ignore

Women lawyers' most common response to sexual harassment in 1992 was ignoring the behaviour.[44] The reasons for doing so included: not seeking to lower themselves to the level of the harasser; the firm belief that a complaint would not be believed or taken seriously; doubt that any positive action would result; or fear of even worse consequences such as being labelled a trouble-maker or being fired. In each case, women's collective experience confirmed

44 Gatfield and Gray, above n 14, at [8.3]. Twenty three per cent of women lawyers who commented on sexual harassment said it was best to ignore the conduct: Gatfield and Gray, above n 14, "Questionnaire comments summary paper", question 36.

that these were feasible and even probable outcomes when women complained about harassment.

None of these reasons for inaction are positive; all convey an element of fear and distrust.

2 Avoid

Since the 1980s, women lawyers have been quite open about the fact that they take steps to avoid being harassed by colleagues, partners and clients. Women lawyers in Wellington and Auckland in the early 1980s, for example, disclosed that they chose not to attend professional social functions where mixing with colleagues could lead to inappropriate behaviour.[45]

In the 1990s, some women lawyers still opt not to attend functions. As one Christchurch lawyer who had experienced unwanted sexual remarks from colleagues said: "I avoid Law Society functions now — they are a joke." Newly-admitted women lawyers comment that they will intentionally leave law firm social functions when they sense that professional barriers are breaking down. They suspect that, as the night goes on and the alcohol consumption increases, they will be perceived as "fair game" for unwanted attention.

As in earlier decades, some women lawyers in the 1990s are limiting their professional interaction with men lawyers. Men lawyers are not noticeably modifying their behaviour, except that they no longer exclude their women colleagues overtly, as they did up to the 1970s. By excluding women from Bar dinners and law school functions, men lawyers were taking steps to remove their temptation to harass women. Likewise, in the 1970s, some Auckland firms would not allow women litigators to go with senior male partners to the Court of Appeal in Wellington because the obligatory overnight stay raised fears of potential sexual impropriety. At this time, the majority of women lawyers were young and unmarried. For a woman lawyer to go out of town overnight alone with a man was considered a risk.[46]

3 Counter

A minority of women lawyers deal with unwanted sexual advances or comments on the spot. In approximately 18 per cent of incidents of sexual harassment, women lawyers will have personally approached the person concerned and

45 See Gatfield *Without Prejudice: Women in the Law*, above n 1, at ch 6.

46 Interview with Margaret Wilson.

explained that the conduct was inappropriate and offensive.[47] A woman partner, after receiving sexual remarks from another partner in social situations, did just that. It was, she said, "straightforward to deal with and certainly not a problem". For another woman lawyer when sexual innuendoes start to cross the boundary of "normal conversational banter" she "immediately makes the point that it is not acceptable. It seems to work."

The competence of some women lawyers in dealing with unwanted or offensive comments has led some employers to think that all women lawyers are equipped to resolve sexual harassment without the need for policies or procedures. The partner in one firm that had no procedure said: "Our female staff are vocal enough to be able to make their complaints known in the unlikely event of sexual harassment." Statistics on complaints made strongly suggest otherwise.

4 Deflect

In response to inappropriate comments, some women lawyers have been able to respond with witty replies that put the comments in context, convey the message that such comments are out of line and still maintain a cordial relationship. An example of one such come-back was used by a woman law student in the early 1970s. A lecturer observing her knitting in class remarked: "I hope you realise that knitting is considered a form of masturbation." She apparently replied: "Fine — you masturbate in your way and I'll masturbate in mine."[48]

[…]

The difficulty for many women lawyers is that the witty response is not always appropriate or easy. The expectation that they will respond "in kind" also places an unfair burden on them. Women usually have no warning that a conversation will turn to sexual remarks about their appearance or to requests

47 Seventeen of the 94 women who commented on sexual harassment said they personally spoke to the person involved: Gatfield and Gray, above n 14, "Questionnaire comments summary paper", question 36.

48 Diana Crossan "Equal Employment Opportunities" (presentation at Wellington District Law Society seminar, 4 August 1993).

for intimacy. Because harassment occurs at work, in court, with clients, or in social professional settings, women lawyers if they were expected to respond in "good humour", would need to be continually on guard and ready with appropriate responses.

In addition, while women lawyers relay stories about quick one-liners like survival stories, for some men they are evidence of women's complicity with the "joke".

5 *Resign*

Where sexual harassment is serious enough and no action is taken, some lawyers have been left with no option but to resign. In the 1992 survey alone, eleven women and four men lawyers volunteered that they had left a job as a result of discrimination or harassment.[49] This is likely to represent the tip of the iceberg, as the 1992 survey respondents did not include those lawyers who were unemployed or working outside private practice.[50]

When people leave jobs as a consequence of harassment, their confidence, self-esteem, and sense of justice are undermined. Psychologists point out that the victim's distress is often compounded by the continued denial of a problem by the employer.

One woman in the 1992 survey who was both lucky and good enough to find another job commented: "I left my first job without a reference because the senior partner took an 'unprofessional' interest in me. It was easier to resign and not take a stand over the matter." Likewise a woman lawyer who experienced sexual remarks, deliberate touching, and requests for sexual favours from a partner took no official action but said: "The partner in question was a jerk. I left." Another woman who had experienced unwanted advances, sexual comments, deliberate touching and being brushed against said: "I took action but was told the partners would do nothing. I left because of the situation six months later."

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49 Gatfield and Gray, above n 14, at [8.3].

50 According to a survey of former policewomen, sexual harassment by male colleagues was a reason why 20 per cent of women surveyed had left the police force: "Sex harassment 'driving women out of police'" *Sunday Star-Times* (21 July 1996) at A5.

In the worst cases, after one victim leaves, the harasser will find someone else to take her place. As one woman lawyer with three years' experience said:

> I was sexually harassed by a partner, my employer at that time. I told him to stop. But the damage to my professional confidence had been done so I left … Other women victims also told him to stop. In each case they left soon after. One subsequent employee made an official complaint.

[…]

II WHY DOES HARASSMENT OCCUR?

A Women's perceived sexual availability

For men to harass women, they must believe that women are sexually available to them as of right. This belief enables harassers to persist with their behaviour even when women object. A person's right to say "no" to unwanted sexual attention is overridden by the belief of the other person that he or she has a greater claim to impose his or her wishes.[51] The first person is most often a woman while the second person is most often a man.

Women's perceived sexual availability to men has a long history. It was only in 1985 that married women in New Zealand were legally granted the right to say "no" to having sex with their husbands. Until then, a husband was entitled to force sex on his wife, without fear of recourse. This view of women as men's property can be traced back to the common law disabilities which limited women's economic and legal rights (including entry into the legal profession) until the 1890s.

In the 1990s wives, at least theoretically, enjoy the protection of their person, while women in the workforce, including women lawyers, are in practice fair game.

B Putting women down

Sexual harassment also serves as a way for men to put women down, and according to researcher Jock Phillips putting women down is a time-honoured "sport" in New Zealand male culture.[52]

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51 For a general discussion on New Zealand rape laws, see Elisabeth McDonald "An(other) Explanation: The Exclusion of Women's Stories in Sexual Offence Trials" in *Challenging the Law and Legal Processes: the Development of a Feminist Legal Analysis* (New Zealand Law Society, Wellington, 1993) at 43–67.

52 Jock Phillips "Mummy's boys: pakeha men and male culture in New Zealand" in Phillida Bunkle and

The explanation for this behaviour apparently lies in the need for men to deny that they are in any way like women. Social scientists and researchers who have examined male behaviour believe that one of the ways in which boys and men affirm their masculinity (and hence their superiority) is by downplaying or denying any sign of femininity in themselves. So, for example, men who fail to comply with the expected masculine standard are also "put down" by insults such as "You're throwing like a girl."[53]

C Power and vulnerability

Regardless of the harasser's motives, sexual harassment is a misuse of power. The fact that those with relatively more power (law firm partners and other employers) harass those with relatively less power (employees) demonstrates that sexual harassment is as much a power issue as it is a gender issue.

For this reason, harassment of men does occur and will continue to occur. As more women achieve positions of status and authority on traditional "male terms" sexual harassment of men employees can be expected to increase. Already, an estimated 20 per cent of men in practice have had personal experiences of a partner, client or colleague misusing their position or power. Their vulnerability is no different to that of their women colleagues, as demonstrated by their reluctance to complain about harassment. Men lawyers who reported personal experience of harassment in the 1992 survey were less likely to have taken action than women lawyers.[54]

[…]

Not all people in positions of status and authority harass women, but those who do are likely to adhere to the beliefs that women are sexually available to them, as of right, and that sexual interaction is not incompatible with professional interaction. In addition, the workplace culture and environment, either overtly or covertly, will condone sexual harassment. Judging by the reports of women lawyers, this dangerous combination of power, vulnerability,

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Berry Hughes (eds) *Women in New Zealand Society* (George Allen and Unwin, Auckland, 1980) at 236.

53 Bill Rout "Being 'staunch': boys hassling girls" in Sue Middleton and Alison Jones (eds) *Women and Education in Aotearoa 2* (Bridget Williams Books, Wellington, 1992) at 174, footnote 6. See also Clare Burton *The Promise and the Price: The Struggle for Equal Opportunity in Women's Employment* (Allen and Unwin, North Sydney, 1991) at ch 1; and Michael King (ed) *One of the Boys? Changing Views on Masculinity in New Zealand* (Heinemann, Auckland, 1988).

54 Gatfield and Gray, above n 14, at [8.3] and table 29. Sexual harassment of a male employee by a woman manager was highlighted in a bestselling 1994 novel, *Disclosure*, by US author Michael Chrichton.

and workplace acceptability of harassment is relatively common and is a major factor in the perpetuation of the problem.
[…]

III WILL SEXUAL HARASSMENT EVER STOP?

Over the past decade, the incidence of sexual harassment has changed little. What hope is there for the future?

In 1991, Waikato University lecturer Bill Rout studied sexual harassment in a boys' school and in a co-educational school. His results give little hope about changes in the attitudes of the next generation of New Zealand men.

Many previously boys-only schools are introducing girls into sixth and seventh form classes. The stated objective of this practice is to encourage competition and allow interaction similar to the university and work environments. But, as Rout's research found, the introduction of girls into a traditionally male school resulted in extensive harassment of the girls. The boys mimicked the girls, made sexist jokes, called the girls nicknames (such as "Horse"), commented out loud on their physical attributes and stared (or ogled) at their bodies. While the girls said they objected to the behaviour, the boys did not perceive the environment as negative or detrimental. Few could explain why they harassed the girls. One boy commented that the harassment was "part of the school tradition".[55]

Rout concluded that boys in single-sex and co-educational schools "learned to accept as 'normal' the sexual harassment of girls and women" — including seeing girls and women as "sexual objects".[56]

IV CONCLUSION

Sexual harassment of women lawyers by men lawyers represents the tip of the iceberg.

If women lawyers are hesitant to complain, with all their knowledge about the law and their comparatively high status in the workforce, how do women support staff fare? An estimated seven thousand women work in the profession as secretaries, word processors, filing clerks, receptionists, librarians and legal

55 Rout, above n 53, at 176–177.

56 At 179.

executives.[57] If, as the evidence suggests the likelihood of sexual harassment increases as the vulnerability of the victim increases, these women are likely targets for harassment.

Lawyers have also been known to harass women clients. On several occasions in recent years, district law societies have received complaints involving sexual misconduct of male lawyers towards women clients. In response to these complaints, the law societies' disciplinary tribunals have censured the lawyers concerned, awarded payment of costs, and suppressed the lawyers' names. If these complaints were the subject of criminal proceedings, imprisonment would be expected.

The law societies' response to solicitor-client sexual harassment requires examination in future as does the non-response to the harassment of women lawyers.

While the New Zealand Law Practitioners Disciplinary Tribunal has recognised that sexual misconduct towards clients is an abuse of power, the district and national tribunals and the law societies need to appreciate that women clients face very similar barriers to making complaints as are faced by women lawyers. Like women lawyers, women support staff and women clients will be reluctant to make allegations of misconduct against lawyers who they would perceive as being inclined and well-equipped to deny, downplay or defend the accusations. The true extent of harassment will not be known until there exists a "woman-centred" complaints process.

57 This estimate is based on the average of one support staff member for every professional staff member. In larger law firms the ratio is lower, while in smaller practices the ratio is usually higher.

LEGALLY BROWN:
The experiences of Pasifika women in the criminal justice system

Litia Tuiburelevu*

The status of Pasifika women within New Zealand's criminal justice system has not been closely examined in academic literature. There is a paucity of discussion exploring the unique challenges Pasifika women face in their interactions with lawyers, judges and the system as a whole. This article identifies some of the gaps in the current research, the attitudes of Pasifika women towards the legal profession and how their respective cultural contexts have been addressed by judges with reference to three recent decisions. It argues that Pasifika women have largely been rendered invisible within the justice system; conflated within the general "Pacific peoples" category with little attention given to their intersectional experiences. This is attributed to the fact that Pasifika women are largely underrepresented in the criminal justice system, as lawyers, judges, legislators and policy-makers. Ultimately, this article finds that the status of Pasifika women within the justice system demands attention and further dedicated research.

I INTRODUCTION

How does New Zealand's criminal justice system treat Pasifika women? The answer is unclear. The difficulty lies in the absence of dedicated research engaging with the experiences of Pasifika peoples and their interaction with New Zealand's legal system. With few Pasifika women in legal academia and the legal profession, there have been fewer opportunities and less of an impetus to explore this question.[1] This is unsurprising considering that there is a paucity

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1 Comprehensive analysis generally comes from dedicated academic and policy research. Currently, Pasifika people comprise 1.5 per cent of all tertiary academic staff. At the time of writing, there are only three law lecturers of Pasifika descent in New Zealand: Dr Keakaokawai Varner Hemi (University of Waikato), Dr Guy Fiti Sinclair (Victoria University of Wellington) and Professor Rex Ahdar (University of Otago). See Dateline Pacific "Low Number of NZ Pasifika Academics adds to cultural burden" (6 September 2018) Radio New Zealand <www.radionz.co.nz>. I acknowledge the recent

of discussion surrounding the issues faced by Pasifika peoples and the law more generally. However, this is concerning given that New Zealand's Pasifika diasporic[2] communities have spoken, rather vocally, about their interactions with the law since their arrival to New Zealand in the early 1960s.[3] These experiences have been largely negative, marred by racism, discrimination, and unequal treatment by law enforcement agencies and the justice system.[4] While references to Pasifika women are peppered throughout articles and policy documents, they often appear as nothing more than a footnote. Thus, it is difficult to develop comprehensive analysis on a topic where no dedicated legal research exists. Pasifika women have arguably become an invisible population within our justice system; a situation which demands greater analysis and attention.

The purpose of this article is to take the first step towards filling this critical gap in criminal law scholarship by canvassing key issues and observations as to how Pasifika women are treated by the criminal justice system. From this, it is hoped that future scholarship will be able to further investigate the problems raised, as well as any other observations that have not been captured in this article. This discussion focuses on two key areas: Pasifika women's experiences and perceptions of the justice system, and their treatment by the judiciary at trial and in sentencing. The purpose of this article is to detangle the discussion from the generality of "Pacific peoples" to more closely examine the nuanced experiences of Pasifika women.

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work of Helena Kaho: see Helena Kaho "Legislation note: 'Oku hange 'a e tangata, ha fala oku lālanga — Pacific people and non-violence programmes under the Domestic Violence (Amendment) Act 2013" [2017] NZWLJ 182.

2 By definition, "diaspora" and/or "diasporic communities" is the spread of any people from their original homeland. In the Pasifika context, this refers to the migration of persons from the Pacific Islands to New Zealand, as well as the second or third generation Pasifika persons born in New Zealand with familial connections in the Pacific Islands. The "Pasifika Diaspora" in New Zealand refers to the diverse Pasifika communities and their respective cultural identities. See Evangelia Papoutsaki and Naomi Strickland "Pacific Islands Diaspora Media: Sustaining Island Identities Away from Home" (paper presented at the 5th International Conference on Small Island Cultures, Sado Island, Japan, 2009); and Benita Simati Kumar "How does the next generation of Pacific diaspora from blended backgrounds construct and maintain their identities through the spaces they inhabit?" (PhD Thesis, Auckland University of Technology, 2016).

3 See Melani Anae "Racism was all around us" (18 June 2016) E-Tangata <www.e-tangata.co.nz>; and Barbara Dreaver "Opinion: Racial discrimination isn't new for Pasifika, any islander will tell you" (3 November 2016) 1 News Now <www.tvnz.co.nz>.

4 Tess McClure "A Racist System: Māori and Pacific Kiwis Talk About the Police" (18 September 2017) Vice <www.vice.com>.

I begin by providing a snapshot of Pasifika women in New Zealand before turning to the New Zealand Law Commission's 1999 research on *Women's Access to Legal Services*.[5] I examine the Law Commission's research on Pasifika women's attitudes towards the legal profession and offer my observations about the relevance of such findings in a 21st century context. Part III analyses Pasifika women within the courtroom by examining the extent to which judges engage their respective cultural contexts by reference to two recent decisions in the High Court and District Court. Finally, Part IV addresses Pasifika women as offenders, and the impact of cultural reporting under s 27 of the Sentencing Act 2002.

It is important to acknowledge at the outset that it is impossible to form concrete conclusions on this topic without a larger corpus of foundational research. Instead, in providing observations on key issues I ultimately advocate for further, intersectional research exploring the dynamics of race, gender and the law in the Pasifika context(s).

II A SNAPSHOT: PASIFIKA WOMEN IN AOTEAROA

Pasifika peoples currently comprise 7.4 per cent of New Zealand's total population making them an ethnic minority grouping.[6] By 2026, it is estimated this figure will increase to over 10 per cent.[7] Pasifika women make up 50.9 per cent of this figure.[8] According to Statistics NZ, New Zealand born Pasifika women have a higher youth percentage, with 77 per cent under 25 years old.[9] The growth of the Pasifika diaspora is considered "one of the defining features of New Zealand society", with Auckland cited as the Polynesian capital of the world.[10]

For the purposes of this article, I adopt the term "Pasifika" as the preferred nomenclature to "Pacific Islanders" and "Polynesians". Pasifika describes those people living in New Zealand who have migrated from the Pacific islands or who identify with one or more Pacific Islands through ancestry or heritage.

5 Law Commission *Women's Access to Legal Services* (NZLC SP1, 1999).

6 "Pacific People in NZ" Ministry for Pacific Peoples <www.mpp.govt.nz>.

7 Based on 2013 census figure projections: see Ministry for Pacific Peoples, above n 6.

8 "Ethnic Group (grouped total responses) by age group and sex, for the census usually resident population count, 2001, 2006, and 2013 (RC, TA, AU)" Stats NZ <www.stats.govt.nz>.

9 Holeva Tupou "The Effect of the Glass Ceiling on Pacific Island Women in New Zealand Organisations" (MBus Dissertation, Auckland University of Technology, 2011) at 14.

10 "Pacific women" (18 May 2012) Ministry for Women <www.women.govt.nz>.

Pasifika peoples in New Zealand mostly come from Samoa, the Cook Islands, Tonga, Niue, Fiji, Tokelau, Tuvalu and Micronesia. Statistically, over 62 per cent of the Pasifika population are New Zealand born, with 38 per cent born in the Pacific.[11]

Although the term Pasifika is used, I acknowledge its limitations as a "pan-Polynesian" label eclipsing the plurality and diversity of the various Pacific island cultures, all of which cannot be homogenised under a single grouping. As Helena Kaho observes, "'Pacific people', in the sense of a homogenous ethnic group, do not exist".[12] Laumua Tunufa'i critically asserts: "Pacific has become tokenistic and piecemeal, as long as it is employed in policy formation in New Zealand it will continue to stigmatise and denigrate".[13] However, Pasifika peoples in New Zealand do share a number of commonalities, namely ancestral genealogy, traditions and history, as well as shared cultural values of family, faith, and collectivism. Although it would be preferable to analyse individual cultural experiences, I am confined to the existing literature that aggregates "Pacific peoples" or "Pacific Island women" without cultural specification.

A Snapshot of Pasifika women in the criminal justice system

Pasifika peoples have long been associated with high crime statistics and disproportionate representation in the criminal justice system.[14] Between 2016 and 2017, 872 adult Pasifika women were convicted of serious offences.[15] Twenty-eight resulted in sentences of imprisonment, with 331 being community based. Notably, over one third of those convictions related to 'monetary' offences.[16] Comparatively, Pasifika males had a total of 5,093 sentences: 619 were custodial sentences, 2,271 were community based, and one-fifth were for

11 "2013 Census QuickStats about culture and identity: Pacific Peoples ethnic group" (15 April 2014) Stats NZ <www.archive.stats.govt.nz> as cited in Debbie Sorensen and Seini Jensen *Pasifika People in New Zealand: How Are We Doing? (*Pasifika Futures, May 2017) at 6.

12 Kaho, above n 1, at 186.

13 Laumua Tunufa'i "Samoan Youth Crime" in Antje Deckert and Rick Sarre (eds) T*he Palgrave Handbook of Australian and New Zealand Crimonology, Crime and Justice* 175 at 179.

14 "Contemporary Pacific Status Report: A snapshot of Pacific peoples in New Zealand" (November 2016) Ministry for Pacific Peoples <www.mpp.govt.nz> at 63–65.

15 "Adults convicted in court by sentence type – most serious offences calendar year" (2018) Stats NZ <www.stats.govt.nz>.

16 "Adults convicted in court by sentence type", above n 15.

monetary offences.[17] The data did not extrapolate the nature of those offences nor did it provide explanation as to why Pasifika women featured more highly in particular types of offending. As of March 2018, Pasifika women comprised 6.1 per cent of the total female prison population, the third largest ethnic grouping behind Māori and Pākehā women respectively.[18] Since 2014 the population of Pasifika female prisoners has increased very slightly by two per cent. Comparatively, Māori women are disproportionately over-represented, comprising 56.5 per cent of female inmates.[19] However, Pacific peoples are twice as likely to be apprehended, prosecuted, and convicted, and 2.5 times more likely to receive a custodial sentence and be remanded in custody than Pākehā.[20] In contrast to Māori women, Pasifika women are only 1.7 times more likely to either be apprehended by police or given a custodial sentence, compared to Pākehā women.[21]

The Department of Corrections asserts that Pasifika offenders are offered targeted rehabilitation and re-integrative support "to motivate Pacific prisoners to address their offending behaviour by using pro-social behaviours to model Pacific values and beliefs".[22] For example, there are specific focus units for prisoners of Pasifika ethnicity under the Saili Matagi rehabilitation programme.[23] However, for Pasifika women serving custodial sentences, there are fewer culturally rehabilitative programs available. For example, New Zealand's first and only Pacific Focus Unit (Vaka Fa'aola) in Spring Hill Corrections Facility is uniquely adapted to engage Pasifika men serving sentences for violent offending.[24] This is a medium-intensity programme focussing on rehabilitative content with a strong Pasifika cultural component through the use of Pasifika

17 "Adults convicted in court by sentence type", above n 15.

18 "Inmate Ethnicity by Institution" Department of Corrections <www.corrections.govt.nz>.

19 "Inmate Ethnicity", above n 18.

20 Bronwyn Morrison "Identifying and Responding to Bias in the Criminal Justice System: A Review of International and New Zealand Research" (November 2009) Ministry of Justice <www.justice.govt.nz> at 18. I note this study is over a decade old and the findings may no longer be reflective of contemporary trends.

21 Morrison, above n 20, at 18. For numerical comparison Māori women were 5.5 times more likely to be apprehended and ten times more likely to receive a custodial sentence than Pākehā women.

22 "Specialist Units" Department of Corrections <www.corrections.govt.nz>.

23 Lucy King and Sosefa Bourke "A Review of the Saili Matagi Programme for Male Pacifica Prisoners" (2017) 5(2) The New Zealand Corrections Journal 70 at 70–75.

24 "Media release: Ombudsman release's Spring Hill Corrections Facility COTA Report" (2017) Department of Corrections <www.corrections.govt.nz>.

languages, proverbs, stories, and art. The group formed a choir to sing traditional Pacific Island hymns under the tutelage of choirmaster Peter Su'a, and later produced an album.[25] These services are currently available exclusively for Pasifika men, with no comprehensive culturally responsive rehabilitative options targeted specifically at Pasifika women.

Culturally targeted interventions must permeate all aspects of the justice system. The lack of offerings for Pasifika women may be reflective of the fact that they currently comprise a smaller portion of the female prison population. However, with young Pasifika women increasingly participating in violent offending (discussed below), additional services will need to target Pasifika women. Certainly, further inter-disciplinary research must be conducted as to what types of programmes and methodologies work for Pasifika female offenders, and whether current initiatives are properly effective in reducing recidivism rates.

B Young Pasifika women and youth crime

The youthfulness of New Zealand's Pasifika population raises concerns about the increasing overrepresentation of Pasifika youth committing violent criminal offences.[26] The Pasifika population is described as a young population, with statistics indicating an increase in the number of Pasifika youth by 2.2 per cent per year.[27] Fifty-five per cent of New Zealand's total Pasifika population are under 25 years, with 22 being the median age.[28] Currently, Pasifika youth represent the third largest group of youth offenders. Whilst Pasifika youth offending has decreased overall in the past decade, violent offending has not.[29] "Violent" offences include homicide, kidnapping, abduction, robbery, grievous assaults, serious assaults, intimidation/threats, and group assemblies.[30] Of Pasifika youth offenders, the majority of violent youth offenders are male

25 "Prison choir to launch CD of Pasifika songs" (30 May 2013) The Big Idea <www.thebigidea.co.nz>.

26 Peter Gluckman *It's never too early, never too late: A discussion paper on preventing youth offending in New Zealand* (Office of the Prime Minister's Chief Science Advisor, 12 June 2018) at 7. See also *Topic Series: Pacific Offenders* (Department of Corrections, April 2015) at 3; and Tunufa'i, above n 13.

27 "Latest Pacific population projections released" (16 October 2017) Ministry of Business, Innovation and Employment <www.mbie.goivt.nz>.

28 Stats NZ 2013 Census Data "Pacific Peoples Ethnic Group" <www.archive.stats.govt.nz>.

29 Gluckman, above n 26, at 25.

30 Julia Ioane and Ian Lambie "Pacific youth and violent offending in Aotearoa New Zealand" (2016) 45 New Zealand Journal of Psychology 23 at 23.

(84 per cent).[31] The most common violent offence committed by Pasifika youth in recent years has been serious assaults, with almost half of the Pasifika youth offending population committing a violent offence as their first offence.[32] The average age of the Pasifika youth offender is around 17 years old.[33] Critically, the evidence does not provide a clear gender breakdown of violent offending amongst Pasifika youth. This makes it difficult to conclude whether Ioane and Lambie's conclusions on Pasifika violent youth offending also apply to Pasifika female youth.

Data from 2016/2017 showed that 44 per cent of offences committed by Pasifika children and young people (those under 16) charged in court were of a violent nature.[34] This was an almost 10 per cent increase in the last year, more than Māori or Pākehā youth (seven percent and four per cent, respectively).[35] An important ethnic breakdown recognised in the literature is that the majority of Pasifika youth offenders are Samoan, reflective of the fact that the majority of the Samoan population is New Zealand born and comprises the highest proportion of Pasifika peoples (49 per cent).[36] The Pasifika youth offender is typically characterised as male, born in New Zealand, urbanised, and having grown up in the most socially deprived areas.[37] However the presence of Pasifika females in violent youth offending is vastly understudied. Where the research delineates between gender, there is little explanation given as to the nuanced contexts that may trigger Pasifika females to engage in criminal offending. In the analysis that follows, I attempt to map some of the key features of Pasifika female youth offending amongst the fragmented data and literature.

Charlotte Best, Dr Ian Lambie and Dr Julia Ioane recently considered the profile of young female offenders in New Zealand.[38] Their research highlighted that the phenomenon of young female offending in New Zealand cannot

31 Ioane and Lambie, above n 30, at 661. This was based on a sample of 200 Pasifika youth offenders from New Zealand Police Databases.

32 Ioane and Lambie, above n 30, at 661.

33 At 664.

34 Gluckman, above n 26, at 25.

35 At 25.

36 Tunufa'i, above n 13.

37 Ioane and Lambie, above n 30, at 665

38 Charlotte Best, Dr Ian Lambie and Dr Julia Ioane "Who are young female offenders?" (2016) NZLJ 69.

be overlooked.[39] While youth offending has decreased overall, female youth offending is decreasing at a lower rate than male offending.[40] Between 2010 and 2014 the proportion of young females charged with violent offending increased from 29 per cent to 37 per cent.[41] In assessing the profile of female youth offenders, the research did not delineate young female offenders by ethnicity, save for recognising the overrepresentation of young Māori women in youth offending.[42] The authors recognised that:[43]

> It may be that, while offending overall is decreasing, it is not decreasing for those young females who are committing more serious offences and who pose a greater challenge to the youth justice system and will continue to do so past adolescence.

In 2014, there were 377 apprehensions of Pasifika female youth aged 17–20 years.[44] This represented a marked decrease from the number of apprehensions in 2008 (600).[45] In terms of the type of offences being committed, in 2014 Pasifika females were most commonly apprehended for acts intended to cause injury (85), theft and related offences (137), and public order offences (59).[46] In 2017, 36 Pasifika women (16 years and under) were charged in the Youth Court for serious offences.[47] Charges were proven against 12 Pasifika women, and three were convicted and sentenced in adult court. Notably, while the total number of charges has significantly decreased in the last decade, since 2013 the number of total charges proven has steadily increased.[48] Moreover, the number of serious charges proven proportionate to the total number of charges has risen. For example, in 2016 there were 33 total offences resulting

39 At 69.

40 At 69.

41 At 69.

42 At 69.

43 At 69.

44 "Annual Apprehensions for the latest Calendar Years" ANSOC (1994–2014) Stats NZ <www.stats.govt.nz>.

45 "Annual Apprehensions", above n 44.

46 "Annual Apprehensions", above n 44. This is the most recent data for Annual Apprehensions for the latest Calendar Years (ANZSOC) period ending 2014.

47 "Children and Young People Charged in court – most serious offence calendar year" (2017) Stats NZ <www.stats.govt.nz>.

48 "Children and Young People Charged in court", above n 47.

in six proven charges and zero sentences in the adult court.[49] By comparison, in 2017 the number of charges increased to 36, with the number of proven charges doubling to 12, the highest recorded figure.[50] The data indicates that the rate of young Pasifika women committing violent offences is increasingly slightly, however there is a paucity of data indicating which type of offences are being committed to accurately draw direct correlations to Ioane and Lambie's research.

However, as the population of young Pasifika women increases, it is critical to understand their involvement in criminal offending and to disaggregate the data between different Pasifika ethnic groups. Twenty-six per cent of Pasifika violent youth offenders in the last year were female, with recidivism rates of 60 per cent.[51] Importantly, Ioane identified that New Zealand born Pasifika are significantly more likely to re-offend than those born in the Pacific Islands.[52] The critical risk factors identified as contributing to this offending were "poor education, antisocial peers, exposure to family violence and poverty".[53] The role of socio-economic deprivation and exposure to family violence cannot be understated. Pasifika peoples reside in the lowest-socio economic areas. These areas are characterised by high rates of poverty, deprivation and inadequate housing. To draw an intersectional analysis, Pasifika women are some of New Zealand's lowest income-earners, and face a greater gender pay gap than Pākehā women.[54] Moreover, exposure to family violence in the home warrants specific cultural analysis as "family violence" from a Pasifika worldview(s) "is culturally defined and situationally contextualised".[55]

One of the main concerns for Pasifika women in the criminal justice system is that young Pasifika women are committing violent offences as their first-time offence, with the average age of offending being 17 years old.[56] More

49 "Children and Young People Charged in court", above n 47.

50 "Children and Young People Charged in court", above n 47.

51 Ioane and Lambie, above n 30, at 25.

52 At 25.

53 At 25.

54 "Gender Pay Gap" (15 August 2018) Ministry for Women <www.women.govt.nz>; and Anna Bracewell-Worrall "Pay inequality: Pacific women may as well work free for the rest of the year – union" (21 September 2018) NewsHub <www.newshub.co.nz>.

55 Jennifer Hand and others "Free From Abuse: What Women Say And What Can Be Done" (Public Health Promotion, Auckland, 2002) at 74.

56 At 26.

research is required to disaggregate the data into specific ethnic groups and to analyse whether New Zealand born and/or mixed–race Pasifika women are more likely to violently offend. An area for further examination is what criminogenic, sociological and psychological factors are potentially driving New Zealand born and/or mixed-race Pasifika women to engage in criminal offending, particularly violent offences. This information "is necessary to provide information for targeted prevention and intervention of this vulnerable population".[57]

The establishment of the Pasifika Youth Court in 2011 provided one culturally responsive mechanism to deal with young offenders following pan-Pasifika cultural processes.[58] A typical Pasifika Court hearing will involve a briefing between the judge and the elders to discuss how each young person is progressing with their plan. Each case will start and end with a prayer.[59] An elder that is from the same cultural background as the young person will talk to the young person and their family, offering encouragement and guidance. Since its inception, there has been little academic comment on the efficacy of the Pasifika Youth Court and its effect on young offenders, particularly in reducing recidivism rates into adulthood.[60] A potential issue that warrants further investigation is whether the Pasifika Youth Court is responsive to young, urbanised Pasifika female offenders who are largely disconnected from their respective cultures, the church and their family (both in New Zealand and/or the Pacific Islands). The Pasifika Youth Court arguably demands a level of cultural 'buy-in' in an environment which may prove alien for young urbanised Pasifika who, for whatever reason, are largely disconnected from traditional "Pasifika values" and cultural contexts. I query whether the Pasifika Youth Court is workable for this emerging demographic of young Pasifika women, who are potentially poised to form a substantial portion of future youth offenders.[61]

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57 At 26.

58 Ministry of Justice "Rangatahi Courts & Pasifika Courts" Youth Court of New Zealand <www.youthcourt.govt.nz>.

59 "Rangatahi Courts & Pasifika Courts", above n 58.

60 A Masters of Social Work thesis was recently published exploring the experiences of Samoan youths in the Pasifika Youth Court. See Natasha Urale-Bake "Aua le limatete ne'i ola pala'ai fanau Samoan youths' views on their experience in the Pasifika Youth Court" (MSW Thesis, The University of Auckland, 2016).

61 I base this assertion off Ioane's findings that New Zealand born Pasifika, many of whom are urbanised,

C *Focussing on Pasifika women: The importance of an intersectional analysis*

Why focus on Pasifika women? The notable dearth of research dedicated to the experiences of Pasifika women demands investigation. I suggest that Pasifika women occupy a paradoxical position: on the one hand they form a very visible part of Aotearoa's rich, multi–cultural social fabric, yet at the same time they are rendered invisible within the law and legal academia. Second, there is a tendency to discuss criminal justice issues in relation to Māori and Pasifika women as though they are one in the same. Whilst both ethnic groups share commonalities in their experiences with racism and socio-economic disenfranchisement, they are mutually exclusive. The status of Māori women within the criminal justice system, particularly as offenders, must be contextualised within their indigeneity and the impacts of colonisation. By contrast, Pasifika women's experiences are centred in a diasporic matrix. Moreover, Pasifika women are routinely subsumed within the experiences of Pasifika men, producing a monolithic account of "Pasifika peoples" without the necessary gender delineation. There is seldom any attempt to differentiate the two.

In exploring how the criminal justice system treats Pasifika women, this article attempts to map some of the intersections of race and gender and identify the gaps in the current knowledge. An intersectional methodology considers the historical, social and political context to recognise the unique experience of Pasifika women based on the intersection of race, class, gender, and other sociologically relevant grounds.[62] This approach focuses on the justice system's interaction with and response to Pasifika women, considering whether the law acknowledges these relevant contexts.

III A CLOSER LOOK AT PASIFIKA WOMEN'S EXPERIENCES WITHIN THE JUSTICE SYSTEM

An appropriate starting point for this analysis is to look backwards, specifically by examining how Pasifika women perceived New Zealand's legal systems based

were significantly more likely to reoffend than those who were born in the Pacific. See Ioane and Lambie, above n 30, at 25.

62 See Carol Aylward "Intersectionality: Crossing the Theoretical and Praxis Divide" (2010) 1(1) Journal of Critical Race Inquiry 1.

on their own experiential recounts 20 years ago. In 1999 the New Zealand Law Commission (NZLC) researched the access of New Zealand women to legal services and those women's experiences therein.[63] The consultation engaged submissions from hundreds of women from a variety of backgrounds with two aims in mind; first, to learn from women about their experiences of access to justice and second, to ascertain whether there were any problematic systemic issues preventing women's access to justice.[64] The Commission consulted with over 200 women of Pasifika descent, including two practising Pasifika lawyers, and brought together 10 Pasifika women to assist in the preparation of the consultation papers.[65]

While the paper is dated, the research findings arguably retain some key points of relevance for Pasifika women. First, it noted the sense of alienation Pasifika women felt towards the criminal justice system because of the lack of cultural diversity among lawyers and judges. Pasifika women commented that this dissonance was amplified "by the fact that both women and men from those groups are significantly underrepresented in the legal profession and judiciary and in influential positions in state sector justice agencies".[66] The absence of Pasifika women throughout all aspects of the profession reified perceptions that the justice system does not value their cultural perspectives. One Pasifika woman commented:[67]

> I think that if there are a lot more Pacific Island lawyers out there perhaps I would feel more comfortable. The difference is between telling secrets to a stranger and telling your secrets to somebody that you might feel comfortable with and I know that I would feel more comfortable with one of my own people/culture.

This resulted in those Pasifika women feeling alienated from legal services, causing some to "shy away from seeking legal assistance because of the shame and humiliation of having to disclose intimate details to a complete stranger".[68]

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63 Law Commission, above n 5.

64 At [72].

65 The paper referred to them as "Pacific Islands women" and did not delineate between different Pacific Island cultural groupings. All women remained anonymous: Law Commission, above n 5, at 90

66 Law Commission, above n 5, at 126.

67 At 144.

68 Law Commission *Women's Access to Legal Advice and Representation: A Consultation Paper* (NZLC MP9, 1997) at 8.

The major theme that emerged was that Pasifika women experienced increased frustration with the system's lack of responsiveness to their cultural needs, particularly where English was their second or third language. This confirmed "that lawyers and judges, both male and female, did not understand their lives or the significance for them of the problems for which they had sought help" and the barriers they faced.[69] Women from a range of minority ethnic groups repeatedly identified barriers of language and cultural values between them and the justice system, and particularly between them and legal service providers. It was plain that for most women from those groups, the clash between their own cultural heritage and the predominantly British/Anglo-Saxon heritage of the justice system presented the largest of all the barriers they encountered in their attempts to utilise the criminal justice system. The Commission, in addressing the "needs of diverse cultural and ethnic groups" found:[70]

> Women said that when the system failed to provide for their most basic needs (such as those already referred to, for information provided in their own languages, or from or through people who speak their languages and understand their lives) they received a clear message that their cultural values were not respected. This was described as being a major deterrent to their use of and faith in the justice system.

The perception that the justice system largely neglected their cultural contexts formed a major deterrent to Pasifika women's engagement with, and subsequent faith in, the justice system. Furthermore, Māori and Pasifika women reported having encountered patronising, ill-informed or racist attitudes among justice system personnel. Pasifika women called for legal services delivered by Pasifika people, with one suggesting creating specific Pasifika community law centres "[r]un by Pacific Islanders for Pacific Islanders."[71]

While I cannot speak on behalf of all Pasifika women, I contend that if similar research was undertaken in 2018 the response(s) would be largely, and unfortunately, similar to that of 20 years prior. I challenge whether in 2018 our legal services and legal practitioners, in both the public and private sector, have become more culturally responsive to the needs ethnic minorities.

69 At 146.

70 At 162.

71 At 137.

Although "diversity" is the word du jour in New Zealand's legal profession, the ethnic make-up of lawyers, barristers, firm partners, Queen's Counsel and the judiciary remains overwhelmingly Pākehā.[72] Although just over 50 per cent of practising lawyers are female, these women are also predominantly Pākehā.[73] Aside from a few minor changes (which I acknowledge in the following section), Pasifika women in particular continue to see themselves and their cultures as largely ignored by the law and legal decision-making. In the context of this research, the reasons as to why Pasifika women continue to see themselves as underrepresented in New Zealand's legal profession can only be found through direct consultation with Pasifika women in the community as well as the experiences of Pasifika legal practitioners, legal service staff and Pasifika judges. The provision of legal services is improved where lawyers understand and respect their client's socio-cultural context(s). This leads to better communication between parties and ultimately fosters greater trust and confidence in the justice system.

IV PASIFIKA WOMEN IN THE COURTROOM

Another observation concerns the interaction between Pasifika women and the judiciary. First, I examine the largely homogenous ethnic makeup of New Zealand's judiciary, into which only two Pasifika women have successfully entered. From this, I observe how a lack of understanding of Pasifika worldviews may impact a judge's substantive decision-making when dealing with Pasifika women who have recently appeared before the court. The nature of the adversarial process means the administration of justice is seen to occur in the environs of the courtroom. Therefore, it is appropriate to assess the attitudes of those tasked with the role of dispensing justice.

As of January 2017, there were 252 judges working in New Zealand; six at the Supreme Court, 10 at the Court of Appeal, 45 in the High Court and 176 in the District Courts.[74] Of those, three are of Pasifika descent: Judge Malosi, Judge Moala and Judge Wharepouri. These three judges comprise just over one per cent of New Zealand's total judicial makeup, all presiding in two of Auckland's District Courts. There are no Pasifika judges in any of New Zealand's superior

72 Geoff Adlam and Sophie Melligan "Snapshot of the profession" LawTalk (March 2018, Issue 915) at 48.

73 At 48–49.

74 New Zealand Law Society "New Zealand judiciary statistics at 1 January 2017" (1 January 2017) <www.lawsociety.org.nz>.

courts and no lawyers of Pasifika descent have been appointed to the rank of Queen's Counsel. This is similarly reflected in the ethnic makeup of New Zealand's legal profession, where Pasifika women comprise only 2.5 per cent of the total female lawyer population.[75] Judge Ida Malosi (from Samoa) was the first Pasifika woman appointed to the judiciary (on 24 September 2002). She currently presides over the District Court and Family Court in Manukau, and the Pasifika Youth Court. There was a fourteen-year gap between when Judge Malosi was appointed in 2002, and when Judge Mina Wharepouri and Judge Soana Moala were appointed in June and September 2016 respectively. Both Judge Wharepouri and Judge Moala were appointed to the District Court.

District Court judges sit at the coal-face of the criminal law. Moreover, it has been reiterated time and again that Māori and Pasifika peoples are overrepresented in criminal offending, with many of those same persons having to appear before the District Court for trial and sentencing. As the highest proportion of Māori and Pasifika peoples in New Zealand reside in South Auckland (Manukau),[76] they routinely appear before the Manukau District Court Judges. It is unfortunate, then, that so few of those same judges reflect the community in which they preside. Whilst judges must dispense justice equally, the system earns greater legitimacy where the judiciary and the legal profession reflect the diverse cultural values in the communities they serve. In recent years there has been greater recognition of the fact that the lack of gender and cultural diversity on the bench fosters unconscious biases that feed into substantive decision-making under the mask of neutrality and colour-blindness.[77] Such behaviours and biases have to be unlearned through targeted cultural competency training. It would not be a stretch to suggest that most of New Zealand's judges are not well versed in Pasifika cultural customs and values. Judge Moala has commented on the limited knowledge her judicial colleagues carry in relation to Māori and Pasifika peoples and the lack of awareness of their social and cultural circumstances.[78] The concern with judicial

75 Geoff Adlam "Census picture of lawyer ethnicity" LawTalk (October 2014, Issue 852) 19 at 19.

76 "2006 Census Data: Demographics of New Zealand's Pacific Population" Stats NZ <www.archive.stats.govt.nz>.

77 See generally Shiv Narayan Persaud "Is Color Blind Justice Also Culturally Blind? The Cultural Blindess in Justice" (2012) 14 Berkeley Journal of African-American Law & Policy 25.

78 Teuila Fuatai "Judges highlight cultural context for offending" (21 November 2017) *Newsroom* <www.newsroom.co.nz>.

decision-making that lacks cultural context, experience or understanding is that it may lead to "pluralistic ignorance" within the judiciary.[79]

If our judges are not representative of those who appear before them, then it is vital that they have evidence before them to help understand a defendant's cultural context and circumstances. Cultural evidence can assist a judge to remove their own ethnocentric biases and subjectivity, whilst facilitating greater understanding and objectivity of a defendant's circumstances and position. An apt illustration of this argument is demonstrated in the recent High Court decision of *R v H*.[80] The defendant was a young Tongan woman (29 years-old) charged with kidnapping in relation to the death of a 50 year-old Thai woman in a highly publicised matter. The defendant applied for name suppression:[81]

> … on the basis that publication of her name would cause her extreme hardship and would also endanger her health, relying on ss 200(2)(a) and 200(2)(e) of the Criminal Procedure Act 2011 (CPA), respectively.

Justice Thomas held that name suppression could not be granted as the principles of open justice outweighed the risks of publication. The defendant submitted that she should be granted name suppression on seven grounds:[82]

a) Her physical health, as a result of her rheumatic fever;

b) Her mental health given symptoms of depression, anxiety and stress;

c) The impact on her employment and the consequential financial impact on her family, given she is within the 90-day trial probation period in her current employment and will be unlikely to obtain new employment once details of her offending are released;

d) The flow-on effects of issues with her health and her ability to earn to her husband and children, and to her sister's family who jointly own and live in the home;

e) The potential for the defendant to lose all her equity in her house if they cannot maintain mortgage payments, exacerbated by the caveat placed on the house by legal aid;

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79 This term was coined in relation to judges in the United States: see Justice RS French "Speaking in Tongues – Courts and Cultures" (2007) 18 FedJSchol at 45.

80 *R v H* HC Auckland CRI-2016-092-5315, 31 August 2016.

81 At [2].

82 At [15].

f) Exclusion from school involvement for the defendant and the impact on her daughter from bullying at school;

g) Exclusion from the Church for the defendant and her extended family;

h) Loss of support and respect from the Tongan community, exacerbated by the defendant's role as eldest child.

Counsel for the defendant approached the application primarily on the basis of the applicant's health concerns. The Judge considered this first, followed by an analysis of whether publication would result in extreme hardship.[83]

It is not necessary to analyse the judgment in its entirety, as my focus is on three particular points raised by the defendant: that the publication of her name would result in the exclusion from church for herself and her extended family; and the loss of support and respect from the Tongan community, exacerbated by the defendant's role as eldest child. I argue that these grounds can collectively encompass, and were put to the Judge as, cultural considerations relevant to the extreme hardship analysis stemming from the defendant's Tongan background. Notably, the Judge failed to consider any of these submissions in forming her decision, despite concluding that "I have weighed up all the factors relied on by the defendant including the presumption of innocence."[84] The Judge's failure to address the cultural arguments raised supports the argument that the Judge did not feel such matters were worthy of judicial scrutiny. The defendant's cultural considerations were rendered invisible, divorcing her from her wider cultural context. Although it was not explicitly stated by counsel, the defendant was essentially submitting to the Court that, as a Tongan woman, publication of her name would adversely affect not only herself but her wider Tongan family and community. This reflects the collectivist value of all Pasifika cultures that people are not atomised individuals but exist as part of a collective.[85] An individual's actions, good or bad, reflect not only oneself but also one's wider whānau/aiga,[86] village, or tribe. The concept of individualism is largely absent

83 At [25].

84 At [50].

85 See generally, Semisis Prescott, Agnes Masoe and Christina Chiang "The concept of Accountability in the Pacific: The Case of Tonga" (paper presented to the 6th Asia Pacific Interdisciplinary Research in Accounting Conference, Sydney, 13 July 2010).

86 Aiga is the Samoan term for family.

in the Pasifika cultural matrix, as one's "identity is constructed in conjunction with their roles of family and the church".[87] According to Michael Lieber:[88]

> The person is not an individual in our Western sense of the term. The person is instead a locus of shared biographies: personal histories of people's relationships with other people and with things. The relationship defines the person, not vice versa.

In *R v H*, the defendant was cognisant that public knowledge of her involvement in serious criminal offending could potentially attach shame and stigma to her wider family unit, and, at worst, cause them to be condemned and ostracised. In essence, the submission was based on a need to protect the integrity of her family's name, a status that is based on the collective opinion of the Tongan community (both in Aotearoa and in Tonga).

The submission about the defendant's exclusion from her church should not have been overlooked either. Participation in the church community is integral to many Pasifika communities and is widely considered an integral cultural value. Ninety per cent of Tongans in New Zealand are affiliated with the Christian church, the highest percentage of all Pasifika cultures in New Zealand.[89] Exclusion from the church community would denote a loss of identity, culture and community — not only for the defendant but for her affected family. The church is largely seen as the cultural base for the Pasifika diaspora as a site "for reaffirmation and reconstitution of cultural identity".[90] For a Tongan, to bring shame upon your parents (which, in the case of the defendant, would have been exacerbated by her role as the eldest child), your family, your community and your church, is seen as highly dishonourable and can only be rectified through forgiveness. I cannot precisely conclude why Thomas J did not lend substantive discussion to these issues. It could be argued

87 Helen Morton "Creating Their Own Culture: Diasporic Tongans" (1998) 10 The Contemporary Pacific 1 as cited in Evangelia Papoutsaki and Naomi Strickland "Pacific Islands Diaspora Media: Sustaining Island Identities Away from Home" (paper presented to the 17th AMIC Annual Conference, Manila, July 2008) at 6.

88 Michael D Lieber "Lamarckian Definitions of Identity on Kapingamarangi and Pohnpei" in Jocelyn Linnekin and Lin Poyer (eds) *Cultural Identity and Ethnicity in the Pacific* (University of Hawaii Press, Honolulu, 1990) 71 at 72.

89 Lesieli Ikatonga Kupu MacIntyre "Tongan Mother's Contributions to Their Young Children's Education in New Zealand: Lukuluku 'A E Kau Fa'e Tonga' Ki He Ako 'Enau Fanau Iiki' 'I Nu'u Sila" (PhD Thesis, Massey University, 2008) at 123.

90 Morton, above n 87, at 13.

that on a plain reading of the Act, the high threshold test for name suppression focuses on whether an individual would experience extreme hardship resulting from publication.[91] Arguably, the s 200(2) definition of "extreme hardship" is confined to the individual defendant as an atomised agent. Persons connected to the defendant are considered in circumstances where those persons may also suffer extreme hardship as a result of the publication. In *R v H*, it may have been considered that such a causal nexus could not be established and therefore was not relevant to the assessment. However, the Court of Appeal has recently held that:[92]

> … in assessing whether another person would be likely to suffer extreme hardship from publication of a convicted person's name, a court considers everything of relevance to that assessment. A person's religious and cultural backgrounds, the characteristics of their community and their place within it, will all be included in the assessment to the extent they are relevant.

Considering that the defendant in *R v H* expressly put these cultural and community considerations before the court, their relevance to the "extreme hardship" assessment required analysis.

I am not suggesting that these cultural considerations would justify name suppression when weighed against the other factors Thomas J was bound to consider. However, these matters did deserve at least some judicial acknowledgment.

Part of the problem with the judgment in *R v H* stems from the lack of cultural competency training offered in New Zealand's law schools, legal professionals courses and within the judiciary to educate practitioners and judges on relevant cultural matters they might never have been exposed to. Second, the plurality of Pasifika cultures means there is no singular Pacific legal jurisprudence for judges to draw upon. Doing so would risk homogenising the plurality of Pasifika cultural identities that demand a more nuanced understanding of individual Pasifika ethnicities. However, embracing a rudimentary level of engagement with Pasifika legal issues, values and customs is the minimum expectation. Long-term, the issue could be sufficiently mitigated through encouraging greater cultural diversity within all levels of New Zealand's legal profession.

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91 Criminal Procedure Act 2011, s 200(2)(a).

92 *Beshara v R* [2018] NZCA 66 at [7].

Moreover, increased cultural and gender diversity increases the pool of knowledge and experience for judges to draw upon, creating a more well-rounded bench. This is not to suggest that non-Pasifika judges cannot acutely understand Pasifika cultural values. However, unlearning entrenched unconscious biases and undergoing cultural competency training takes time and effort. Where the bench is predominantly and historically occupied by an identifiable gender, ethnic and class demographic, it feeds unconscious bias into substantive decision-making despite a veil of neutrality and "colour-blindness". This alienates minority groups, many of whom are negatively over-represented in the dock. In addressing the 25th Australian Institute of Judicial Administration, Robert French J, at the time a judge of the Federal Court of Australia, aptly summarised the importance of cultural understanding in a judge's work:[93]

> It is essential, however that people involved in the work of the courts are educated to an awareness of difference that transcends their own experiences of life. For those experiences and the worldviews that go with them are necessarily culturally conditioned.

His Honour acknowledged that in increasingly multi-cultural societies (such as Australia and New Zealand), administering justice equally becomes increasingly problematic when it cuts across cultural boundaries, particularly in criminal practice.[94] Although his Honour did not address the criminal justice system specifically, New Zealand courts are challenged by the over-representation of ethnic minorities as criminal offenders. The appointment of three Pasifika individuals into positions that have been historically monopolised by Pākehā marked a significant milestone for Pasifika peoples in seeing themselves reflected in legal decision-making. But there is more to be achieved. More than a decade passed between the appointments of Judge Malosi and Judge Moala, leaving one to ask whether it will take another 14 years (or more) before there is another Pasifika judge.

I contrast Thomas J's approach with that of a recent sentencing decision involving a young Samoan woman convicted on two charges of theft by a person in a special relationship: S*erious Fraud Office v Papu*.[95] Ms Papu was the

93 French, above n 79, at [4].

94 At [3].

95 *Serious Fraud Office v Papu* [2017] NZDC 21687.

daughter of the Pastor at a Samoan church. For a period of four years she had transferred money from the Church into her personal account. The amount taken totalled $1,056,222.[96] In many ways, the defendant was rather fortunate to appear before Tongan Judge Moala in the Manukau District Court. It is clear from the decision that Judge Moala, also from a Pasifika background, could converse with the defendant in a way that conveyed a sense of understanding. By way of example, the Judge said:[97]

> That money comes from the blood, sweat and tears of many Samoan families. Their children and their families have gone without so that they can contribute to the church because God and the church is a priority and is everything to these people. … I do not need to tell you, you already know that.

And further:[98]

> Everything I have read on the file tells me that your remorse is genuine and the regret is there. … I can only imagine how [your father] must feel about your offending and the trust that you have breached by taking your money from the church.
>
> …
>
> I know that if your father raised you right, you have had a conscience, you would have been thinking about it every time you took that money.

The comments regarding the offender's father might seem condescending. However, from a Pasifika cultural standpoint, such censure is appropriate given Judge Moala's position of authority and her ability to understand the complexity of the offender's familial relationship to her father, the Pastor of the victim Samoan church. These statements speak directly to both the offender and her aiga, emphasising the harm caused to her father; thus having a greater impact on the defendant because of the extensive consequences of her offending on her family, church and wider Samoan community. Importantly, Judge Moala's starting point was to contextualise the offending against the offender's cultural and family background, rendering those factors of equal importance to the other purposes and principles of sentencing. The Judge was

96 *Serious Fraud Office v Papu* [2017] NZDC 21687.

97 At [11] (emphasis added).

98 At [14] and [21] (emphasis added).

not provided with a cultural report under s 27 of the Sentencing Act, which would have allowed the Court to hear about the personal, whanau, community and cultural background of the offender. Second, none of these cultural factors were explicitly stated in the defence counsel submissions. Judge Moala just knew. As such, the Judge was able to factor in the cultural considerations when applying a 25 per cent discount for mitigating features, including the offender's previous good character, efforts at rehabilitation, personal circumstances at the time of offending, and the defendant's gambling problem. An additional 25 per cent discount was also given for the defendant's guilty plea.[99]

It is unlikely that this level of understanding could have been achieved by a non-Pasifika judge without the assistance of a cultural report. In comparison to *R v H*, it is evident how the justice system becomes hindered, if not stagnant, when cultural understanding is limited or non-existent. Conversely, the *Papu* case lends weight to the comments from Pasifika women in the Law Commission's report that where Pasifika peoples are at the forefront of delivering justice, their approach is imbued with a level of cultural respect and understanding. The presence of Pasifika, particularly Pasifika female judges, in the courtroom is a significant step in reducing the sense of dissonance many Pasifika women felt, and arguably still feel, towards the justice system.[100]

V SENTENCING AND CULTURAL CONSIDERATIONS

The previous discussion highlighted the importance of judicial recognition of cultural contexts and the risk of "pluralistic ignorance" where such recognition is not delivered. The scarcity of Pasifika (and, more particularly Pasifika female) practitioners and judges diminishes the opportunity for these worldviews to be fully realised and drawn upon in substantive judicial decision-making. Until such time as the embracing of Pasifika worldviews becomes automatic within the profession and the courts, such information must be decisively put before a judge. At present, the primary (and arguably, only) mechanism for the court to consider an offender's cultural context is through cultural reports issued under s 27 of the Sentencing Act.

Section 27 was introduced to encourage courts to consider alternatives to imprisonment when sentencing offenders of Māori descent or from

99 At [26].

100 Referring to the statements of Pasifika women in Law Commission, above n 5.

other ethnic minorities.[101] The section provides courts with appropriate and relevant material necessary to make an informed sentencing decision about an offender, including the potential for more culturally relevant rehabilitative options instead of a custodial sentence. Judge Moala, speaking extra-judicially, commented that in her time as a judge, there has been a strong shift by the judiciary to better understand Te Ao Māori,[102] as well as exploring alternatives to imprisonment. She noted "many of us [judges] are keen to change the way we do things in order to make positive changes."[103] Cultural reports can be considered a type of "cultural evidence", providing the judge with an individualised taxonomy of the offender to be considered in conjunction with other relevant considerations.

Justice Whata, in the recent High Court decision of *Solicitor General v Heta*, demonstrated how successfully s 27 can be used in sentencing, and observed that:[104]

> Section 27 mandates consideration of the full social and cultural matrix of the offender and the offending … inclusion of all material background factors in the assessment aligns with the underlying premise of s 27 just mentioned and it better serves the purposes and principles of sentencing to identify and respond to all potential causes of offending, including where relevant, systemic Māori deprivation.

He continued:[105]

> [It] mandates and enables Māori (and other) offenders to bring to the Court's attention information about, among other things, the presence of systemic deprivation and how this may relate (if at all) to the offending, moral culpability and rehabilitation.

The decision is noteworthy because the s 27 report itself did not itself draw

101 Te Puea Matoe "The Relevance of Cultural information at sentencing for Māori in the Criminal Justice System of Aōtearoa" (Ngā Pae o te Māramatanga and Michael and Suzanne Borrin Foundation, June 2018) at 10–11; Thomas Clark "Ko Ngā Take Ture Māori: Sentencing Indigenous Offenders" (2014) Auckland U L Rev 245 at 260; and Judge O'Driscoll "A powerful mitigating tool?" [2012] NZLJ 358 at 358.

102 Te Ao Māori refers to the Māori world/worldview(s).

103 Judge Soana Moala "Cultural Reports obtained under section 27 of the Sentencing Act" (paper presented to the Legal Research Foundation Manukau Seminar Update on Sentencing, Auckland, 2 May 2017) at [78].

104 *Solicitor-General v Heta* [2018] NZHC 2453 at [41].

105 At [49].

linkages to "systemic Maori deprivation", Ms Heta and her offending.[106] Interestingly it was Judge Moala in the District Court who first observed that Ms Heta's life circumstances reflected "the significant post-colonial trauma and disruption of the cultural identity experienced by Maori whanau, hapu and iwi, where alcohol and poverty has resulted in offending of this type."[107] As a result of these factors, Whata J applied a markedly liberal approach in recognising the discretion afforded to Judges in the sentencing exercise to acknowledge the broader sociological, historical and criminogenic factors that impact offenders (in this case, of a Māori woman). The decisions in *Heta* illustrate the importance of diversity in the ethnic and cultural makeup of the judiciary. Both Judge Moala and Whata J, being Tongan/Māori and Māori respectively, employed their own understandings of the cultural and historical factors affecting Ms Heta's offending. Their doing so is unsurprising as both have spoken extra-judicially about the importance of analysing an offender's cultural and personal circumstances, and have pushed towards normalising this in sentencing.[108]

Retired Australian Chief Justice Robert French has stated that the inclusion of cultural factors allows judges to engage in a type of "informed awareness into a world (or, worldviews) he or she might not otherwise have been aware of".[109] In New Zealand, the use of s 27 cultural reports has seen a marked resurgence in recent years, with increasing awareness of the impact an offender's cultural, familial, and socio-economic background has on their offending. However, Judge Moala observed that in many cases involving Māori and Pasifika persons, the use of s 27 cultural reports has been "rare".[110] The focus of s 27 cultural report discussions have thus far understandably centred on Māori offenders, as the section was introduced into the Sentencing Act to specifically address the systematic over-incarceration of Aotearoa's indigenous population.[111] As observed, there is an absence of literature discussing the use of s 27 reports by Pasifika offenders and Pasifika female offenders more

106 *Heta*, above n 104, at [65] per Whata J.

107 *R v Heta* [2018] NZDC 11085 at [9]–[10] per Judge Moala.

108 Teuila Fuatai "Judges highlight cultural context for offending" *Newsroom* (21 November 2017) <www.newsroom.co.nz>.

109 Justice RS French, above n 79, at 3.

110 Fuatai, above n 78.

111 Matoe, above n 101, at 10–11; Clark, above n 101, at 260; and Judge O'Driscoll, above n 101, at 358.

specifically. There has been little explanation offered or research undertaken from the Law Commission or Law Society as to why s 27 reports have been seldom used by Pasifika offenders and what impact this is having on their sentencing outcomes (if any).

The practical benefit of putting a cultural report before a judge, specifically in regards to Pasifika women, is evidenced in the very recent decision of *R v Momoisea*.[112] This case involved a 41 year-old Samoan woman convicted of the murder and attempted murder of her ex-partner and his new girlfriend, respectively.[113] The Crown submitted that at sentencing, the minimum period of imprisonment should be no less than 17 years, as this was an "especially bad" murder.[114] Defence counsel supplied a s 27 cultural report to assist in its submission of the relevant mitigating factors to be considered. Specifically, counsel submitted that the Judge should only impose a minimum period of imprisonment of 10 or 11 years on the defendant, partly to reflect the banishment imposed on the defendant and her family from her village in Samoa following the offending.[115] Justice Downs commented:[116]

> You were born and raised in a Samoan village. You moved to New Zealand seven years ago or so. But, you have tended to mix only within the Samoan community. As observed, your English is poor. Because of your offending, you have been banished from your village. This is significant. In traditional Samoan culture, being part of the village is part of a person's identity. You and your children will not be able to return. Accordingly, you cannot visit or care for your parents when you are eventually released from prison. Unless, of course, the village decides to accept you. That remains possible.

The seriousness of banishment cannot be overemphasised. In Samoan custom, banishment is recognised as the most important sanction a village can impose. As a response, it sits above other forms of penalty such as fines or ostracism from the village community. Banishment can be characterised as one of the most significant punitive measures, denoting complete extrication of the defendant from her community. It must be noted that this was Ms Momoisea's first

112 *R v Momoisea* [2018] NZHC 1577.

113 At [2]–[15] and [35].

114 At [22].

115 At [36(d)].

116 At [53].

offence and the victims were also Samoan. To restore the harm she imposed, Ms Momoisea engaged in the Samoan custom of ifoga, the traditional system of justice as practised in Samoa to seek forgiveness. This involves submitting to a ritual and public humiliation in return for the forgiveness by the offended party.[117] As Cluny Macpherson and La'avasa Macpherson highlight:

> The word ifoga currently means a "ceremonial request for forgiveness made by an offender and his kinsman to those injured" and comes from the word ifo that literally means to bow down and, among other specific usages, to "make a formal apology".

Significantly, both victims' families accepted the ifoga in this case. Acceptance by the victims' families (ole taliga ole ifoga) represents a willingness by the victimised parties to engage in reconciliation and indicates that the defendant has, and must continue to, accept responsibility for her actions. Acceptance is not the default response and comes after careful consideration. Justice Downs referenced the ifoga but did not highlight its importance as a separate factor from the banishment imposed. I suggest more detailed analysis of this culturally significant ritual beyond a cursory mention might constitute a separate, mitigating feature as evidence of remorse and reparation. Nevertheless, the s 27 report was a critical ingredient in the Judge's decision to impose a minimum period of imprisonment on Ms Momoisea that was two and half years less than that proposed by the Crown.[118] A twelve-month discount was given for her "earlier good character and the cultural matters".[119] Whilst a non-custodial sentence was not possible because of the seriousness of her offending, this case demonstrates the importance of counsel supplying cultural evidence for Pasifika offenders.

In cases where a custodial sentence does not have to be imposed, Pasifika defendants would benefit from counsel raising alternative and culturally appropriate rehabilitative options as a more appropriate form of punishment. There is a clear gap in the research about the use of s 27 reports by Pasifika offenders, and female offenders particularly. This information would prove useful in formulating attempts to increase their uptake.

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117 George B Milner *A Dictionary of the Samoan Language* (Oxford University Press, London, 1976) as cited in Cluny Macpherson and La'avasa Macpherson "The Ifoga: The Exchange Value of Social Honour in Samoa" (2005) 114 Journal of the Polynesian Society 109 at 109.

118 *Momoisea*, above n 112, at [57].

119 At [57].

A "Cultural reports" — under threat?

On 29 June 2018 the Ministry of Justice determined that "cultural reports" (included court ordered s 27 reports) issued under s 27 of the Sentencing Act were no longer to be funded by the Ministry.[120] While a judge is not required under the Act to order a report, they may recommend that one is issued where they believe it would assist in the sentencing exercise.[121] The Act provides little guidance on the practical issue of funding, leading many to assume that they would be funded by the court. The Pacific Lawyers' Association expressed concern at the Ministry's recent decision, commenting that:[122]

> The flexibility the 2002 Act provides in sentencing processes and principles means there can be a reconciliation between the "traditional" criminal justice system and the precepts of Māori and Pacific customary practices through these reports in trying to fit appropriate sentences to Māori and Pacific offenders.
>
> Without funding for section 27 cultural reports, offenders will be at a significant disadvantage and will be denied access to justice. This cost-cutting measure will erode an offender's rights to have their cultural background considered at sentencing because they will not be able to afford a report writer who can give the Court information directly relevant to the imposition of a more appropriate sentence.

It seems paradoxical for the Government to wax lyrical about combatting the over-representation of Māori and Pasifika peoples in the criminal justice system yet make decisions that make it more difficult for those same people to put necessary cultural evidence before a judge. Whilst an offender can still raise cultural arguments via their counsel's written and oral submissions, this is predicated on counsel possessing the requisite cultural competence to adequately raise such arguments. As highlighted in the previous discussion, the lack of Pasifika and Pasifika female lawyers means this pool of knowledge is spread thin amongst defence lawyers, affording their defendants less opportunity to have their circumstances and worldview accurately submitted before a judge.

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120 Marty Sharpe "Ministry stops funding court reports that examine cultural context of crimes" (28 August 2018) Stuff <www.stuff.co.nz>.

121 Sentencing Act 2002, s 27.

122 "Cultural report funding cut concerns Pacific Lawyers Association" (1 August 2018) New Zealand Law Society <www.lawsociety.org.nz>.

Whilst an offender can apply to have a s 27 report funded through a disbursement extension under legal aid, this is given on a discretionary basis, absent of any clear qualifying criteria.[123] This raises concern for those individuals who exceed the threshold for legal aid funding yet cannot afford to fund a report privately — specifically, those Pasifika women who earn lower incomes but sit just above the criminal legal aid threshold. Obtaining a written report is a costly and timely endeavour. It is estimated that report-writers charge approximately $120 to $150 per hour and that reports can take six to eight weeks to prepare.[124] Considering that Pasifika women are among the lowest income earners with little disposable income, such expenses are grossly unaffordable. Moreover, there is a dearth of public information available directing offenders to cultural report writers and services specifically for Pasifika people.

I believe that the removal of funding will make s 27 reports much harder to acquire for Pasifika persons who can neither access nor fund the necessary cultural resources to assist in their sentencing. This will be even more pronounced for Pasifika women. While some might be fortunate enough to have a judge who takes their cultural background into account, in the absence of a cultural report this prospect is unrealistic in the majority of cases and means that the needs and circumstances of Pasifika women in the criminal justice system are not being taken into account.

VI CONCLUSION AND FUTURE DIRECTIONS

The purpose of this article is to fill a gap in the current legal literature that overlooks the interactions Pasifika women have with the criminal justice system. Through observing a series of relevant issues across New Zealand's criminal justice system, this analysis shows that the issues facing Pasifika women are intrinsically interlinked in a cycle of socio-economic inequality and intersectional discrimination, which leads to the underrepresentation of these same people in the legal profession and relative overrepresentation as criminal offenders. Furthermore, the lack of critical scholarship engaging with these issues means these correlations are not readily acknowledged nor, ultimately, addressed. Indeed, this article does not conclusively answer the question posed at the outset. If anything, this article has revealed the complex web

123 "Cultural report funding cut", above n 122; and Sharpe, above n 120.

124 Tu Puea Matoe "Cultural Speaker Fact Sheet" (June 2018) Michael and Suzanne Borrin Foundation <www.borrinfoundation.nz>.

of interactions, experiences and neglect Pasifika women face in the criminal justice system, thereby posing more questions, rather than offering answers.

However, three key observations emerge. First, Pasifika women have long been over-looked within legal academia and policy. New Zealand's legal and academic profession cannot purport to be culturally diverse if they fail to raise awareness of the legal issues facing ethnic minorities. There are clear gaps in the research which, if filled, would assist in painting a clearer picture of the issues identified. A critical limitation of this article is that it has drawn observations from a purely academic and analytical standpoint. It has not engaged in fieldwork research or empirical methodologies. Comprehensive research that consults with Pasifika women, on all sides of the justice system, is long overdue. This article advocates for a more targeted, intersectional analysis and theoretical framework that is appropriate for Pasifika women. Fieldwork research that interviews Pasifika women, including judges, offenders, victims, lawyers, court registrars, service staff and academics will rid the discussion of speculation on what Pasifika women might think and feel, and address the matter in a culturally appropriate and collaborative manner.

Second, legal decision-making risks reliance on pluralistic ignorance if it extricates Pasifika women from their wider socio-cultural context. Propounding the rhetoric of neutrality and colour-blindness is an inadequate response in an era where Pasifika peoples, especially young Pasifika women, are increasingly overrepresented in criminal offending. There is an increased need for lawyers and judges alike to be cognisant of Pasifika worldviews and how incorporating these value systems and socio-cultural contexts might improve the dispensation of individualised justice.

Finally, the obvious limitation in this research was its pan-Polynesian approach and grouping of "Pasifika women" as a singular gendered category. Further research targeting specific Pasifika ethnic identities could identify culturally specific issues, thereby eliciting culturally appropriate responses. This extends to understanding Pasifika women beyond the limited male/female binary, acknowledging the plurality of Pasifika gender identities existing in New Zealand, and the very specific legal issues Pasifika people face as a diasporic community.

THE END OF "HE OR SHE"?
A look at gender-neutral legislative drafting in New Zealand and abroad

Ruby King and Jasper Fawcett*

In recent years, the gender binary has started to give way to a more accurate understanding of gender as nuanced and multi-faceted. This article examines a small aspect of this shift: gender-neutral language in legislative drafting in New Zealand and overseas. We examine the history of gendered language in New Zealand and assess the status quo, concluding that while gender-neutral language seems to be encouraged, it is not yet mandatory. We outline the challenges faced in achieving full gender-neutrality, review international drafting practices, and canvass several areas in which New Zealand is making desirable steps towards full gender inclusivity in legislation.

I INTRODUCTION

Traditionally, sex and gender have been understood as binary concepts. A person was either female or male; a woman or a man. While this has never been an accurate reflection of sex and gender, it is only relatively recently that non-binary conceptualisations of gender have started to be acknowledged. Recognition of the full spectrum of genders is a desirable step, but is not the ultimate goal. New Zealand must strive toward full gender-neutrality if it is to take a step toward meaningful inclusivity — only neutrality captures a proper understanding of gender.

In order to effect true inclusivity, gender-neutrality must take place across many aspects of life such as birth certificates, anti-discrimination laws, representation in the media, and access to appropriate facilities

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such as public bathrooms. The purpose of this article is to focus on one particular aspect of the neutrality discussion: legislative drafting. Lawyers know all too well how important the language used in legislative drafting is, reflecting and shaping how individuals understand and interact with society and its laws. This article explores current gender-neutral drafting practices in New Zealand and overseas in order to shed light on the issue with a view to promoting full inclusivity in legislative drafting.

Part II begins with a discussion of the meaning of gender-neutrality. The history of gendered language in legislation is canvassed in Part III, alongside the current position in New Zealand. Part IV outlines the perceived challenges surrounding gender-neutral language, with a focus on the still hotly debated use of the singular *they*. Part V offers comparisons with other jurisdictions, and Part VI explores notable developments in New Zealand.

We conclude that, until now, the place of legislative drafting in the broader gender-neutrality discussion has largely been overlooked. Developments in this area are a clear example of how language in the law can reflect a vision of a more inclusive society.

II WHAT IS GENDER-NEUTRALITY?

Western culture, and the law governing it, has historically adopted binary understandings and expressions of sex and gender.[1] The gender binary categorises people as either a woman or a man based on their biological sex. Where a person's sex matches their gender, they can be described as 'cisgender'.[2] However, many people's experiences of sex and gender are more nuanced than that:[3]

> It is estimated that one to two per cent of people "are born with sexual features that vary from the medically defined norm for male and female", and in the year 2011 alone Victorian hospitals reported about 40 cases of infants who were born with "physical or biological conditions that mean [they] cannot be said to be exclusively male or female".

People also may not identify with the gender paired with their biological sex

1 Anne Fausto-Stirling "The Five Sexes: Why Male and Female Are Not Enough" (1993) 33(2) The Sciences 20 at 20 as cited in Theodore Bennett "'No Man's Land': Non-Binary Sex Identification in Australian Law and Policy" (2014) 37(3) UNSWLJ 847 at 847–848.

2 At 849.

3 At 852 (footnotes omitted).

or may not identify with either of 'female' or 'male', and are therefore non-cisgender.[4] By way of example, New York City recognises 31 different genders,[5] and Facebook recognises 50.[6] Alongside cis female and cis male, Facebook lets users select options such as gender-fluid, pangender, transsexual, and agender.

For the purposes of this article, the term 'gender-neutral' is adopted. We use it in a completely non-gendered and all-inclusive sense.

III GENDERED DRAFTING: HISTORICALLY AND TODAY

A Historical Use of Gendered Language

Traditionally, New Zealand society and language were male-centric, as reflected in legislation, which solely referred to "him" and "he". The Shorthand Reporters Act 1900, for example, described all reporters as male, stating that "[i]f any person, not being an authorised reporter … holds himself out to the public as an authorised reporter, he is liable to a penalty".[7] The Law Practitioners Amendment Act 1935 set down punishments for professional misconduct such as "[c]ensure him" and "[o]rder him to pay a penalty".[8] This example is particularly surprising given the Female Law Practitioners Act 1896 was passed almost 40 years earlier, and pioneering women such as Ethel Benjamin were practising as lawyers long before 1935.[9]

It is important to note that while many statutes referred to men only, there was always an express or implied understanding that references to "him" or "he" included women. For a long time, provision has been made in various Interpretation Acts (culminating in the current Interpretation Act 1999)[10] that references to the masculine gender include the feminine.[11] However, the

4 At 852.

5 Peter Hasson "New York City Lets You Choose From 31 Different Gender Identities" (24 May 2016) The Daily Caller <www.dailycaller.com>.

6 Matthew Sparkes "Facebook sex changes: which one of 50 genders are you?" *The Telegraph* (online ed, London, 14 February 2014).

7 Shorthand Reporters Act 1900, s 16.

8 Law Practitioners Amendment Act 1935, ss 3(2)(c)–3(2)(d).

9 Ethel Benjamin was admitted as a Barrister and Solicitor of the Supreme Court of New Zealand on 10 May 1897: Ministry for Culture and Heritage "NZ's first woman barrister and solicitor appointed" (March 2018) New Zealand History <www.nzhistory.govt.nz>.

10 Note that the Interpretation Act 1999 is soon to be integrated into the Legislation Bill 2017 (257–2), pt 2.

11 Interpretation Act 1888, s 4; Acts Interpretation Act 1908, s 5; Acts Interpretation Act 1924, s 4; and Interpretation Act 1999, s 31.

message was clear that women were not regarded as the norm, and were seen by many as second-class citizens not warranting an express mention. Moreover, such references obviously do not accord recognition to non-binary genders, and so are not gender-neutral.

References slowly began to change to the gender-binary *him or her* as the place of women in society shifted.[12] The wording in some statutes began to read, for example, "where the Secretary has stated that *he or she* is satisfied …".[13] By the 1960s and 1970s, a renewed wave of feminism had thrust the issue of gendered language in legislation into the spotlight. Pressure from feminists for laws and policies to be more gender-inclusive led to the actual text of these laws and policies being considered seriously for the first time.[14]

In the 1980s and 1990s, the New Zealand Law Commission produced four reports that changed the landscape of legislative drafting and access.[15] These reports came in response to a push by the then-Minister of Justice Hon Geoffrey Palmer, who took a keen interest in improving the accessibility of legislation to all.[16] One of these reports, entitled *Legislation Manual: Structure and Style*, sought to create a set of guidelines for drafters that focused on plain and accessible language.[17] These guidelines were largely adopted by the Parliamentary Counsel Office (PCO) and form the basis of the plain language techniques that the PCO use today. The report emphasised that:[18]

> There is no mystery to plain language. Plain language is ordinary language, expressed directly and clearly. … In legislation its use is intended to remove the barriers to communication, and in this way make the law more accessible.

To achieve plain language and improve accessibility the *Structure and Style*

12 For a detailed summary of the women's rights movement in New Zealand, see Christine Dann *Up from Under: Women and Liberation in New Zealand 1970–1985* (eBook ed, Bridget Williams Books, 2015) at ch 1.

13 Forests Act 1949, s 67C(1)(f)(iii) (emphasis added).

14 Margaret Wilson, Professor of Law and Public Policy, University of Waikato "Gender-Neutral Law Drafting: The Challenge of Translating Policy into Legislation" (Sir William Dale Annual Memorial Lecture 2011, Institute of Advanced Legal Studies, London, 11 January 2011).

15 Law Commission *Legislation and its Interpretation: Statutory Publications Bill* (NZLC R11, 1989); Law Commission *A New Interpretation Act: To Avoid "Prolixity and Tautology"* (NZLC R17, 1990); Law Commission *The Format of Legislation* (NZLC R27, 1993); and Law Commission *Legislation Manual: Structure and Style* (NZLC R35, 1996).

16 Wilson, above n 14.

17 Law Commission *Legislation Manual: Structure and Style*, above n 15.

18 At [136].

report suggested drafters should use gender-neutral language and avoid the traditional use of male pronouns ("he") and nouns ("chairman").[19] The report recognised that doing so might be clunky, and that drafters should "[c]hoose the technique that communicates the message as effectively and as elegantly as possible".[20]

In general, there has been a positive step away from singularly-gendered language ("he"), to dual-gendered language ("he or she"), and this binary language is currently the status-quo in most of New Zealand's statutes.[21] Unfortunately however, references to "he or she" fail to achieve gender-neutrality in a non-binary sense, as they pigeonhole gender into two categories and do not recognise that people may identify with a gender other than male or female. It is therefore incorrect for such language to be described as gender-neutral in its full sense, although it is undoubtedly more desirable to recognise at least two genders rather than one, which was the case previously.[22]

B The Current Position in New Zealand

In New Zealand, entirely gender-neutral drafting is strongly encouraged, but not required. Legislative drafting guidelines are provided to Parliamentary Counsel in the PCO Drafting Manual, which has recently undergone significant changes in respect of gender-neutral language.[23] The Manual provides guidance on all aspects of drafting, such as ensuring plain language is used.[24] According to the currently available public version of the PCO Drafting Manual, gender-neutral language (in the form of "they" or "their") has been used in writing since the 14th century.[25] To cater for the need for gender-neutrality in legislation, a range of techniques are listed as permitted, such as:[26]

i) omitting the pronoun altogether;

ii) repeating the noun;

19 At [186] and [188]–[189].

20 At [187].

21 At the time of publication, the phrase "he or she" appeared in more than 470 Acts. See, for example, the Holidays Act 2003, s 23(1)(b); and the Food Act 2014, s 33(2).

22 See the discussion of the Shorthand Reporters Act and the Law Practitioners Amendment Act above.

23 Chapter 3 of the PCO Drafting Manual was updated in 2018.

24 "Principles of clear drafting" Parliamentary Counsel Office <www.pco.govt.nz>.

25 At [3.70A].

26 At [3.70].

iii) using "they" or "their" to describe singular persons;

iv) using masculine and feminine pronouns (for example, "he" or "she");

v) recasting the sentence into the plural;

vi) converting the noun to a verb;

vii) using a relative clause; or

viii) using a passive construction.

The PCO Drafting Manual notes that these techniques will contribute to full gender-neutrality to varying degrees.[27] In particular, while using gendered pronouns such as "he or she" is still an accepted method, the Manual instructs drafters that this technique is only to be used sparingly.[28] The continued use of "he or she" is also intended to be reviewed in 2019.[29] It is important to note that in some cases of amending specific provisions in old legislation, phrases like "he or she" still have to be used in the amendments to ensure consistency with the language used in the old legislation.[30] For example, if an old statute says "he or she" throughout, any amendments to that statute will also need to say "he or she" in order to maintain consistency in the wording used across the statute as a whole. On the whole however, the recent changes to the Drafting Manual express the PCO's commitment to neutralising New Zealand's gendered legislation. The new section on gender-neutral language emphasises that:[31]

> In the past, gender-neutral language was seen merely as language that did not use "masculine language" being blind to women. It is increasingly recognized that this is an overly narrow concept of gender-neutrality, and that language (and law in general) should move beyond binary concepts of gender that undermine its applicability to all persons.

It is clear from a scan of the current legislation that gendered language still exists throughout the statute books.[32] That being said, change is occurring,

27 At [3.70].

28 At [3.70B].

29 At [3.70B].

30 At [3.72].

31 At [3.69A].

32 See, for example, the Summary Offences Act 1981, s 20A(3) which still assumes that the Attorney-General is a "he"; and the Crimes Act 1961, s 8A(5)(a) which states that "he or she may be arrested".

albeit incrementally. New legislation tends to no longer use gender-specific language (unless there is no other option, or it is amending legislation and requires consistency) and old legislation is slowly being re-written or replaced with modern language as it is updated by Parliament. As the calls for gender-neutrality are relatively recent, it is unsurprising that most existing legislation does not comply with fully gender-neutral guidelines; nor is it surprising that the PCO Drafting Manual has not until recently excluded techniques that only achieve partial gender-neutrality. However, now that the issue is gaining traction there is no reason that legislation enacted from this point on should not be completely gender-neutral.

Alongside the PCO Drafting Manual update, further inklings of positive change can be seen in international drafting practices and in particular, in actual New Zealand statutes. The developments are explored in full below, following a discussion of the challenges posed by complete gender-neutrality.

IV THE CHALLENGES OF GENDER-NEUTRAL DRAFTING

Adapting to completely gender-neutral language in legislative drafting does not come without its challenges — the most significant of which is the use of the singular *they*. The problem stems from the lack of an English gender-neutral pronoun, as exists in other languages, such as Finnish and Swedish.[33] Gender-neutral pronouns solve the problem of gendered drafting for obvious reasons,[34] and some English-speaking countries like Canada have started adopting gender-neutral pronouns (such as *ze*) colloquially but not yet in legislation.[35] In New Zealand, the te reo Māori word *ia* has always existed as a gender-neutral pronoun that can mean *he*, *she*, *him*, *her*, *it* and *they*.[36] *Ia* is used regularly throughout Te Ture mō Te Reo Māori 2016/the Māori Language Act 2016,[37] the first (and at this point, only) New Zealand Act to be drafted bilingually. Unfortunately, *ia* is not used in English and so does not appear

33 See the discussion of gender-neutral pronouns in Finland and Sweden below.

34 Gender-neutral pronouns such as *hän* in Finland can be used to refer to any and all genders (that is, the pronoun encompasses *he*, *she*, and *they* all in one) and so are inclusive.

35 Jessica Murphy "Toronto professor Jordan Peterson takes on gender-neutral pronouns" (4 November 2016) BBC <www.bbc.com>.

36 PM Ryan *The Raupō Dictionary of Modern Māori* (4th ed, Penguin Group (NZ), North Shore, 2012) at 79.

37 See, for example, s 9(1).

in any other legislation. However, the word *they* and its variants (*them*, *their*) can be used in place of gendered pronouns. For example " … where a child or young person is removed from *their* family", could be used rather than the current wording " … from *his or her* family".[38]

The common issue with this approach is that using *they* or *their* in a singular sense (to refer to one person or object) is grammatically incorrect.[39] It does, however, provide a straightforward means of neutral drafting. A conflict thus arises between technically correct grammar in the strictest sense, and fully gender-neutral language.

Members of the United Kingdom's upper house of Parliament, the House of Lords, have expressed strong opinions against the singular *they*. In a 2013 Parliamentary Debate, Lord Scott detailed how "absurd" he found attempts at gender-neutral language in legislation to be, stating that:[40]

> Statutes and statutory instruments ought not only to be clear and free of ambiguity, but surely ought also to stand as models for the correct use of the English language. To prostitute the English language in pursuit of some goal of gender equality is, I suggest, unacceptable.
>
> …
>
> [It is] an insult to the lovely English language …

The argument against the singular *they* is not that it should never be used. Rather, opponents claim that it is improper to use *they* in formal writing as it is "colloquial" and "just wrong".[41] The argument that the singular *they* is too colloquial or somehow improper, however, easily fails. Language is organic, and it changes to suit people's needs in light of evolving social norms. Such change is "natural and inevitable",[42] and many words that were once colloquial are now considered acceptable in everyday usage.[43] The continual addition of new words such as "Google" to dictionaries around the world is demonstrative

38 Oranga Tamariki Act 1989, s 13(2)(f) (emphasis added).

39 This argument is discussed below.

40 (12 December 2013) 750 GBPD HL 1006–1007.

41 Mary Norris *Between You & Me: Confessions of a Comma Queen* (Text Publishing, Melbourne, 2015) at 69.

42 Jean Aitchison *Language Change: Progress or Decay?* (4th ed, Cambridge University Press, Cambridge, 2013) at 245.

43 Eric Partridge *Slang: To-Day and Yesterday* (Routledge, New York, 2015) at 11.

of the ever-shifting nature of language.[44] The word *they* has itself been used colloquially since at least the 14th century,[45] with writers like William Shakespeare and Jane Austen both employing it as a singular pronoun in their works.[46]

Another issue that grammarians have with the singular *they* is that "a pronoun … should not have two grammatical senses".[47] *They* can be used in the singular but also in the plural, which can cause confusion about who is being referred to. In the sentence, "if a person hits another person they must report it", for example, it is unclear whether the first, second, or both people are required to report the incident. This is a fair criticism. However, as the PCO Drafting Manual emphasises the importance of avoiding ambiguity when using *they*, it seems that the simple solution is to use one of the alternative gender-neutral methods of drafting where the use of *they* creates ambiguity.[48]

Strong support for the use of *they* in legislation is found in the latest edition of *Thornton's Legislative Drafting*.[49] Widely thought of as the bible of legislative drafting practice, *Thornton's Legislative Drafting* provides guidance to Parliamentary Counsel and drafters around the world. *Thornton's Legislative Drafting* notes that the problem of gender-neutral drafting arises from the fact that there is no gender-free singular pronoun in English.[50]

Thornton's Legislative Drafting lists numerous methods of avoiding gender-specific language (including those listed in the PCO Drafting Manual and set out above), many of which have been adopted and implemented in drafting manuals overseas. *Thornton's Legislative Drafting* goes further than most, however, and specifically chastises the use of "his or her" because it "fails to sideline gender: it still uses gender specific expressions".[51] This point is an

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44 Angus Stevenson and Maurice Waite (eds) *Concise Oxford English Dictionary* (12th ed, Oxford University Press, Oxford, 2011) at 613.

45 "Principles of clear drafting", above n 24, at [3.70A].

46 Catherine Helen Palczewski, Victoria Pruin DeFransisco and Danielle Dick McGeough *Gender in Communication: A Critical Introduction* (3rd ed, SAGE Publications, Los Angeles, 2017) at 101.

47 Dieter Kastovsky and Arthur Mettinger (eds) *The History of English in a Social Context: A Contribution to Historical Sociolinguistics* (Mouton de Gruyter, Berlin, 2000) at 269.

48 "Principles of clear drafting", above n 24, at [3.70A].

49 Helen Xanthaki (ed) *Thornton's Legislative Drafting* (5th ed, Bloomsbury Professional, West Sussex, 2013).

50 At [3.67]. See more on this point in the discussions of Finnish and Swedish drafting below.

51 At [3.68].

important one. The view that "his or her" or "he or she" is gender-neutral because it caters for both males and females is outdated and incorrect, as it still adheres to exclusive binary concepts. To combat this, the use of "they", "them" and "their" is recommended to drafters:[52]

> Although this technique has not been fully accepted, it is gaining ground rapidly, mainly because it serves perfectly the purpose of gender neutral language: it draws the users' attention to gender neutrality and can be used with ease in all languages irrespective of how many genders and grammatical forms there are. What seems to annoy most opponents to the technique is the grammatical error in its expressions. … But is grammatical correctness that important? Since grammar is simply a tool, and not a chain, in the hands of drafters, *gender neutrality cannot continue to remain anchored down by the inherent limitations of language*.

As the leading text in the area, *Thornton's Legislative Drafting*'s advocacy for and recommendation of gender-neutral alternatives, even if not traditionally 'grammatical', ought to carry considerable weight. While drafting offices have their own guidelines, the ultimate product largely depends on the style and preference of the drafter, subject to any changes during the legislative process such as by select committees and the views of the instructing departments or agencies. *Thornton's* stance, that gender-neutrality ought to trump what some people consider to be awkward grammar, ought therefore to be adopted if legislative drafting is to be done in a truly inclusive way.

Many linguists seem to agree that the use of gendered language in general is on the way out. Twenty years ago, Emeritus Professor of Linguistics Janet Holmes concluded that "there is good evidence to suggest that [the] pseudo-generic *he* has all but disappeared. Non-sexist norms have demonstrably displaced the grammatically prescribed sexist forms".[53] More recently, it has become clear to linguists that "*they* has increasingly moved towards singular senses … Disturbing though these developments may be to purists, they're irreversible. And nothing that a grammarian says will change them."[54]

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52 At [3.70] (emphasis added).

53 Janet Holmes "Generic pronouns in the Wellington Corpus of Spoken New Zealand English" (1998) 1(1) Kotare 32 at 38 (original emphasis).

54 Bryan A Garner *Garner's Modern English Usage* (4th ed, Oxford University Press, Oxford, 2016) at 736 (original emphasis).

In 2015, the American Dialect Society elected the singular *they* as Word of the Year for its use as a gender-neutral alternative to *he* or *she*.[55] The singular *they* is now (or at least ought to be) accepted in spoken and written English, and colloquial and semi-formal English.[56] Its widespread use in legislation remains a final frontier. In the context of English language broadly, it seems as if "the battle has been won".[57] It is likely only a matter of time before written legislation catches up to these developments and adopts the singular *they* as a gender-neutral alternative.

V GENDER-NEUTRAL DRAFTING AROUND THE WORLD

The following discussion examines a series of other jurisdictions and international bodies to shed light on how the issue of gender-neutral drafting is addressed around the world.

A Australia

Australia's federal Parliamentary Counsel Drafting Manual proclaims that "[f]or many years, OPC has drafted using gender-neutral language."[58] Unfortunately however, such a claim is only correct insofar as providing gender-neutrality for binary genders. In other words, phrases like *he or she* are still used. Australia's additional drafting guidelines further reflect this, encouraging the use of *him or her* (subject to drafter discretion) and seldom mentioning non-binary alternatives (aside from simply using the noun, for example, *a person*).[59]

Like most countries however, Australian attitudes are changing. In the landmark case of *NSW Registrar of Births, Deaths and Marriages v Norrie*, the

55 Jessica Bennett "She? Ze? They? What's In a Gender Pronoun" *The New York Times* (online ed, New York, 30 January 2016).

56 The singular *they* has long been accepted in informal speech — for example, when told "there's someone here who wants to speak to you", it is perfectly normal to reply "who are they?" or "what do they want?" Further, the singular *they* has now become widely accepted by copy editors in semi-formal publications. See Andy Hollandbeck "Associated Press Accepts Singular They" (29 March 2017) Copyediting <www.copyediting.com>.

57 Email from Janet Holmes (Emeritus Professor of Linguistics, Victoria University of Wellington) to Jasper Fawcett regarding the use of *they* and other gender-neutral alternatives in language (9 March 2018).

58 Office of Parliamentary Counsel *OPC Drafting Manual* (edition 3.1, February 2016) at [98].

59 Office of Parliamentary Counsel *Drafting Direction No 2.1: English usage, gender-specific and gender-neutral language, grammar, punctuation and spelling* (1 March 2016) at [15].

High Court of Australia held that the New South Wales Registry of Births, Deaths and Marriages could record the sex of Norrie as "non-specific".[60] Decisions such as this may, we hope, be a precursor to legislative change.

B Canada

Canada's legislative language is arguably the most inclusive of all the countries surveyed in this article. Canadian drafting guidelines recommend the use of the singular "they" to refer to indefinite pronouns and singular nouns, thereby avoiding gendered language entirely.[61] Although, as with most other countries, Canada's ideal approach is to use alternative methods and draft in a way that avoids the need for specific genders, or the use of *they* altogether.[62]

Much of Canada's federal legislation (for example, the Criminal Code,[63] the Divorce Act,[64] and the Canada Labour Code[65]) uses gender-neutral language, including the singular *they*. While "his or her" is still used sporadically,[66] it is heartening to see such an emphasis on gender-neutral language at the federal level. The Canadian Charter of Rights and Freedoms, Canada's main constitutional document, is also entirely gender-neutral and uses "they" to great effect.[67]

At the state level, Canada's drafting guidelines also encourage the use of the singular *they*, and recommend against using gender-specific language by employing alternate techniques. Evidence for this can be found in the drafting guides of British Columbia,[68] Nova Scotia,[69] and Ontario.[70]

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60 *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11, (2014) 250 CLR 490.

61 "Legistics: Gender-neutral Language" (7 January 2015) Canadian Department of Justice <canada.justice.gc.ca>.

62 "Legistics: Gender-neutral Language", above n 61.

63 Criminal Code RSC 1985 c C-46, s 34(1).

64 Divorce Act RSC 1985 c 3 (2nd Supp), s 8(1).

65 Canada Labour Code RSC 1985 c L-2, s 196(4).

66 See, for example, Criminal Code, s 515(10)(a).

67 Canadian Charter of Rights and Freedoms, pt 1 of the Constitution Act 1982, being sch B to the Canada Act 1982 (UK).

68 Office of Legislative Counsel *A Guide to Legislation and Legislative Process in British Columbia: Part 4 — Statute Revisions* (Province of British Columbia Ministry of Justice, August 2013) at 3.

69 Registry of Regulations *Style and Procedures Manual: A Guide to Drafting Regulations in Plain Language* (Nova Scotia Department of Justice, January 2005) at 75.

70 Donald L Revell, Cornelia Schuh and Michael Moisan "'Themself' and nonsexist style in Canadian legislative drafting" (1994) 10(1) English Today 10.

Additionally, the Canadian Parliament has recently voted to re-word their national anthem, 'O Canada', to make it gender-neutral.[71] A small change of just two words was made: a reference to "all thy sons" in the third line was changed to "all of us". While not legal in nature, this change is demonstrative of the strong commitment to equality and gender-neutrality across Canadian English as a whole.

C European Parliament

In 2009, the European Parliament released a document entitled *Gender Neutral Language in the European Parliament* (the Guidelines),[72] which is designed to provide guidance for gender-neutrality in all publications and communications across the European Union. Consistent with what we have seen in other countries, the Guidelines provide that gender-neutral language in its broad non-binary sense should be the norm, not the exception.[73] The European Parliament recommends using the same techniques as listed in the PCO Drafting Manual (like repeating the noun), and specifically suggests that plural forms such as "officials shall carry out their duties" should be used if possible.[74] Much like the PCO Drafting Manual, the European Parliament recommends only using "he or she" sparingly and if no other technique is appropriate.[75]

D Finland

In Finnish, the third-person singular pronoun *hän* is used when speaking and writing about people. There are no gender-specific pronouns like *he* or *she*, as in English. Accordingly, the issue of gender-neutrality does not arise in Finland. Further, unlike some European languages, Finnish does not use genders for its nouns (as we do with words like *actor* and *actress*). There is a suffix, *-mies,* which appears at the end of occupations such as builder, plumber, and public servant, but it has never been considered gender-specific in Finnish society.[76]

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71 Leah Schnurr, Julie Gordon and Peter Cooney "Canadian lawmakers vote to make national anthem gender neutral" (16 June 2016) Reuters <www.reuters.com>.

72 European Parliament *Gender-neutral language in the European Parliament* (February 2009).

73 At 3.

74 At 9.

75 At 9.

76 Email from Karen Khoo (Embassy of Finland, Canberra) to Ruby King and Jasper Fawcett regarding gender-neutral pronouns in Finland (5 November 2016).

The lack of gendered nouns in Finnish makes it much easier to achieve gender-neutrality across the language as a whole.[77] While "his or her" is still frequently used in the English translations of Finnish legislation,[78] this is because English has no comparable gender-neutral pronoun. As these are only translations, they have no legal effect in Finland (just as a Finnish translation of New Zealand legislation would have no legal effect).

With the help of the European Institute for Gender Equality, 'Gender Impact Assessments' have grown in popularity throughout Finland and wider Europe, and have been recommended to senior officials in an attempt to encourage the vetting of legislation and other official publications for gender sensitivity and neutrality.[79] Providing a Gender Impact Assessment of proposed legislation means that the consequences that the legislation will have on different genders can be analysed in advance, thus preventing it from being directly or indirectly discriminatory.[80] While the assessment is designed to prevent discrimination arising from legislation in general, it presumably also examines whether gender-neutral language is used. We note that in New Zealand, all Cabinet papers are also required to include a statement on gender implications that may result from the proposal(s),[81] and that a similar vetting system also exists in Sweden.[82]

E Germany

German legislative drafting guidelines echo those in most other countries. Essentially, they state that gender equality is important, but should not be achieved at the expense of clarity.[83] German linguists have questioned whether language can be changed by amending legislation, with academic Anatol Stefanowitsch saying that it's "hard to transform grammar through legislation,

77 Conversely, it is much more difficult to achieve gender-neutrality in countries (like New Zealand) which use gendered nouns. The removal of gendered nouns from legislation is discussed below in relation to words such as *chairman*.

78 See, for example, the unofficial translation of the Act on Registered Partnerships 2001 (Finland), s 6(2).

79 European Institute for Gender Equality *Gender Impact Assessment: Gender Mainstreaming Toolkit* (Publications Office of the European Union, 2016).

80 See, for example, European Institute for Gender Equality *Gender Training in the European Union: "Gender Impact Assessment" training in the city of Vantaa, Finland*.

81 Cabinet Office "What are the key requirements of a Cabinet paper" (2 March 2018) Department of the Prime Minister and Cabinet <www.dpmc.govt.nz>.

82 The Swedish process of gender equality analysis is discussed below.

83 Federal Ministry of Justice *Manual for Drafting Legislation* (3rd ed, 2008) at [110]–[123].

and even if so, such changes often happen over centuries".[84] In actual fact, the minor and technical nature of any reform required means that legislative change is not difficult to effect.

F Ireland

Ireland's legislation is not gender-neutral in the full sense. The Gender Recognition Act 2015 was recently passed but, despite being an Act entirely about recognising and providing for different genders, the text itself still uses the wording "him or her".[85] The Act is currently being reviewed to expand the ability of young adults to self-declare as belonging to a non-binary gender,[86] with the results planned to be published no later than September 2018.[87] However, the scope of this review seems to focus on the policy of the legislation rather than the actual words used in it. Just as Te Ture mō Te Reo Māori/the Māori Language Act is an Act about te reo that is written in te reo, an Act on gender recognition ought to be written using gender-neutral language. We hope that the increasing focus on gender issues will result in the Parliament of Ireland improving its position in the near future.

G Sweden

Similarly to Finland, Sweden has addressed the issue of gender-neutrality in a unique way. In 2015, the gender-neutral pronoun *hen* was introduced into the official Swedish dictionary.[88] The word can be used in two ways:

i) if the gender is unknown or not relevant, for example, "if anyone needs to smoke, *hen* may do so outside"; and

ii) as a pronoun for inter-gender people, for example, "Kim is neither boy nor girl, *hen* is inter-gender".

The English language grows by an estimated 5,400 words every year (with roughly 1,000 of those deemed relevant enough to print in dictionaries).[89]

84 Philip Oltermann "Germans try to get their tongues around gender-neutral language" *The Guardian* (online ed, London, 24 March 2014).

85 Gender Recognition Act 2015 (Ireland), ss 6(1), 14(2), and 16(4)(a).

86 Marie O'Halloran "Review of Gender Recognition Act will start by September, Varadkar announces" *The Irish Times* (online ed, Dublin, 10 May 2017).

87 The review had not been published at the time this article was written.

88 Svenska Akademien "hen" Svenska Akademiens Ordböcker <www.svenska.se>.

89 Andy Bodle "How new words are born" *The Guardian* (online ed, London, 4 February 2016).

However, the time it takes to introduce a new word (a neologism) to a language's lexicon can vary greatly, often taking generations.[90] While *hen* is in Sweden's dictionary, it does not currently exist in its legislation. It seems unlikely that it will be added until it has become an accepted and widely-used word in everyday language. This is still a positive development, because the introduction of a gender-neutral pronoun entirely solves the problem of gendered language — but it is important to note that even if a word becomes commonplace in everyday language, the addition of that word to legislation would require incremental amendments over a period of many years.

Sweden has also recently established the Swedish Gender Equality Agency, which analyses new government policies and works closely with departments and relevant stakeholders to implement gender-equal policies throughout society.[91] Similarly to vetting processes undertaken in Finland and New Zealand, these analyses focus on gender-neutrality in a general sense. We again presume that part of this general approach will include an examination of the wording used in legislation and policy documents.

H United Kingdom

United Kingdom legislation is not gender-neutral at all, even in the binary sense of the term. Primary statutes such as the Criminal Law Act 1967 (UK) and the Family Law Act 1996 (UK) make regular use of "him".[92] Notably, the United Kingdom's Parliamentary Counsel Guidelines state that it "is government policy that primary legislation should be drafted in a gender-neutral way, so far as it is practicable to do so".[93] However, "gender-neutral" in this context seems to be limited to the gender binary: the Guidelines suggest that "he or she" be used when referring to an individual.[94] In 2016, the United Kingdom's Ministry of Justice said, in reply to a petition:[95]

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90 Yaroslav Levchenko *Neologism in the lexical system of modern English: On the mass media material* (GRIN Verlag, Germany, 2010) at 3–4.

91 "About the Agency" (25 April 2018) The Swedish Gender Equality Agency <www.jamstalldhetsmyndigheten.se>.

92 Criminal Law Act 1967 (UK), s 6(3); and Family Law Act 1996 (UK), s 33(1)(a)(i).

93 Drafting Techniques Group *Drafting Guidance* (Office of the Parliamentary Counsel, July 2018) at [2.1.1].

94 At [2.1.12].

95 "Petition: Allow transgender people to self-define their legal gender" (22 January 2016) Petitions: UK Government and Parliament <www.petition.parliament.uk>.

> Non-binary gender is not recognised in UK law.
>
> …
>
> We recognise that a very small number of people consider themselves to be of neither gender. We are not aware that that results in any specific detriment …

As mentioned above, some members of the United Kingdom Parliament are vehemently opposed to the use of gender-neutral alternatives at the expense of 'proper' English.[96] In essence, there seems to be an attitude among lawmakers in the United Kingdom of prioritising traditional grammar over gender-neutral language. This position sits in stark contrast to the views of *Thornton's Legislative Drafting*,[97] and to comparable overseas jurisdictions such as Canada and New Zealand.[98]

I Conclusions

It is worth noting briefly that in those countries that do take some step towards gender-neutral legislation, neutrality has typically been implemented selectively. In other words, blanket changes are not usually made; incremental amendments as a result of public pressure are more common.[99]

The typically piecemeal nature of this type of legislative change is due in large part to the legislative process, and the fact that legislation is designed to last as long as possible without amendment so as to minimise the use of parliamentary resources. Simply put, legislation is inherently difficult to overhaul and modernise. Despite these barriers, gradual amendments are being made successfully to legislation around the world.

VI CHANGES IN NEW ZEALAND

As discussed, gender-neutral drafting is strongly encouraged in New Zealand. However, it is not mandatory,[100] leaving open the possibility of the continued

96 (12 December 2013) 750 GBPD HL 1007.

97 Xanthaki, above n 49.

98 See the discussions of Canadian and New Zealand drafting practices above.

99 See the sexual violence amendments to the Crimes Act 1961, discussed below under 'Amendments to Selected Pieces of Legislation'.

100 "Principles of clear drafting", above n 24, at [3.69]–[3.74].

use of gendered language in drafting. A selection of areas where there have been notable shifts towards gender-neutrality are canvassed below.

A Amendments to Selected Pieces of Legislation

1 Crimes Act 1961

Certain provisions of the Crimes Act 1961 relating to sexual violation were amended by the Crimes Amendment Bill (No 2) 2005 to make them gender-neutral.[101] This came in response to the case of *JWB v Accident Rehabilitation and Compensation Insurance Corp*, in which an ACC claim failed because there was (at that stage) no offence covering the situation of a woman indecently assaulting her male son.[102] The Act now reads, "Person A rapes person B if person A has sexual connection with person B" so as to avoid gendered language.[103] This is an effective method, though it is worth noting that it can fast become ambiguous if there are more than a few people involved (for example, persons A, B, C, and D).[104]

2 Education Act 1986

The Education Act 1989 has also been amended recently to ensure that several provisions are gender-neutral.[105] This was achieved by using alternative language such as "a person" and "the parent".[106] Despite these amendments however, the Act remains cis gender-biased and still employs the use of "his or her" in many provisions.[107] This is a prime example of the small and incremental changes occurring to New Zealand's legislation, in lieu of a full overhaul.

3 New Zealand Council for Educational Research Act 1972

Amendments to the New Zealand Council for Educational Research Act 1972 were themselves amended before they were passed to ensure that many of the

101 See, for example, Crimes Act, s 128.

102 *JWB v Accident Rehabilitation and Compensation Insurance Corporation* DC Auckland DCA149/99, 23 November 1999.

103 Crimes Act, s 128(2).

104 For an example of the complexity caused by using multiple person labels, see s 83 of the Local Government (Auckland Transitional Provisions) Act 2010.

105 Education (Update) Amendment Act 2017.

106 Education Act 1989, s 24(1).

107 See, for example, s 1A(3)(a).

Act's provisions were gender-neutral.[108] The Act now only references gendered pronouns twice.[109] This purposeful language change by way of Supplementary Order Paper shows a commitment by Parliament to ensuring that legislation is enacted in a gender-neutral way. We hope to see more amendments made to bills passing through the House to bring them in line with neutral drafting standards.

B Inland Revenue Department Drafting Practices

Because of the specialised nature of its work, the Inland Revenue Department (IRD) drafts most of its own legislation.[110] Tax legislation frequently incorporates the use of the singular *they*, among other gender-neutral drafting methods. The Income Tax Act 2007, for example, uses both "they" and "their" as singular pronouns to no detrimental effect on readability, as can be seen in the following passage:[111]

> An amount that a person derives from disposing of personal property is income of the person if *they* acquired the property for the purpose of disposing of it.

Many more examples of this style of gender-neutral drafting can be found across legislation administered by the IRD.[112] That being said, there are still a number of tax statutes that continue to use "his or her" or "his".[113]

C Powers under the Legislation Bill

The Legislation Bill 2017 is intended to combine and replace the Legislation Act 2012 and the Interpretation Act 1999.[114] The Bill currently includes a new cl 16, which states that when it comes to legislative interpretation,

108 Supplementary Order Paper 2016 (176) Education Legislation Bill 2015 (100–1) (explanatory note) at 9.

109 New Zealand Council for Educational Research Act 1972, ss 12 and 30A.

110 See the Legislation Bill, above n 10, cl 67; and the Inland Revenue Department (Drafting) Order 1995.

111 Income Tax Act 2007, s CB 4 (emphasis added).

112 Goods and Services Tax Act 1985, s 16(4); KiwiSaver Act 2006, ss 10, 36, and 59C; Stamp and Cheque Duties Act 1971, s 86KA; and Tax Administration Act 1994, ss 14G, 15D–15E, 15S, 20C, 22, 24H, 25, 28D, 31C, 32G, 32M, and 120KE. Many of these examples also use "a person" and "the person", which may take into account legal personhood, necessary in tax legislation.

113 See the Estate and Gift Duties Act 1968; Student Loan Scheme Act 2011; Taxation Review Authorities Act 1994; and the Unclaimed Money Act 1971.

114 The Legislation Bill was awaiting its second reading at the time of writing, with the Justice Committee's report delivered to the House on 1 June 2018.

"[w]ords denoting a gender include every other gender."[115] While this is only a presumption, which does not apply if the enactment being interpreted or the context expressly provides otherwise,[116] it marks a significant shift from the clause's predecessor, which simply stated that references to the masculine included the feminine.[117] As currently drafted, cl 16 appears to be a catch-all that will apply wherever gender-biased language is mistakenly used, given the underlying preference for drafting to be gender-neutral from the outset.

Under cl 86 of the Bill,[118] the Chief Parliamentary Counsel also has the power to reprint statutes in order to change gender-biased language, like *chairman*, to gender-neutral language, like *chairperson*. Changing *he* to *they*, or another relevant noun, is listed as a specific example. This important, but little-known, power could be used to systematically remove references to gendered language; both masculine (*chairman*) and binary (*he or she*).

The word *chairman* is used in approximately 176 acts in the New Zealand statute book. Some of these references exist in rarely used statutes that are still in force, such as the Akaroa High School Act 1881.[119] Typical provisions where the word is used include phrases like "signed by the Chairman of the Commission",[120] and "chairman means the chairman of the Board".[121] After examining all 176 of these acts, all references to *chairman* are, in the authors' opinion, able to be changed to *chairperson* or *chair* without any problems arising. Many other references to gendered language also exist, with words such as "workman",[122] "fisherman",[123] "foreman",[124] "manpower",[125] "salesman",[126] and "serviceman",[127] all visible in current legislation. Again, we think these could all be changed to gender-neutral alternatives such as *worker*, *fisher*,

115 Clause 16(1).

116 Clause 9(1).

117 Interpretation Act 1999, s 31.

118 Above n 10, cl 86(a).

119 Akaroa High School Act 1881, ss 7, 9–11 and 15.

120 Fair Trading Act 1986, s 47H(1)(b)(ii).

121 New Zealand Stock Exchange Restructuring Act 2002, s 4.

122 Maori Affairs Restructuring Act 1989, s 84(1)(b).

123 Fishing Vessel Ownership Savings Act 1977, s 5(a).

124 High Court Rules 2016, r 10.11(4).

125 Statistics Act 1975, s 4(f).

126 Insurance Law Reform Act 1977, s 10.

127 See, for example, the Government Superannuation Fund Act 1956, s 62(1).

supervisor, *workforce*, *salesperson*, and *serviceperson* without any detrimental or legal effect.

The Legislation Bill also includes the same powers of revision as in the Legislation Act 2012, which allows bills to be re-cast in plain and modern language provided there are no changes to the effect of the law itself.[128] The most recent example of this is the Contract and Commercial Law Act 2017 (CCLA), which combined 12 acts relating to contract and commercial law and rewrote them in plain language so as to be more easily understood by the general public.[129] The revision programme has the potential to be an effective method of removing gendered language from legislation, as gender-neutral wording can be easily introduced without impacting the substantive meaning of provisions. Many regularly used Acts are proposed to be revised in the years to come,[130] including the Summary Offences Act 1981 which contains extensive references to gender-biased language (it still assumes that the Attorney-General is a "he"[131]) and the Accident Compensation Act 2001 which is full of similarly gendered language.[132]

It is worth noting the distinction between these revision powers and the reprint powers discussed above. While reprints can be made at the discretion of the Chief Parliamentary Counsel,[133] revision bills must be scrutinised carefully by the select committee and debated and passed by the House if they are to have effect.[134] Following the successful revision of the CCLA in 2017, we hope that the revision power afforded under the new Legislation Bill will be employed more regularly to overhaul not just gendered language, but out-dated language as a whole.

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128 Above n 10, cls 91–99.

129 See the Contract and Commercial Law Act 2017, sch 3, for a comparative table of the corresponding old and new provisions.

130 Parliamentary Counsel Office "Consultation on revision programme 2018–2020" (29 January 2018) <www.pco.govt.nz>.

131 See, for example, Summary Offences Act, ss 4(4), 11(2) and 20A(3).

132 See, for example, Accident Compensation Act 2001, ss 16(3), 17(1) and 28(1)(a).

133 Legislation Bill, above n 10, cl 85(1).

134 Under the Standing Orders of the House of Representatives 2017, SO 271, revision bills are not debated at first or third reading and there is usually no Committee of the Whole House. They are still referred to the select committee for consideration and debated at second reading. The legislative process for revision bills is streamlined because the contents of the bill should be uncontentious and implement no new policy.

VII CONCLUSION

New Zealand, alongside the rest of the world, is making progress when it comes to legislative drafting that is inclusive of the full gender spectrum. The conversation has well and truly begun. This is not to say, however, that progress will be rapid. It only takes a glance back to New Zealand's drafting history to ascertain that. It is reassuring to see, however, how far New Zealand has come from using only masculine language in legislation, to embracing fully gender-neutral language in the more comprehensive sense. This article has canvassed these changes, and set out New Zealand's current position on gender-neutral drafting. The same can be said for many comparable jurisdictions, with governments beginning to recognise the importance that legislative drafting plays in the inclusion of all people.

While true gender-neutrality and gender equality are goals being fought for across various fora, it is important to ensure that no platform is overlooked — especially not one as significant as legislation. This article offers a springboard for discussion about how true gender-neutrality can efficiently and quickly be achieved in existing and future legislation.

THE REACTIVATION OF PAY EQUITY IN NEW ZEALAND BY *TERRANOVA:* *Why did it take so long?*

Charlotte Doyle*

The Equal Pay Act 1972 was enacted with the intention of eradicating discrimination in wages between men and women. From the very beginning, this goal included the achievement of equal pay for equal value, or "pay equity". Yet despite the inclusion of pay equity in the legislation, for over forty years following its enactment, the Act has achieved very little in terms of implementing pay equity in New Zealand. In 2014, the Court of Appeal reactivated the Act in the Terranova *decision by allowing aged care worker Kristine Bartlett to make a pay equity claim on the basis that her profession was undervalued because it is female-dominated. The Court's finding that assessments of pay equity were possible departed radically from previous judicial interpretations and political understandings of the Act. This reactivation has elevated the implementation of pay equity into one of the most pressing legal, political, social and economic issues for gender equality in contemporary New Zealand. This article considers why progress on this important legal battleground for women has stagnated for so long, and concludes that legal mechanisms intending to progress gender equality must be supported by broader political, social and economic concerns.*

I INTRODUCTION

New Zealand has earned an international reputation for being a progressive leader on issues of gender equality. According to global measures of economic participation, education and political empowerment, the gap between men and women is steadily decreasing.[1] This, however, is a slow trend, and progress has arguably stalled in recent decades. A marked gender pay gap persists in

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1 See World Economic Forum *The Global Gender Gap Index Report 2017* (November 2017) at 15.

New Zealand, confronting the ways in which our society accords economic value to work performed by women, and leaving legal battlegrounds for gender equality still to be fought.[2]

The reasons for a lingering pay gap are diverse and complex, extending beyond simply men and women earning different wages for performing the same work. Causes of gender inequality are numerous and often deeply rooted in historical socio-economic trends and developments. While equal pay for women and men who perform the same work has largely been achieved in New Zealand, occupations predominantly performed by women continue to be paid at significantly lower rates than jobs dominated by men.[3] This occupational segregation entrenches pay inequality in New Zealand's workforce and is estimated to contribute to 30 per cent of the total gender pay gap.[4]

The principle of equal pay for work of equal value, or "pay equity", seeks to rectify this differentiation by adjusting the valuation of women's work to match that of equivalent professions dominated by men. It differs from "equal pay", which eradicates discrimination between men and women who are performing the same work, typically under the same employer. Pay equity has long been recognised internationally as a fundamental human right.[5] It has also been enshrined in New Zealand's legislation since the enactment of the Equal Pay Act in 1972 (the Act).

At the time of its passing, the Act was heralded as a ground-breaking piece of social legislation.[6] "Equal pay" is broadly defined in the Act as a

2 See for example Statistics New Zealand *Labour Market Statistics (Income): June 2016 quarter* (7 October 2016) at 7, which shows that in the June 2016 quarter the gender pay gap stood at 12 per cent, compared with 9.9 per cent in the June 2014 quarter. A further marked wage gap disparity exists between Pākehā women and women of Asian, Māori and Pasifika descent who are over-represented in lower-paid occupations.

3 This article recognises the important distinction between the terms 'gender' and 'sex', and is conscious of using inclusive language. At times the use of either term in the article reflects the language used in a source referenced. All references to women include those who identify as women.

4 Ministry for Women "Occupational segregation" <www.women.govt.nz>; and Statistics New Zealand *Women at work: 1991-2013* (2015) at 7 states between 20 per cent to 40 per cent.

5 *Universal Declaration of Human Rights* GA Res 217A, III (1948) states that everyone has the right to equal pay for work of equal value. It is also a founding principle of the International Labour Organisation and is protected by the International Covenant on Economic, Social and Cultural Rights. New Zealand is a party to all of these agreements.

6 John Marshall, then Prime Minister, stated that the Bill would "be recognised as a landmark in our social history": see (29 August 1972) 380 NZPD 2180, as cited in *Service and Food Workers Union Nga Ringa Tota Inc v Terranova Homes and Care Ltd* [2013] NZEmpC 157 at [86] [*Terranova Employment Court judgment*].

rate of remuneration for work where there is no element of differentiation between employees based on their sex.[7] While equal pay for equal work was implemented relatively quickly, the social law reform ambitions of the Act regarding pay equity failed to be acknowledged for another 40 years after its enactment.[8] New Zealand's delay in implementing pay equity has frequently been raised as a human rights issue,[9] making it one of the most important contemporary legal challenges for achieving gender equality.

In 2014, the Court of Appeal in *Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc* (*Terranova*) sought to "reactivate" the Act after this longstanding dormancy.[10] Aged care worker Kristine Bartlett claimed that her profession was undervalued because the work was predominantly performed by women. This, she argued, breached her right under the Act to equal pay for work of equal value.[11] As I later discuss, the Court's acceptance of her claim radically departed from previous understandings, both judicial and political, of the Act's scope. The decision transformed the issue of pay equity from a political talking point into a tangible legal problem, elevating it into one of the most pressing and important issues for gender equality in contemporary New Zealand society.

The historical stagnancy of the Act was not for a lack of campaigning by women for pay equity to be implemented.[12] Broader socio-economic and political concerns had shaped resistance towards implementing pay equity, and women working in undervalued professions such as nursing, aged care work and teaching were prevented from lodging pay equity claims. Core factors that have prohibited progress include widespread perceptions held by employers and unions that the issue was too difficult, judicial refusals to interpret the Act's scope or to appropriately implement the Act, and the absence of pay equity from governmental policy under both Labour and National governments in recent

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7 Section 2(1).

8 *Terranova Employment Court judgment*, above n 6, at [95].

9 For example, International Labour Organisation Committee of Experts on the Application of Conventions and Recommendations *General Report and observations concerning particular countries* (Report III: Part 1A, International Labour Conference, Session 101, 2012) [ILO 2012] at 551.

10 *Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2014] NZCA 516, [2015] 2 NZLR 437 at [1] [*Terranova*].

11 At [6].

12 Megan Cook *Just Wages: History of the Campaign for Pay Equity 1984–1993* (Coalition for Equal Value Equal Pay, Wellington, 1994) at 27.

decades. The Court of Appeal's radical interpretation of the Act in *Terranova*, favouring anti-discrimination rights over economic concerns, has, however, created a new opportunity for meaningful implementation of pay equity.

To assess why this opportunity was presented so recently, this article considers the history of law reform on pay equity in New Zealand by looking closely at the introduction of the Equal Pay Act in 1972 and the social goals that were intended by its enactment. The subsequent dismissive judicial and political treatment of the Act is then investigated to determine why progress on implementing pay equity under the Act stalled for so long.

After contextualising the legal framework, the article then analyses how judicial treatment of the Act by the Court of Appeal in *Terranova* elevated pay equity into a revitalised contemporary legal issue. The responses of successive governments to the findings in *Terranova* are then considered with an assessment of where responsibility for future progress lies. The article concludes that the success of legal reform that aims to achieve gender equality is contingent on the alignment of a wealth of other considerations. The current opportunity to implement effective legal reform will inevitably be similarly determined by contemporary political concerns and climates.

II CONCEPTUALISING PAY EQUITY

A What is pay equity?

The phrase "equal pay for work of equal value" and the term "pay equity" are used interchangeably to describe a method of valuing work that is predominantly performed by women. It is an objective assessment that compares the skills, training and responsibilities of different occupations performed predominantly by men and women.[13] If pay equity were achieved, women would receive the same pay as men for performing a comparable job.[14] This differs from "equal pay", which compares the rates of pay of men and women performing the same work and typically under an individual employer.[15] Pay equity targets occupational segregation as an important

13 Ministry of Women's Affairs *Next Steps Towards Employment Equity: A discussion document* (July 2002) at 17.

14 Ministry of Women's Affairs *Next Steps Towards Pay Equity: A background paper on equal pay for work of equal value* (September 2002) at 4.

15 Ministry of Women's Affairs *Employment Equity*, above n 13, at 17.

contributor to the gender pay gap.[16] The most common occupations dominated by women continue to be those that are traditionally associated with domestic and unpaid roles.[17] These include caring, cleaning, teaching and healthcare positions, generally considered as *women's work*.[18] They are positions that also continue to be paid at lower rates than occupations predominantly performed by men, such as protective services (police and fire services), manual trades and technical professions.[19] The pay differential largely reflects entrenched cultural perceptions regarding the relationship between skills and economic productivity, and is discrimination on the basis of sex.[20]

Pay equity seeks to eradicate the differential by objectively evaluating the social and economic value of comparable female and male occupations. A frequent comparison is made between nursing, a female-dominated profession, and policing, a male-dominated profession.[21] Pay differentiation would be justified according to agreed criteria rather than predicated on social biases.[22] As a result, the concept of pay equity is broader than equal pay as it targets structural discrimination by undertaking a horizontal comparison across occupations.[23]

B Occupational segregation in New Zealand

Occupational segregation by gender continues to be a defining feature of New Zealand's labour market.[24] Census data from 1991–2013 reveals that women are over-represented in lower paid positions in the healthcare, education

16 Statistics New Zealand *Women at work*, above n 4, at 7.

17 Sandra Fredman "Reforming Equal Pay Laws" (2008) 37 ILJ 193 at 195.

18 Mary Cornish and Fay Faraday *Achieving Pay and Employment Equity for Women — Human Rights and Business/Development Imperatives* (paper presented to the Pay and Employment Equity for Women Conference, Wellington, June 2004) at 2.

19 Statistics New Zealand *Women at work*, above n 4, at 7 and 11.

20 See for example Statistics New Zealand *Women at work*, above n 4, at 8, citing Sylvia Walby and Wendy Olsen *The impact of women's position in the labour market on pay and implications for productivity* (Women and Equality Unity (DTI), London, 2002).

21 Ministry of Women's Affairs *Pay Equity*, above n 14, at 16.

22 Linda Hill "Equal pay for work of equal value: making human rights and employment rights laws work together" (2004) 21 Social Policy Journal of New Zealand 1 at 5.

23 International Labour Organisation *Time for equality at work: Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work* (Report I(B), International Labour Conference, Session 91, 2003), at [137].

24 See for example Statistics New Zealand *Women at work*, above n 4, at 7 which noted that "New Zealand's labour market has been (and remains) highly segregated by gender".

and social assistance industries,[25] despite being more likely to have higher formal qualifications than men.[26] Almost half of the labour workforce is concentrated in occupations where 70 per cent or more of the employees are of the same gender.[27] For example, census data reveals that 92.4 per cent of nurses and midwives, and 90.4 per cent of primary and early childhood teachers identified as women in 2013.[28] In the same year, 98.8 per cent of builders identified as men.[29] This persistent segregation based on the type of occupation is estimated to account for approximately 30 per cent of the gender pay gap.[30]

Occupational segregation has a significant societal impact. In order to achieve the same occupational distribution for men and women, 44 per cent of women would need to change their profession.[31] Pay equity avoids that obstacle by rectifying historical biases within the status quo. Research has also indicated that implementing pay equity has a positive economic impact on overall labour productivity and efficiency.[32] Explicit acknowledgement of such segregation in equal pay legislation is generally lacking and presents a significant impediment to the achievement of pay equity.[33]

C Pay equity as a human right

International human rights law has long recognised a specific right to pay equity.[34] Equal pay for work of equal value is a founding principle of the International Labour Organisation (ILO),[35] of which New Zealand is a

25 Statistics New Zealand *Women at work*, above n 4, at 19.

26 At 6 and 33.

27 At 7.

28 At 15.

29 At 15.

30 Ministry for Women, "Occupational segregation", above n 4.

31 Statistics New Zealand *Women at work*, above n 4, at 5.

32 Philip Borkin *Closing The Gender Gap: Plenty of Potential Economic Upside* (Goldman Sachs, 9 August 2011) at 2.

33 See Rochelle Hume "Paid in Full? An Analysis of Pay Equity in New Zealand" (1993) 7 Auckland U L Rev 471 at 474.

34 *Universal Declaration of Human Rights*, above n 5, art 23(2) states that "[e]veryone, without any discrimination, has the right to equal pay for equal work". It is also a founding principle of the International Labour Organisation and protected by the International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976), art 7. New Zealand is a party to these agreements.

35 Cornish and Faraday, above n 18, at 10.

member state. The ILO's Convention 100 on Equal Remuneration for Men and Women Workers of Equal Value 1951 (ILO Convention 100) requires member states to recognise the principle by implementing measures that objectively assess the value of work performed by men and women.[36] The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW),[37] which has been described as an "international bill of rights for women",[38] also requires governments to protect the right to pay equity. The principle of pay equity is further protected in the International Covenant on Economic, Social and Cultural Rights.[39]

Despite having legal obligations under these conventions that are administered domestically through the Act and other statutes,[40] pay equity has been historically absent in New Zealand. This has been criticised as a human rights failure.[41] In response to a report submitted by New Zealand in 1998, the CEDAW Committee expressed "serious concern at the continuing wage differential between women and men".[42] New Zealand's report had presented a positive update on other initiatives being taken to improve the gender pay gap, and pay equity was not acknowledged. The ILO's Committee of Experts on the Application of Conventions and Recommendations has also repeatedly commented on New Zealand's failure to implement pay equity.[43]

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36 Convention (No 100) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value 165 UNTS 303 (opened for signature 29 June 1951, entered into force 23 May 1953), art 3 [Convention 100].

37 Convention on the Elimination of All Forms of Discrimination Against Women 1249 UNTS 113 (opened for signature 18 December 1979, entered into force 3 September 1981).

38 United Nations Entity for Gender Equality and the Empowerment of Women *Overview of the Convention* (2007) <www.un.org>.

39 International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976), art 7.

40 Ministry of Business, Innovation & Employment *International Labour Conventions Ratified by New Zealand* (New Zealand Government, June 2015) at 71. Note that in order for legal obligations under conventions to be legally binding on New Zealand they need to be incorporated through domestic legislation and performed either through existing law or new legislation.

41 ILO 2012, above n 9, at 551; and Dr Jackie Blue, Equal Employment Opportunities Commissioner "New Horizons for Women Trust Award Ceremony" (Women Trust Award Ceremony, Premier House Wellington, July 23 2016) <www.hrc.co.nz>

42 *Report of the Committee on the Elimination of Discrimination against Women* GA Res 53/38, A/53/38Rev.1 (1998) at New Zealand [273]–[274].

43 International Labour Organisation Committee of Experts on the Application of Conventions and Recommendations *General Report and observations concerning particular countries* (Report III: Part 1A, International Labour Conference, Session 90, 2002) [ILO 2002] at 413.

In 2012, the Committee again expressed concern that New Zealand had not given full legislative effect to pay equity.[44] The only sanctions for non-compliance with these Conventions are indirect, but include negative reports from international organisations and a potential "loss of reputation in the international community".[45]

D Pushing for legal change

Pay equity has traditionally been encompassed in broad campaigns for equal pay. Legal strategies have been central to political movements for achieving economic equality for women throughout many western democracies since the 1960s,[46] including New Zealand. Campaigns for pay equity specifically tend to seek to change the way society values the economic contributions of women by establishing a particular form of legal recognition.

The goal of legally implementing pay equity is, however, shaped by the socio-economic context in which it operates and which it seeks to challenge. Adopting a socio-legal approach, which frames law as a social instrument directed at a specific goal, the history of pay equity reveals that law is politically and practically limited in providing a solution to a social problem.[47]

Pay equity campaigners have adjusted their approaches to those that are most likely to achieve successful reform in the prevailing context including new legislation, government policy and the use of litigation. Over time, the efficacy of these calls for reform have been shaped by prevailing socio-economic concerns, which in turn dictate the attitudes of institutions responsible for the implementation of equal pay as well as the empowerment of those who seek to enforce it.

The history of pay equity demonstrates that, while a right to be free from sex-based discrimination may be enshrined in legislation, its success is dependent on the extent to which those implementing the law — including the government, courts and employers — are willing to uphold such a right. The various tools for reform thereby ebb and flow in efficacy, and

44 ILO 2012, above n 9, at 551.

45 Hill "Human rights", above n 22, at 7.

46 Dorothy Chunn, Susan Boyd and Hester Lessard "Feminism, Law and Social Change: An overview" in Dorothy Chunn, Susan Boyd and Hester Lessard (eds) *Reaction and Resistance: Feminism, law and social change* (Vancouver, UBC Press, 2007) 1 at 1.

47 See, for example, Susan Armstrong "Evaluating Law Reform" (2006) 10 UWSLR 157 at 166.

the conceptualisation of pay equity as a human right is similarly shaped by prevailing economic and human rights discourses.

III AN UNFULFILLED PROMISE: PAY EQUITY IN THE EQUAL PAY ACT 1972

Discriminatory pay rates and conditions of employment are prohibited by a number of laws in New Zealand, including the Government Service Equal Pay Act 1960, the Employment Relations Act 2000, the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. The Equal Pay Act is a core part of this anti-discrimination and human rights legislative framework. From the very beginning, the scope of the Act's application was highly contested, with the provision for pay equity being unclear.[48] This ambiguity has markedly influenced and impacted upon the ability of law reform to achieve pay equity in New Zealand.

A Background to the Act

Official support for equal pay legislation started to emerge in New Zealand in the 1960s.[49] The decade had seen a surge of participation of women in the labour force, a socio-economic change that altered the factual situation of male and female work.[50] As inequality became more visible and perceptions about women's economic role in society began to shift, the need for reform was suddenly apparent.[51] A feminist movement that actively sought positive legal rights for women was emerging.[52]

A Commission of Inquiry into Equal Pay (the Commission) proposed new legislation, in the form of an Equal Pay Act.[53] This new Act was envisaged

48 Martha Coleman "The Equal Pay Act 1972: Back to the Future?" (1997) 27 VUWLR 517 at 520.

49 Elizabeth Orr *Equal Pay for Work of Equal Value in New Zealand: A History of the 1960 and 1972 Equal Pay Acts* (paper presented to the Women's Studies Conference, Palmerston North, November 2003) at 4. Note: Elizabeth Orr was chair of the National Advisory Council for the Employment of Women (NACEW) and played an instrumental role in establishing the 1972 Equal Pay Act.

50 The Commission of Inquiry into Equal Pay *Equal Pay in New Zealand: Report of the Commission of Inquiry* (September 1971) at [1.15].

51 See, for example, Report of the Commission of Inquiry, above n 50, at [1.15], which recognised that the matter of equal pay had been brought "to the forefront".

52 Margaret Wilson "Impact of Women's Political Leadership on Democracy and Development in New Zealand" in Commonwealth Secretariat (ed) *The Impact of Women's Political Leadership on Democracy and Development: Case Studies from the Commonwealth* (Commonwealth Secretariat, London, 2013) 39 at 55.

53 Report of the Commission of Inquiry, above n 50, at [4.7].

to give effect to equal pay as it would "prohibit discrimination in pay rates on the basis of sex, lay down the principles to be followed, and establish the rights and obligations of employers and employees".[54]

The Act was heralded in Parliament as a ground-breaking piece of social legislation. The then-Prime Minister, Rt Hon John Marshall, praised the Act as:[55]

> … one of the most important pieces of legislation the House will have to consider this session. It is a significant forward move in the social legislation of this country, and it will be recognised as a landmark in our social history. It is in my view a matter of social justice that it should be done …

The Commission, however, cautioned that legislative reform would only "marginally accelerate" a change in public opinion and attitudes towards equal pay, and could not achieve a comprehensive transformation.[56] It further noted that employers tended to be influenced by widely held, but often misconceived, social beliefs about women in employment including notions of "absenteeism" and disruptions caused by marriage and pregnancy.[57] Any official action, including legislative change, would be limited in its impact on changing public opinion; a change in the "deep-rooted attitudes of New Zealanders" would be needed.[58]

B The Equal Pay Act 1972: was pay equity included?

When drafting the definition of "equal pay", the Commission had explicitly rejected proposals from the New Zealand Employers' Federation that it should exclude work predominantly or exclusively performed by women.[59] A broad definition of equal pay was adopted in the Act: "a rate of remuneration for work in which rate there is no element of differentiation between male employees and female employees based on the sex of the employees".[60] Sex-based distinctions in rates of remuneration would be eliminated by categorising

54 At [4.7].

55 (29 August 1972) 380 NZPD 2180, as cited in *Terranova Employment Court judgment*, above n 6, at [86].

56 Report of the Commission of Inquiry, above n 50, at [1.18].

57 At [3.8].

58 At [1.6].

59 At [2.10].

60 Section 2(1).

work according to objective factors for a specific category of work.[61] There are strong indications that the Commission also intended to give effect to the provisions of the ILO Convention 100 by including pay equity assessments in its recommendations.[62] A submission from the New Zealand Federated Dental Technicians' and Assistants' Industrial Association of Workers to the Commission was even concerned that the Commission was focusing on pay equity at the expense of achieving equal pay for "similar work".[63]

Occupational segregation was extensively discussed by the Commission and recognised as a cause of unequal pay in New Zealand.[64] It accepted undoubted evidence that occupations traditionally performed by women were paid at lower rates than those performed by men.[65] The Act was clearly intended to address occupational segregation and the economic valuation of women by implementing pay equity.[66]

Despite the apparent inclusion of pay equity in the Commission's suggestions for reform, a long-standing lack of consensus over whether it was in fact provided for in the Act became a significant impediment to the realisation of pay equity in New Zealand.[67] The two concepts of equal pay for equal work and equal pay for work of equal value were not explicitly distinguished by the Commission. Instead, the principles were conflated as two different forms of implementation of the broader concept of equal pay. This left the scope of the Act ambiguous.

Two different criteria to be applied in determining equal pay are included in the Act. Section 3(1)(a) applies to work which is either dominated by men or where neither male nor female employees predominate. By contrast, s 3(1)(b) applies to work that is exclusively or predominantly performed by women. This section requires consideration of the skill, effort and responsibility required in the respective work, as well as the conditions under which it is performed — criteria which are commonly used in pay equity comparisons.

61 Report of the Commission of Inquiry, above n 50, at [1.6].

62 At 5; and Coleman, above n 48, at 524.

63 "Wage authority 'barrier to equal pay'" *The Christchurch Star* (New Zealand, 14 April 1971).

64 Coleman, above n 48, at 524; and Ian McPherson "Pay equity: the right to a fair wage" [2016] NZLJ 253 at 254.

65 Report of the Commission of Inquiry, above n 50, at [2.4]

66 Coleman, above n 48, at 519.

67 At 519–520.

Section 3(1)(b) was described by a Review Committee as "the most difficult to interpret and implement", due to a lack of guidance in the legislation on how female-dominated professions may be compared to male-dominated ones.[68] Hypothetical comparators have been a universal difficulty for pay equity assessments in other jurisdictions,[69] and continue to be a significant impediment to implementing pay equity today.

IV THE BATTLE FOR PROGRESS: OBSTRUCTIVE JUDICIAL AND POLITICAL TREATMENT

A Implementation of the Equal Pay Act 1972

Equal pay was not a new legal concept and there was widespread public awareness of the change in national policy and law at the time. Yet pay equity claims under the Act have been unsuccessful from the very beginning. The courts have failed to use the Act to achieve pay equity, which has been widely attributed to consistently narrow and dismissive judicial treatment of equal pay issues. In 1979 the Review Committee expressed serious concern about judicial attitudes towards the Act and the impact this would have on its future.[70] In 1986, this concern would prove to be well founded.

1 The Clerical Workers *case*

The narrow interpretation of the Act in *New Zealand Clerical Administration IAOW v Farmers Trading Co Ltd* significantly impeded the potential of the Act to redress pay equity.[71] A case was brought to the Arbitration Court after employers had declined to negotiate equal pay claims with the Clerical Workers Union.[72] The claim was intended to test whether the Act included pay equity under s 3(1)(b). At the time, a national awards system was still operating in New Zealand and the Clerical Workers Award covered 30,000 workers, of

68 *Progress of Equal Pay in New Zealand*: *Report of a Committee appointed by the Minister of Labour* (Department of Labour, October 1975) at [5.71]–[5.72].

69 See Fredman, above n 17, at 200–202.

70 *Equal Pay Implementation in New Zealand: Report of a Committee Appointed by the Minister of Labour* (June 1979) at 49.

71 *New Zealand Clerical Administration IAOW v Farmers Trading Co Ltd* [1986] ACJ 203; and Mai Chen *Women and Discrimination: New Zealand and the UN Convention* (Victoria University Press, Wellington, 1989) at 22.

72 Coleman, above n 48, at 531.

which 90 per cent were women.[73]

The Court declined to hear the case on the grounds that equal pay had already been achieved through the abolishment of separate award systems for men and women after the Act's enactment.[74] Many pay equity activists at the time argued that the Court had misinterpreted the Act and that a very different result would have been reached if the Court had performed its proper function in implementing the Act.[75]

Any potential for the Act to be used to address pay equity was seriously impaired as a result because the decision fostered a widespread perception, including among government officials, that the Act did not provide for pay equity claims.[76] The case was understood to provide a definitive view on the scope of the Act.[77] Section 3(1)(b), however, remained untested and undefined.

B Further legislative reform: The Employment Equity Act 1990

The lack of progress in the courts in the 1980s diverted the focus of campaigners, most notably women's organisations, back to a longer-term campaign for further legislative reform as an avenue for achieving pay equity. Social activism in favour of pay equity gained extra vigour with a national pay equity campaign launched in 1986 by the newly formed Coalition for Equal Value Equal Pay.[78]

After six years of continuous lobbying from supporters of a pay equity policy, both within and outside government, the Employment Equity Act 1990

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73 *New Zealand Clerical Administration,* above n 71, at 204. Awards and agreements were negotiated by unions and employer representatives to set wages on behalf of industries in New Zealand's labour market. The awards were abolished with the introduction of the Employment Contracts Act 1991.

74 At 207.

75 Elizabeth Orr "The Arbitration Court's Role in Supervising the Equal Pay Act 1972" *Equal Pay for Work of Equal Value: A Women's Issue* (seminar paper, Centre for Continuing Education, Victoria University of Wellington, 1986) at 13, as cited in Megan Cook, above n 12, at 6.

76 See for example Orr *Equal Pay*, above n 49, at 6. See also Margaret Wilson "Old law cannot deliver pay equity today" (press release, 14 February 2004) where then-Minister of Labour Margaret Wilson stated "the Equal Pay Act 1972 was not designed to advance modern pay equity claims". See also The Treasury *Pay and Employment Equity — a framework for Analysis* (8 May 2003) at [33] — the Equal Pay Act was described to eliminate different gender pay rates for the same work and did not extend to equal pay for work of equal value. See also Treasury *Background Information for the Pay and Employment Equity Taskforce* (22 July 2003) at [16] — the Equal Pay Act was described as providing "equal pay for men and women doing the same job".

77 Frances Wright "Equal Pay and the Employment Contracts Act 1991" (1992) 7 Auckland U L Rev 501 at 501. Wright referred to *New Zealand Clerical Administration*, above n 71, which had held that the Act was limited because it did not provide for equal pay for work of equal value.

78 See Cook, above n 12, at 28.

was enacted.[79] The Labour Government believed that this new Act was necessary as "New Zealand did not have a legislative basis for pay equity claims", and the prevailing belief was that the Equal Pay Act was not designed to advance pay equity claims.[80] The Employment Equity Act was intended to sit alongside the Equal Pay Act and rectify inequality in terms of both opportunities for employment and rates of remuneration between occupations predominantly performed by men and women.[81] Importantly, this included redressing the "inequitable impact" of historic and current discrimination against women in the rates of remuneration paid in occupations predominantly performed by women.[82] An Employment Equity Commissioner was established as a statutory body to conduct pay equity assessments.[83] Twelve pay equity claims were lodged with the Commissioner as soon as the Act was passed.[84] Before any claims could be resolved, however, the election of a new government disrupted this progress.

C A step backwards: a politically charged issue

Three months after the Employment Equity Act was enacted, the newly elected National Government repealed the Act. While the National Government was committed to equity in employment, pay equity was dismissed as an inappropriate mechanism for achieving it.[85] A political and ideological commitment to enterprise bargaining meant the National Party fundamentally differed from the Labour Party's belief in centralised wage-fixing.[86]

Pay equity did not conform to the National Government's extensive neoliberal and ideological reform of New Zealand's labour law frameworks at the time. This included the passing of the Employment Contracts Act 1991 (ECA), which decentralised employment relationships by abolishing the awards system and thereby abolished the method by which wages had previously been

79 Margaret Wilson "The Employment Equity Act 1990: A Case Study in Women's Political Influence, 1984–90" in John Deeks and Nick Perry (eds) *Controlling Interests: Business, the State and Society in New Zealand* (Auckland University Press, Auckland, 1992) 113 at 129.

80 See Wilson "Old law", above n 76.

81 Employment Equity Act 1990, long title.

82 Long title.

83 Hill "Human rights", above n 22, at 8.

84 Linda Hill "Equal pay for equal value: the case for care workers" (2013) 27(2) Women's Studies Journal 14 at 17.

85 (18 December 1990) 511 NZPD 396.

86 (18 December 1990) 511 NZPD 396.

regulated and controlled by the government.[87] The Government's neoliberal reforms sought to create an unconstrained labour market and uphold a system in which the individual was primary.

The changes had a significant impact on the ability to implement pay equity. The replacement of collective bargaining with enterprise bargaining made it more difficult to identify discrimination in a workplace as pay rates were typically shielded by confidentiality clauses.[88] The ability to compare wages both within and between companies became limited. Compulsory membership of unions had been a longstanding element of New Zealand's labour framework,[89] but the ECA introduced voluntary unionism. This limited the ability of unions to provide a collective voice for women on pay equity.[90]

For the remainder of the 1990s, pay equity was excluded from the Government's policies entirely. A 1991 Working Party found that the Act would continue to provide for claims of equal pay, but pay equity claims were artificial, arbitrary and therefore not acceptable to include in the policy.[91] Underlying these positions was a strong belief that a deregulated and flexible market was a fairer mechanism for achieving pay equity without government intervention.

D Softer approach: 1999–2008 Labour Government

Pay equity returned to the forefront of the political agenda with the re-election of the Labour-led coalition Government in 2002.[92] Addressing lower levels of pay in women's occupations was officially recognised as central to lowering the gender pay gap.[93] In 2004, a Pay and Employment Equity Taskforce was appointed to develop an action plan on pay and employment equity in the public sector.[94]

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87 McPherson, above n 64, at 255.

88 At 255.

89 See Industrial Conciliation Arbitration Act 1894.

90 Laila Harré "Unions and Pay Equity in New Zealand: Organisation, Negotiation, Legislation" (2007) 18(2) Labour & Industry 51 at 53.

91 Department of Labour *Report of the Working Party on Equity in Employment* (January 1991) at 12.

92 Celia Briar "New Zealand Conference on Pay and Employment Equity for Women" (2004) 23 Social Policy Journal of New Zealand 215 at 215–216.

93 As demonstrated by the discussion document released by the Ministry of Women's Affairs: Ministry of Women's Affairs *Employment Equity*, above n 13.

94 Ruth Dyson "Launch Pay and Employment Equity Unit" (press release, 17 December 2004).

Importantly, these commitments by the Labour Government signalled that pay equity was still an issue.[95] It was, however, a significantly softened stance compared to the previous work on pay equity; it focused only on the public sector and was implemented through policy rather than legislative change.[96] With the removal of national occupational wage awards by the ECA in 1991, it became more challenging to compare pay in female-dominated occupations with their equivalent male-dominated occupations.[97] The lack of mechanisms to assess the value of work and weaknesses in collective bargaining undermined the ability of unions to tackle the issue.[98]

The Labour Government continued to subscribe to an orthodox economic analysis of employment policies,[99] which influenced the development of policy on pay equity. The ECA had been replaced by the Labour Government's Employment Relations Act 2000 (ERA) as the principal framework for employment relationships. The ERA promoted good faith bargaining principles for the resolution of employment disputes, but many of the ECA's features were retained, including individualised contract arrangements and an emphasis on productive employment relationships.[100] This cautious approach from the Government was also in response to resistance from employers, who continued to be averse to working with unions and apathetic towards pay equity.[101] Libertarian lobby group, the New Zealand Business Roundtable, stated that "[p]ay equity is a policy whose time has passed".[102]

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95 Prue Hyman "Pay Equity and Equal Employment Opportunity: Policy, Rhetoric and Reality in the 2004 New Zealand Labour market" (2004) Labour, Employment and Work in New Zealand 283 at 283.

96 Ministry of Women's Affairs *Employment Equity*, above n 13, at 3.

97 Briar, above n 92, at 217.

98 Erling Rasmussen and Danaë Anderson "Between unfinished business and an uncertain future" in Erling Rasmussen (ed) *Employment Relationships: Workers, Unions and Employers in New Zealand* (2nd ed, Auckland University Press, Auckland, 2010) 208 at 218.

99 Prue Hyman "Low waged work and gender pay equity in New Zealand" (paper presented to the National Advisory Council on the Employment of Women Conference on Pay and Employment Equity for Women, June 2004) at 9.

100 Erling Rasmussen "Introduction" in Erling Rasmussen (ed) *Employment Relationships: Workers, Unions and Employers in New Zealand* (2nd ed, Auckland University Press, Auckland, 2010) at 1.

101 Hyman "Low waged work", above n 99, at 2.

102 Letter from Norman LaRocque (Policy Advisor for New Zealand Business Roundtable) to Judy Lawrence (Chief Executive of Ministry of Women's Affairs) regarding the Ministry's discussion document *Next Steps towards pay equity* (29 November 2002).

With the election of a National Government in 2009, the policy efforts on the part of the predecessor Labour Government were to a large extent dismantled. As part of reprioritisation of government spending and broader plans to reduce the size of the public service, the Pay and Employment Equity Unit was discontinued.[103] A free market and soft policy approach, including toolkits, employer education and research, was again seen as sufficient to close the gender pay gap.[104]

E Lack of progress: pay equity left off the political agenda

After the wide-sweeping economic restructuring of the 1980s, both Labour and National Governments were wary of any major interventions in the market.[105] Pay equity was a highly controversial issue,[106] both ideologically and practically, due to the level of government intervention required if it were to be achieved. During this time there was also a general apathy on the part of politicians and the media towards pay equity.[107] This was premised on a perception that the gender pay gap had already closed due to other achievements such as equal pay for the same work.[108]

The Equal Pay Act had, however, survived "the sweeping legislative reforms" of New Zealand's labour market in the 1980s and 1990s.[109] The ability to conduct pay equity assessments under s 3(1)(b) of the Act remained untested,[110] due to a prevailing view that the Act was simply redundant. The preservation of the Act would prove to provide an essential avenue for legally elevating pay equity from political wavering to an issue that demanded attention.

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103 Kate Wilkinson "Pay equity unit disestablished" (press release, 14 May 2009).

104 Judy McGregor "The human rights framework and equal pay for low paid female carers in New Zealand" (2014) 38(2) New Zealand Journal of Employment Relations 4 at 11; the Ministry of Women's Affairs was given greater responsibility for this work.

105 Ministry of Women's Affairs *Briefing to the Incoming Minister of Women's Affairs* (2008) as cited in Prue Hyman "Pay Equity and Equal Employment Opportunity in New Zealand: Developments 2008/2010 and Evaluation" (2010) 36(1) New Zealand Journal of Employment Relations 65 at 66.

106 Hyman "Policy, Rhetoric", above n 95, at 285.

107 McGregor, above n 104, at 11.

108 Hyman "Developments 2008/2010", above n 105, at 65.

109 McPherson, above n 64, at 255.

110 Hill "The case for care workers", above n 84, at 22.

V REACTIVATION OF THE ACT: THE *TERRANOVA* CASE

A Background: a new political climate

An emerging human rights-based discourse in the early 2000s promised to empower a new push for change. The prospects of bringing another test case for pay equity under s 3(1)(b) of the Equal Pay Act had never faded from the minds of campaigners. They had long foreseen that a new generation of judges, who might hold more favourable attitudes towards pay equity, would bring greater prospects of success, and it was essentially a matter of waiting for the right opportunity.[111]

As predicted, judicial attitudes did start to change. A number of cases that successfully argued discrimination in employment indicated that notions of anti-discriminatory and decent working conditions were gaining sway in the courts.[112] A new culture of understanding had also taken hold throughout the unions, where there was increasing support for mobilising low-paid workers through legal action.[113]

Further momentum towards pay equity was gained through human rights frameworks.[114] A national inquiry into the aged care sector in 2012 by the Human Rights Commission (HRC), titled *Caring Counts*, had a significant impact on the understanding of pay equity in New Zealand. The inquiry's findings revealed that the low pay rates in this sector were directly caused by historic undervaluation of what had traditionally been considered women's work.[115] The report was widely publicised by the media.[116] The National Government at the time accepted its findings and acknowledged that there was an issue of occupational inequality, but stated that it had insufficient resources at the time

111 See, for example, Coleman "Back to the Future", above n 48, at 534; and Trade Union History Project *Fifty Years of Struggle: The Story of Equal Pay* (proceedings of Trade Union History Project Annual Seminar, 25 October 1997) at 28.

112 For example the "Sleepovers" case, *IDEA Services Ltd v Dickson* [2011] NZCA 14, [2011] 2 NZLR 522.

113 E tū "Equal Pay" (April 2017) E tū stand tall <www.etu.nz>.

114 McGregor, above n 104, at 11–13.

115 New Zealand Human Rights Commission *Caring Counts (Tautiaki Tika)* (May 2012) at 50.

116 See, for example, McGregor, above n 104, at 4; The New Zealand Herald "Editorial: Report sheds light on needs of aged care" *The New Zealand Herald* (online ed, Auckland, 30 May 2012); David Kemeys "Undercover boss slams workers' conditions" *The Sunday Star Times* (online ed, Auckland, 27 May 2012); and Michelle Duff "Rest home spy hails saint-like workers" *The Dominion Post* (online ed, Wellington, 28 May 2012).

to rectify it.[117] Regardless, the report had triggered renewed advocacy for pay equity and would provide an evidential basis for subsequent litigation.[118]

B Judicial treatment of the Equal Pay Act in Terranova

A social and political climate had emerged in which the Service and Food Workers Union (SFWU) felt that a pay equity case had a strong likelihood of success.[119] In 2012, the SFWU supported aged care worker Kristine Bartlett's claim in the Employment Court against her employer Terranova Homes Ltd (Terranova), which operated a number of rest homes throughout New Zealand. Bartlett brought her claim on behalf of a number of other rest home workers, all of whom were women, employed on individual employment agreements, and members of the SFWU. Over 90 per cent of Terranova's employees were women; there were only four male employees out of 110 total caregivers. Bartlett argued that her rate of remuneration of $14.46 an hour (less than a dollar over the minimum wage at the time) was significantly lower than it would be if the aged care sector was not dominated by female employees.[120] This was claimed to be discrimination under the criteria in s 3(1)(b) of the Act, which applies to work predominantly performed by women.[121]

From the outset, the Employment Court emphasised that the unprecedented nature of the litigation meant that any conclusions would potentially have broad social, financial and political implications.[122] The case attracted a number of prominent interveners including the Council of Trade Unions, the New Zealand Aged Care Association, Business New Zealand, the Coalition for Equal Value Equal Pay and the HRC.[123] As the decision touched on an issue of public policy, the Attorney-General also had a right to make submissions.[124]

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117 Claire Trevett "Aged care pay inequality a costly fix" *The New Zealand Herald* (online ed, Auckland, 28 May 2012).

118 McGregor, above n 104, at 12.

119 Hill "The case for care workers", above n 84, at 19.

120 *Terranova Employment Court judgment,* above n 6, at [5].

121 At [16]–[17].

122 At [5].

123 See *Service and Food Workers Union Nga Ringa Tota Inc v Terranova Homes and Care Ltd* [2013] NZEmpC 51 [*Terranova interlocutory judgment*].

124 See John Burrows and Ross Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 277.

1 *The Employment Court's decision*

The Employment Court agreed to consider and answer preliminary questions of law in the case.[125] A number of the questions raised novel issues of law under the Equal Pay Act.[126] These included whether the s 3(1)(b) requirement for equal pay for work that is performed exclusively or predominantly by female employees included equal pay for work of equal value, as a remedy for systemic undervaluation of such work by women.[127] A further issue was how to assess compliance with this requirement, that is, which comparisons could be used, and what evidence could be accepted.[128] The Court was therefore required to determine the scope of s 3(1)(b) for the first time.

The plaintiffs argued that the rates of remuneration paid by Terranova to its workers breached s 3(1)(b) of the Act, because the employees' levels of responsibility, labour and service were undervalued on the basis that it was women's work. The plaintiffs proposed that the Court's statutory interpretation needed to engage with the text and purpose of the legislation in order to uphold the anti-discriminatory nature and original goals of the Act. This would further need to be consistent with domestic human rights laws and international conventions. As evidence of the link between occupational segregation and historic undervaluation of sectors predominated by women, the plaintiffs relied on the HRC's *Caring Counts* report.[129] Supported by the industry group Aged Care Association, Terranova argued that a narrow interpretation of the Act, such as that in *Clerical Workers*,[130] in which assessments of equal pay were limited to comparisons of the same work, was the correct interpretation of the Act.

The Employment Court concluded that the Act is intended to include the concept of pay equity. Skills, responsibility, conditions of work and degrees of effort were evidence that could be taken into account. In addition, cross-sector comparisons were held to be acceptable to rectify any systemic undervaluation of the work as a result of historic or structural sex discrimination.[131] The Court

125 See *Terranova interlocutory judgment*, above n 123, at [8].

126 *Terranova Employment Court judgment,* above n 6, at [6].

127 At [7].

128 At [7].

129 At [21]–[23].

130 *New Zealand Clerical Administration*, above n 71.

131 *Terranova Employment Court judgment,* above n 6, at [42]–[46].

acknowledged that differentials in cross-sector comparisons were difficult to identify and assess, however it rejected the defendant's arguments that this made a broad interpretation of s 3(1)(b) unworkable. In the Court's view, s 3(1)(b) required a comparison between "apples and oranges" whereas a narrow interpretation would consider "apples and apples".[132] This decision radically departed from previous understandings of the scope of the Act and attracted nationwide attention from the public as a "landmark" decision for gender equality.[133]

2 *The Court of Appeal's decision*

Terranova appealed the Employment Court's decision, challenging its determinations on the ambit of the Act and scope of comparators that could be taken into account for assessments under s 3(1)(b).[134] The Employment Court's conclusion that the Act included pay equity was not challenged, but the appellants submitted that an interpretation of s 3(1)(b) should be narrow, and evidence of systemic undervaluation could not be taken into account.[135] Terranova submitted that only in exceptional circumstances could the rates paid by other employers in the same sector be considered, and that comparisons with employers in entirely different sectors should be rejected entirely.[136] The Attorney-General also submitted that taking systemic undervaluation of an occupation into account would be a step too far as it could never be relevant to a question of law.[137]

The Court of Appeal dismissed the appeal and found the Employment Court had not misinterpreted the Act. A statutory interpretation of the text and purpose of the Act had revealed that comparisons with rates paid by other employers was plainly contemplated by the Act. Internal comparisons were seen by the Court to defeat the inclusion of s 3(1)(b) as a distinct category of assessment of work predominantly performed by females, and pay equity

132 At [43].

133 See "Landmark gender pay equality ruling appealed" *The New Zealand Herald* (online ed, Auckland, 18 September 2013).

134 *Terranova*, above n 10, at [73].

135 At [77].

136 At [77].

137 At [79].

was encompassed in the Act's broad definition of equal pay.[138] The case was subsequently directed back to the Employment Court for resolution, and an appeal by Terranova to the Supreme Court was declined in 2014.[139] The New Zealand Council of Trade Unions described the case as an "historic legal victory" for advancing the rectification of unequal pay in female-dominated occupations.[140]

3 A purposive approach

Both the Employment Court and Court of Appeal's conclusions were guided by the anti-discriminatory purpose of the Equal Pay Act. Their approaches were partly attributable to a broader "shift in the balance between public and private interest", where individual freedoms are overruled by the broader public interest intended by legislation.[141] Under the Act, this balance is between the individual interests of employers and the social good of removing discrimination against women in employment.

The Aged Care Association argued that raising wages for carers would have a drastic economic impact on aged care providers because funding was received from the Ministry of Health on a per bed basis.[142] The Employment Court, however, compared the achievement of pay equity with the abolishment of slavery and stated that the short term price of implementing pay equity did not outweigh the "unquantifiable" social cost of perpetuating discrimination against a vulnerable and undervalued social group.[143] Arguments made by Terranova about the unworkability of the Employment Court's interpretation due to cost were also rejected by the Court of Appeal; again because those arguments were outweighed by the purpose of the Act.[144]

The interpretation of the Act in *Clerical Workers* has previously been criticised for its failure to interpret the Act according to its purpose. At the time of the 1986 decision, literal interpretations of the text without consideration

138 At [101] and [113].

139 See *Terranova Homes & Care Ltd v Service and Foodworkers Union Nga Ringa Tota Inc* [2014] NZSC 196, [2015] 2 NZLR 437 at [18].

140 New Zealand Council of Trade Unions "Historic victory in pay equity case for carers" (press release, 23 August 2013).

141 Burrows and Carter, above n 124, at 237.

142 *Terranova Employment Court judgment*, above n 6, at [108].

143 At [109]–[110].

144 *Terranova,* above n 10, at [172].

of the intention behind a statute were more common.[145] In 1997, pay equity campaigner Martha Coleman argued that the purposive approach should be applied to the Act as an anti-discrimination law part of New Zealand's human rights framework.[146] She proposed that the purposive approach should be applied to the definition of discrimination under the Act, and also to the criteria in s 3 for assessing the presence of discrimination.[147] This interpretation would be consistent with the legislative history of the Act, the New Zealand Bill of Rights Act and New Zealand's international obligations. She predicted that jurisprudential developments in anti-discrimination law would facilitate such an interpretation in any future claims for pay equity under the Equal Pay Act.[148]

The decisions of the Employment Court and Court of Appeal were consistent with these predictions. Each of these Courts concluded that cross-sector comparisons that took into account systemic undervaluation, as proven by historic, current or structural gender discrimination, would be consistent with the Act's purpose and definition of equal pay. The Employment Court stated that "statutes are always speaking" and an Act ought to perform in a contemporary context.[149] The purpose of the Act, to remove and prevent discrimination on the basis of sex in rates of remuneration, was identifiable in the long title and intentions behind its enactment.[150] The Employment Court noted that, because s 3 provided the mechanism by which the purposes of the Act would be achieved, the Act must be interpreted consistently with this purpose.[151] The Court looked to the legislative history of the Act, including the 1971 Report of the Commission of Inquiry into Equal Pay and parliamentary debates that introduced the Equal Pay Bill. It also sought to interpret the Act consistently with New Zealand's human rights framework and international obligations under ILO Convention 100.

The Court of Appeal placed weight on different considerations in order to extrapolate the purpose of the Act. The Court found there was sufficient

145 Burrows and Carter, above n 124, at 248.

146 Coleman "Back to the Future", above n 48, at 536.

147 At 536.

148 At 552.

149 *Terranova Employment Court judgment*, above n 6, at [93] and [95].

150 At [31].

151 At [40].

ambiguity in the Commission's report around pay equity such that the Employment Court had placed unjustified weight on the report to ascertain whether the Act was intended to include cross-sector comparisons.[152] Rather than relying on background evidence of the intention of the law-makers behind the Act, the Court of Appeal centred its interpretation on the anti-discrimination focus of the Act. The Court noted that the definition of equal pay in the Act, which provides that it is a rate of remuneration where there is "no element" of sex-based differentiation, makes it difficult to argue that the Act was not intended by Parliament to be used to the "fullest possible extent".[153] For the Court of Appeal, the reference to work predominantly performed by women in s 3(1)(b) also indicated the Act was intended to operate more broadly than achieving equal pay for the same work.[154] The Court of Appeal concluded nothing in the Act justified the exclusion of systemic undervaluation in assessments under s 3(1)(b), and the inclusion of this evidence in such assessments would uphold the anti-discriminatory purpose of the Act.[155]

The Attorney-General submitted to the Court of Appeal that "courts should be wary of updating legislation in a way that would have extensive social, cultural and economic impacts not contemplated by Parliament".[156] While the Court of Appeal acknowledged that this was not its role, it stated that the undervaluation of entire industries predominated by women was "undoubtedly something of concern to the 1972 Parliament".[157] The Act had never been fully utilised;[158] the problem of pay inequity that the Act was intended to address remained at the time of *Terranova*. The Act's values had not fallen out of date, but had become emboldened by a broader shift in attitudes towards discrimination and human rights. The core objective of the Act, to remove discrimination on the basis of sex in employment, was still pertinent for a contemporary interpretation.

152 *Terranova,* above n 10, at [86]–[95].

153 At [107].

154 At [101]–[102].

155 At [110].

156 At [115].

157 At [115].

158 Burrows and Carter, above n 124, at 406.

C What next?

The unprecedented interpretation of the Equal Pay Act in *Terranova* transformed pay equity from a political issue into a legal problem. Kristine Bartlett's success triggered a wave of claims from workers in other low-paid sectors, including from teachers,[159] midwives,[160] and social workers.[161] Litigation does not, however, provide a sustainable solution to the issue of pay equity.[162] Claims are expensive and time-consuming, with the heaviest financial and evidential burden placed on the unions and low-paid women.[163] Rather than pay equity being pursued by employers and employees as a common goal, it instead becomes a point of conflict.[164] The success of a case is further limited to compensating an individual or particular group of complainants, and may not change the systemic causes of the discrimination.[165] Unlike equal pay claims, which allege discrimination against an individual employer, pay equity targets systemic discrimination. An important contributor to this discrimination, occupational segregation, is a structural feature of the labour market,[166] and arguably requires a deeper level of legal intervention to eradicate the root of the problem. Further government intervention was necessary.

VI THE GOVERNMENT'S RESPONSE AND RESPONSIBILITIES

While the *Terranova* case progressed through the courts, the National Government maintained a distance from the litigation and surrounding

159 Jody O'Callaghan "Teachers' union takes legal action over gender pay gap for support workers" *Stuff* (16 October 2015). The New Zealand Educational Institute backed a claim from female support workers (teacher aids) who are seeking equal pay for their profession.

160 NZ College of Midwives "Pay equity case — New Zealand College of Midwives alleges gender discrimination under the New Zealand Bill of Rights Act 1990" (press release, 31 August 2015). The country's biggest equal pay challenge to date was filed at the High Court in Wellington against the Ministry of Health — note that this argues that there is discrimination under the Bill of Rights Act 1990 rather than the Equal Pay Act.

161 Public Service Association "Social workers launch historic equal pay claim" (press release, 16 November 2015). The New Zealand Public Services Association has filed a case alleging a breach of the Equal Pay Act 1972.

162 Fredman, above n 17, at 206.

163 At 206.

164 Pay Equity Taskforce *Pay Equity: A New Approach to a Fundamental Right* (Department of Justice Canada, 2004) at 98.

165 Fredman, above n 17, at 207.

166 Statistics New Zealand *Women at work*, above n 4, at 8.

debates on pay equity.[167] The Ministry of Health had been invited by the Employment Court to intervene in the case due to the Government's interest in the issue, however it declined to do so.[168] Faced with "mounting court cases" after the Court of Appeal's decision, the Government was no longer able to take a passive stance.[169]

A Response

The National Government considered that reliance on the courts for the resolution of pay equity issues was undesirable and inefficient.[170] This sentiment was shared by employers.[171] A Joint Working Group on Pay Equity Principles (Working Group) was created in October 2015, involving the primary stakeholders in pay equity disputes, to identify pay equity principles that could be applied across both public and private sectors and avoid the need for litigation.[172]

The Working Group was a tripartite group of representatives from the government, unions and employers, established to give recommendations on how to implement pay equity. The Minister of Health confirmed a government commitment to negotiating pay rates for nearly 50,000 care and support workers.[173] While the Working Group's discussions were taking place, however, other pay equity claims under the Act were placed on hold.[174] Recommendations of the Working Group were required to be consistent with the Court of Appeal decision in *Terranova* and to acknowledge that pay equity is provided for in the

167 McPherson, above n 64, at 256.

168 *Terranova Employment Court judgment*, above n 6, at [108].

169 Max Towle "Govt has 'finally woken up' to gender pay gap — caregiver" *Radio New Zealand* (online ed, Wellington, 21 October 2015), referring to comments made by Alistair Duncan, spokesperson for the union E tū.

170 See for example State Services Commission *Terms of reference — Joint working group on pay equity principles* (17 November 2015) at [4], which noted that the "Government's preferred response" was for "pay equity principles that can be supported by employers … and unions."

171 Sharon Brettkelly "Pay equity 'could cost hundreds of millions'" *Radio New Zealand* (online ed, Wellington, 8 June 2016).

172 State Services Commission, above n 170, at [5]. Note that no representatives from women's organisations were involved. The Government was represented by the Ministry of Business, Innovation and Employment and State Services Commission, the unions were led by the New Zealand Council of Trade Unions and employers by Business New Zealand.

173 Paula Bennett (Minister of State Services) and Michael Woodhouse (Minister for Workplace Relations and Safety) "Working group to pursue pay equity principles for workplaces" (press release, 21 October 2015).

174 State Services Commission, above n 170, at [11].

Act.[175] Dr Jackie Blue, the Equal Employment Opportunities Commissioner, commented that the Working Group was an "historic first step to achieving a zero gender pay gap".[176]

The Working Group reported back in May 2016 with a list of recommendations, noting that "[p]ay equity is a complex issue, involving multiple historical and current factors".[177] The recommendations focused on facilitating pay equity claims in good faith between employees and employers.[178] A set of principles, and a recommended process, was laid out by the Working Group that could operate within existing legal frameworks by updating the ERA and the Equal Pay Act. After the merit of a pay equity claim had been accepted, parties would be required to negotiate a resolution, using tools such as occupational assessments of the skills, responsibilities, conditions and effort required by the work predominately undertaken by women.[179] The Working Group suggested that the government be proactive on the issue of pay equity for the benefit of the wider community and the government itself.[180]

The Working Group's focus on direct negotiation with employers was welcomed by unions, including E tū,[181] as seeming to open up an easier pathway for hundreds of thousands of women in low-paid sectors to achieve pay equity. A pathway for claiming pay equity had, however, been present in the Equal Pay Act for over 40 years but was never successfully used. The ability for low-paid women to successfully use any pathway set up for pay equity is a core issue, and the shape of any legislative amendments responding to the

175 At [3].

176 Human Rights Commission "Human Rights Commission welcomes pay equity milestone" (press release 21 October 2015).

177 Letter from Patsy Reddy (Crown Facilitator), Richard Wagstaff (New Zealand Council of Trade Unions), Phil O'Reilly (Business New Zealand), Paul Stocks (Ministry of Business, Innovation and Employment) and Lewis Holden (State Services Commission) to Paula Bennett (Minister of State Services) and Michael Woodhouse (Minister for Workplace Relations and Safety) regarding Recommendations of the Joint Working Group on Pay Equity Principles (24 May 2016) at 2.

178 At 4.

179 At Appendix 2 at [3].

180 At 4.

181 On 7 October 2015, the Service and Food Workers Union merged with the Engineers Printers and Manufacturers Union to form E tū, the largest private sector union in New Zealand. See Uni Global Union "Huge victory in New Zealand for care and support workers" (20 October 2005) <www.uniglobalunion.org> for a reproduction of E tū's press release welcoming the announcement.

Working Group's recommendations will be crucial to the preservation of pay equity as a contestable legal right in New Zealand.

To adopt the recommendations of the Working Group, the National Government introduced new legislation: the Employment (Pay Equity and Equal Pay) Bill.[182] The Bill would amend the ERA and repeal the Equal Pay Act. The Government claimed that the Bill would "make it easier for employees to file pay equity claims" by creating a process that would allow women to file claims with their employers directly rather than in the courts.[183] With a reassurance of its commitment to pay equity, the National Government stated that the Bill would support an "effective and efficient pay equity regime".[184]

Despite claims that the Bill would facilitate pay equity claims, a closer scrutiny of its provisions revealed that the detail of the Bill did not accord with its stated purpose, and in fact departed from *Terranova*. Employees were granted a right to make a pay equity claim, and a process for pay equity bargaining was established including requirements to act in good faith. However, in reality the Bill would have made the pathway for pay equity claims more difficult, and was labelled by some as "a wolf in sheep's clothing".[185]

A core issue with the Bill was the high threshold for making a claim to trigger a bargaining process. Pay equity claims must be raised with employers in the first instance, and an employee or group of employees were only permitted to make such a claim, if it had merit.[186] A claim had merit if:[187]

i) it related predominantly to work performed by women; and

ii) there were reasonable grounds to believe the work had been historically undervalued; and

iii) there were reasonable grounds to believe the work continued to be subject to systemic sex-based undervaluation.

These requirements placed a heavy evidential burden on low-paid women to demonstrate that their claim was worthy of a pay equity assessment. The

182 Employment (Pay Equity and Equal Pay) Bill 2017 (284–1).

183 Michael Woodhouse "Pay Equity Bill introduced" (press release, 27 July 2017).

184 Woodhouse, above, n 183.

185 The New Zealand Public Service Association "National's 'pay equity' Bill is a wolf in sheep's clothing" (press release, 8 August 2017).

186 Employment (Pay Equity and Equal Pay) Bill 2017 (284–1), cl 14(1).

187 Clause 14(2).

Working Group had noted that the collation of evidence of a workforce's historical undervaluation is a highly arduous task that requires specialist resources.[188] The burden of preparing a claim, especially high for women without union support, is a strong deterrent from making claims. Further, if an employer did not agree that a claim had merit, these employees would likely be forced to revert to dispute resolution processes, with the ultimate possibility of ending up in court.

Both courts in *Terranova* found that cross-sector comparisons would be acceptable, even necessary, for pay equity assessments to uphold the anti-discriminatory purpose of the Act. The Bill, however, included a problematic hierarchy of comparators where a claim would have to first compare wages against male employees in the same business or sector before any cross-sector comparisons could be made. The government argued that it was "not bound" to the Court of Appeal's methodology.[189] Requirements for internal comparisons within the same employer fail to confront occupational segregation and defeat the fundamental purpose of a pay equity assessment — to assess the devaluation of a female-dominated *profession* (nurses) against a comparable male-dominated one (police officers). As stated by the Employment Court in *Terranova*, this would be a self-defeating comparison between "apples and apples".[190] The Bill placed cross-sector comparisons in the 'too hard' basket.

Such a narrow approach to comparators in the Bill fails to ensure that pay equity assessments would successfully eradicate discrimination against low-paid women.[191] By repealing the Equal Pay Act, including its definition of 'equal pay', the Bill further subverts the anti-discriminatory interpretations of the Act by the courts in *Terranova*, thwarting the ground-breaking progress for pay equity achieved through this litigation.

The sentiment shared between the then-Opposition in Parliament,[192] the

188 Letter from Patsy Reddy, above n 177, at 3–4.

189 (8 August 2017) 724 NZPD 19946–19947.

190 *Terranova Employment Court judgment*, above n 6, at [43].

191 At [53]. The Employment Court commented that a narrow approach to s 3(1)(b) "may simply perpetuate discrimination."

192 (8 August 2017) 724 NZPD 19950. The opposition at the time was the Labour Party, Green Party, New Zealand First, and the Māori Party. All Opposition parties voted against the Bill in its first reading on 8 August 2017, which narrowly passed by a vote of 60–59.

unions,[193] and Kristine Bartlett herself,[194] was that the new Bill erected a road block for further pay equity claims. It was alleged that claims like Bartlett's would not be able to happen again under the new Bill.[195] In the wake of *Terranova*, women's organisations and pay equity campaigners expressed concern that the National Government's ideological and financial commitment to a decentralised free market would result in a watering down of the principles proposed by the Working Group,[196] and inhibit the progress of law reform. Under the guise of a political commitment to assisting low-paid women, the subtle subversion of *Terranova* by the Bill reveals the traditional resistance to government intervention to implementation of pay equity is justified.

With the election of a new Labour-led Government in late-2017, the Bill was withdrawn entirely.[197] Making pay equity an immediate priority was a core election campaign promise for the Labour Party leading up to the 2017 General Election.[198] The Working Group was also reconvened to consider the two key concerns with the former Bill — first, how to select male comparators when assessing female-dominated work, and second, how to determine the merit of a claim as a pay equity claim.[199] Reporting back in February 2018, the Working Group emphasised the importance of retaining the Equal Pay Act as the "legislative vehicle" to support implementing pay equity.[200] Despite the apparent need for fresh strategies, *Terranova's* revelation that the Act already provides for pay equity possibly removes the need for brand new legislation, and instead

193 New Zealand Council of Trade Unions "Serious concerns with National's proposed new equal pay law" (press release, 26 July 2017).

194 Andre Chumko "Equal pay advocate Bartlett 'let down' by Govt" *Newsroom* (17 August 2017).

195 (8 August 2017) 724 NZPD 19948.

196 Prue Hyman "Equal Pay — the case for action now" *The New Zealand Herald* (online ed, Auckland, 9 February 2016).

197 Iain Lees-Galloway (Minister for Workplace Relations and Safety) and Julie Anne Genter (Minister for Women) "Statement on Equal Pay legislation" (press release, 1 November 2017).

198 Jacinda Ardern "Pay equity to be a priority for Labour" (press release, 12 August 2017); and Labour Party "Workplace Relations Policy" (2017) <www.labour.org.nz>.

199 Iain Lees-Galloway (Minister for Workplace Relations and Safety) and Julie Anne Genter (Minister for Women) "Joint Working Group on Pay Equity Principles Reconvened" (press release, 23 January 2018).

200 Letter from Traci Houpapa (Crown Facilitator), Richard Wagstaff (New Zealand Council of Trade Unions), Kirk Hope (Business New Zealand), Paul Stocks (Ministry of Business, Innovation and Employment), Lewis Holden (State Services Commission) to Iain Lees-Galloway (Minister for Workplace Relations and Safety) and Julie Ann Genter (Minister for Women) regarding Recommendations of the Reconvened Joint Working Group on Pay Equity Principles (27 February 2018) at 2.

the existing legal structures that enabled Kristine Bartlett's success should be preserved and strengthened. The Working Group also urged the Government to invest in support, information gathering and specialists to assist with claims.

On 19 September 2018, symbolically the 125th anniversary of women's suffrage in New Zealand, the Labour-led Government introduced a new Equal Pay Amendment Bill.[201] Rather than starting afresh, the Bill amends, not repeals, the Equal Pay Act to implement "a simple and accessible process" for making pay equity claims.[202] As recommended by the Working Group, this update to the existing Equal Pay Act is likely to be an effective approach for facilitating pay equity claims to provide greater clarity on the process for lodging claims while preserving the existing legal mechanisms that were successful in *Terranova*.

Fundamental differences between the Equal Pay Amendment Bill and the Bill proposed by National appear to alleviate previous concerns. Where National's Bill required claims to demonstrate 'merit', the new Bill sets the threshold for bringing a claim significantly lower, where a claim will now proceed to pay equity bargaining if the employer considers it is 'arguable'. Under s 13C(2), an 'arguable' claim is where (a) the claim relates to work predominantly performed by female employees, and (b) it is arguable that the work is currently undervalued or has historically been undervalued. The Bill does not introduce a hierarchy of comparators and instead explicitly condones the use of a comparator with work performed by males in a different sector as being appropriate. To incentivise employers to address pay equity, the Bill also permits courts to award back pay in order to address undervaluation of women's work.

There had been predictions that the sixth Labour Government would bring a new left-wing political approach, with Prime Minister Jacinda Ardern stating that the market economy had failed in recent times and government intervention was required in a number of areas.[203] The Government's Equal Pay Amendment Bill indicates that this has included pay equity.

The favourable judicial interpretation in *Terranova* and the principles created by the Working Group presented significant questions to both the

201 Equal Pay Amendment Bill 2018 (103–1).

202 Equal Pay Amendment Bill 2018 (103–1), explanatory note.

203 Bryce Edwards "Political Roundup: Will Labour coalition bring radical change?" *The New Zealand Herald* (online ed, Auckland, 23 October 2017).

former National and Labour-led Governments as to how it should position itself. As demonstrated by New Zealand's history on pay equity, the extent to which either a Labour or National Government will be proactive in pushing for law reform on pay equity is dependent on a number of considerations. The implementation of pay equity is not only a practical and legal issue, but also a political one. The enactment of new legislation is a political process, and as a result, ideology unavoidably influences the allocation of "rights, duties, powers and liabilities".[204]

B Responsibilities

Responsibility for preserving and universally implementing pay equity now rests with the government. Throughout the lifetime of the Equal Pay Act in New Zealand there have been repeated calls for stronger and explicit dedication to implementing pay equity from the government. In 2004, for example, the Pay and Employment Equity Taskforce called for a "[c]lear and explicit public commitment" by the government to achieve pay equity.[205] International progress towards achieving pay equity demonstrates that the government must assume responsibility for implementing change, rather than relying on free market principles to correct structural inequalities.[206]

The government bears the greatest responsibility not only as a lawmaker but also as the country's largest employer of female workers.[207] This means the government has the power to lead by example. The significant reallocation of financial resources required to implement pay equity means the government also bears the greatest financial burden. The New Zealand Aged Care Association estimated that it would cost the aged-care sector alone $500 million per annum to raise the wages of caregivers to the rate proposed by the E tū Union and there have been repeated calls from the sector for government support.[208] A wealth of research has revealed that government action on the issue of occupational segregation has significant potential to positively

204 Kenneth Keith "Philosophies of Law Reform" (1991) 7 Otago LR 363 at 377.

205 Pay and Employment Equity Taskforce *Pay and Employment Equity in the Public Service and the Public Health and Public Education Sectors* (1 March 2004) at 55.

206 At 56, referring to Susan Iversen *Analysis of Pay Equity Initiatives in the Health Sector in the UK, Ontario and New Zealand* (Taskforce on Pay and Employment Equity in the Public Service and Public Health and Education Sectors, January 2004).

207 See letter from Patsy Reddy, above n 177, at 5.

208 Brettkelly, above n 171.

contribute to New Zealand's economy in the long term, even boosting GDP by 10 per cent.[209] Nevertheless, while the long-term benefits of achieving pay equity are convincing, a balancing exercise between the costs and benefits of implementing pay equity will continue to be inevitable.

As the historical stagnancy has demonstrated, achieving pay equity will require proactive support from the government beyond amending the legislative framework. Government support is particularly necessary for providing pay equity to women in the private sector and in small-to-medium-sized businesses where union membership is low.[210] The Working Group emphasised the importance of government investment in regulatory and support agencies with the "skills, training, knowledge and resources" to assist the private sector in addressing pay equity issues.[211] The Working Group, however, cautioned that these efforts should not be relied upon to comprehensively achieve pay equity and that legislative amendments are needed for progress.[212]

The Working Group's initial recommendations to the National Government had strongly suggested that, as an employer, the Government needed to be proactive in reaching specific pay equity settlements in sectors dominated by female employees for which the Government is the primary funder.[213] The National Government finalised a $2 billion pay equity settlement with care and support workers in April 2017 covering 55,000 workers in aged and disability residential care services.[214] This settlement has since been commended by CEDAW in the International Labour Organisation.[215] The then-Prime Minister, Rt Hon Bill English, warned that this was "unique" however, and the "hurdle would be pretty high" for any other groups making a claim for pay equity.[216] This settlement controversially excluded mental

209 Borkin, above n 32, at 2.

210 Briar, above n 92, at 217.

211 Letter from Patsy Reddy, above n 177, at 4.

212 At 3.

213 At 4.

214 Ministry of Health "Care and support workers pay equity settlement" (updated 28 March 2018) <www.health.govt.nz>.

215 International Labour Organisation Committee on the Elimination of Discrimination against Women *Concluding observations on the eighth periodic report of New Zealand* CEDAW/C/NZL/8 (2018) [ILO 2018] at [33].

216 Isaac Davison and Claire Trevett "Government announces historic pay equity deal for care workers" *The New Zealand Herald* (online ed, Auckland, 18 April 2017).

health and addiction workers. A core election promise by the Labour Party was to prioritise pay equity negotiations with these workers. Its promised negotiations commenced with 3,800 mental health and addiction workers in February 2018,[217] and a Terms of Settlement has been signed with support staff in the education sector.[218] This possibly indicates a deeper willingness to achieve universal pay equity, reflecting an ideological shift in approach.

VII LESSONS FOR ACHIEVING GENDER EQUALITY THROUGH LAW

The under-utilisation and treatment of the Equal Pay Act by lawmakers and law enforcers demonstrates that the efficacy of law reform to achieve meaningful change is reliant on a wealth of factors, influenced by a dynamic and broad set of relationships and structures. The attribution of successes and failures of pay equity law reform to either lawmakers, the government or the courts, is complex and not clear-cut.[219] The ability of both litigation and legislative change to advance a social issue such as pay equity is, to a significant degree, dependent on favourable yet evolving socio-economic and political conditions. Progress on pay equity is also reliant on the attitudes and perspectives of the lawmakers, those responsible for its implementation, and those who have the resources to support a legal claim. The use of the law as an instrument for change is ineffective if the underlying goals fail to align with prevailing social attitudes and economic structures.

Even if the tools to achieve it are enshrined in law, the implementation of gender equality is affected by fundamental transitions in contextual social discourses.[220] Institutions that control reform are receptive to certain discourses at different times, which dictates the progression of reform.[221] Broader developments in judicial treatment of anti-discrimination laws played an important role in achieving meaningful reform at the time of the enactment of the Equal Pay Act and creating the environment in which the *Terranova* case

217 Ministry of Health "Mental health and addiction workers' pay equity settlement" (updated 30 July 2018).

218 Jacinda Ardern (Prime Minister) and Chris Hipkins (Minister for Education) "Historic pay equity settlement for education support workers" (press release, 14 August 2018).

219 Margaret Davies "Legal theory and law reform: Some mainstream and critical approaches" (2003) 28 Alt LJ 168 at 170.

220 At 168.

221 Chunn, Boyd and Lessard, above n 46, at 19.

was brought. Whereas the widespread labour market restructuring during the 1990s stalled the advancement of pay equity reform in favour of a neoliberal ideology, in recent decades a renewed civil society interest in anti-discrimination issues has provided a boost to the issue. The value society accords to vulnerable groups in employment is increasingly being called into question;[222] low-paid women in predominantly female occupations are one such group.

While it is important to recognise that any legal reform to achieve pay equity is contextualised by broader socio-economic and political concerns, and therefore cannot provide an all-encompassing solution to a social problem, effective legislation plays an essential role.[223] The attribution of rights and responsibilities and the recognition of collective or individual identities in legislation frames the balance of power between employers and employees in the long term. Legislative reform also has symbolic importance for marginalised groups seeking equality.[224] Constitutional law experts have argued that reliance should not be placed solely on the market or courts to rectify issues of discrimination and equality.[225]

Experience in New Zealand and overseas has demonstrated that establishing legal requirements for stakeholders to take action on pay equity is possibly more effective at reducing gender inequality attributable to occupational segregation than relying on voluntary policies or the operation of the free market.[226] For example, the Canadian Pay Equity Taskforce recommended in 2004 that proactive and explicit pay equity legislation should be enacted, supported by specialist agencies and resources.[227] *Terranova* exposed the weaknesses of reduced government intervention, as indicated by the case triggering a flood of other claims from female workers in other low paid sectors when Kristine Bartlett's claim was successful.[228] In response to New Zealand's 8th CEDAW report, the CEDAW Committee recommended that the principle of equal pay for work of equal value be adopted and enforced through legislation, setting out

222 Including the treatment of migrant workers, contractors, and carers for disabled family members.

223 Davies, above n 219, at 170.

224 At 170.

225 Mai Chen *Women and Discrimination: New Zealand and the UN Convention* (Victoria University Press, Wellington, 1989) at 23.

226 Ministry of Women's Affairs *Employment Equity*, above n 13, at 25–26.

227 Pay Equity Taskforce, above n 205, at 503.

228 See the claims discussed in footnotes 159, 160 and 161 above.

requirements for job classification methods, pay surveys, and regular reviews of wages.[229] A duty imposed on employers to implement pay equity should be supported by additional funding and resourcing from the government, such as a statutory body to assist with assessments.

Not only are the attitudes held by institutions including the courts and government vital to reform, but perceptions of the players who utilise them, including unions and employers (the potential plaintiffs and defendants), are also key to achieving change. Union support and commitment has been an essential precondition for the achievement of pay equity because unions often act as the legal representatives of low-paid women in court claims, settlements with employers, and negotiations with the government.[230] Through individualisation of employment contracts, the ECA, has, to a large extent, denied collective identities, especially by gender, from having legal recognition.[231] Many low-paid women in female-dominated occupations continue to face challenges in accessing union support, particularly in the private sector, where union membership remains very low.[232] In order to be successful, any further reform on pay equity must address the facilitation of the collective representation required by low-paid women.

The Ministry of Women's Affairs stated in 2002 that:[233]

> … the next step towards pay equity would involve not just deciding how to measure and reward work of equal value in women's and men's different jobs. It would also require an innovative new strategy to *deliver* pay equity to women.

The socio-economic and political environment confronting the Labour-led Government in 2018 is vastly different from that when the Equal Pay Act was enacted in 1972. The prospect of meaningful progress for pay equity in the wake of *Terranova* is arguably more positive now than ever. Policies on the gender pay gap across the political spectrum emphasise principles of good faith and natural justice, and upholding human rights in not only workplace relations, but across

229 ILO 2018, above n 215, at [34(c)].

230 Harré, above n 90, at 52.

231 Margaret Wilson "The Role of the State in the Regulation of Employment Relations: The New Zealand experience" (1997) 2 FJLR 131 at 140.

232 Statistics New Zealand "Union membership and employment agreements — June 2016 quarter" (14 September 2016) at 1.

233 Ministry of Women's Affairs *Employment Equity*, above n 13, at 16 (emphasis in the original).

society. There is currently a greater balance between the prioritisation of social justice issues against fiscal obligations than in previous decades.[234] There has also been a shift in the perspectives of employers who are increasingly accepting pay equity to be a new business reality.[235] The legal success of aged care workers has set in place a groundswell of formal and public movements for pay equity in other sectors including education,[236] nursing,[237] and DHB administration staff.[238]

Any current and future steps in law reform that seek to achieve pay equity will require new strategies to account for New Zealand's contemporary social structures. In order to be successful, such strategies must be adaptive and responsive to future societal changes. Such an update however needs to recognise that the law co-exists and operates within broader social structures and economic constraints that similarly influence legal relationships and priorities.[239] Any realisation of ambitions to achieve gender equality through legal change however relies on being in harmony with the surrounding political and social concerns. While the current Labour-led Government appears poised for stronger government intervention on the issue than in the past, practical and political challenges that require a balancing of different considerations and commitments for achieving pay equity remain. However, rights-based judicial interpretations and a favourable socio-economic environment will likely encourage legislative and policy action.

VIII CONCLUSION

Since the Equal Pay Act was enacted in 1972, efforts to achieve pay equity in New Zealand have been embroiled in a complex narrative. The enactment of the legislation was intended to remove discrimination in wages between men and women. As demonstrated by the persistent gender pay gap, these intentions were never realised. From the outset, the creators of the Act themselves had recognised that the success of the new law was contingent upon a favourable

234 McGregor, above n 104, at 14.

235 Business New Zealand *Bargaining for pay equity* (1 July 2016) Business New Zealand <www.businessnz.org.nz>.

236 NZEI Te Riu Roa "Educators join national movement for pay equity on May 5" (press release, 1 May 2018).

237 "DHB nurses to pursue pay equity" *Nursing Review* (online ed, 22 June 2017).

238 The New Zealand Public Service Association "DHB admin and clerical workers raise claim for Equal Pay" (press release, 18 April 2018).

239 Davies, above n 219, at 171.

shift in social attitudes regarding equal pay. This unfortunately did not happen for over 40 years.

The subsequent challenges to advancing pay equity in New Zealand reveal that achieving such an alignment in attitudes is reliant on a willingness for change on the part of law-makers and effective engagement with the Act by those in charge of its implementation. In the case of *Clerical Workers*, the dismissal of a pay equity claim created a widespread understanding that the concept of equal pay for work of equal value was not provided for in New Zealand's legislative framework. After the radical overhaul of New Zealand's labour framework to a decentralised free market, the high degree of investment required to achieve pay equity became incompatible with the social, economic and political interests of both employers and the then-government.

The recent interpretation of s 3(1)(b) of the Equal Pay Act in *Terranova* redefined the scope of the Act by including pay equity. A number of factors contributed to the success in the case, including a trend of favourable judicial treatment of discrimination issues in employment, union support and stronger recognition of pay equity as a human right. The resulting evolution in perceptions about the scope of the Act has been a significant driver of a broad shift in approaches to pay equity.

Neither litigation nor new legislation are able, in isolation, to provide comprehensive solutions to the social issue of pay equity. However, each continues to play a tangible role in an overall framework of change. As the different results achieved in the *Clerical Workers* and *Terranova* cases demonstrate, the courts play a core role in framing existing perceptions regarding the status quo and exposing a need for reform. With the decision in *Terranova*, the Court of Appeal served its function in providing clarification and guidance on the scope and interpretation of the Act. As a result of this reactivation of the Act, a new opportunity for meaningful reform has been presented by transforming the issue of pay equity into a legal problem that required proactive engagement.

In progressing forward however, responsibility for enacting further legal reform that will universally achieve and preserve pay equity in New Zealand rests with the government. Whether the legal and political developments in response to *Terranova* will fully tip pay equity into being a universal reality, not merely a political talking point, is yet to be seen; the Equal Pay Amendment Bill is not law yet. Shaped by the prevailing social attitudes, economic

concerns, and political priorities of the institutions that control its instigation and implementation, the story of pay equity indicates that legal progress for gender equality will never be predictable, nor clear-cut. But, if there is any time for achieving pay equity, that time seems to be now.

PROSECUTING SEXUAL VIOLENCE IN CONFLICT AND THE FUTURE OF THE COMMON CRIMINAL PURPOSE AT INTERNATIONAL CRIMINAL LAW

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Sexual violence has long been considered an incidental crime, unrelated to the wider context of a conflict. In practice, this misconception can result in sexual violence unconsciously being subjected to a higher standard of proof than other crimes before it can be considered within the common criminal purpose of a criminal group. While the International Criminal Tribunal for the former Yugoslavia (ICTY) has established a robust body of jurisprudence in relation to sexual violence, sexual violence crimes are often relegated to "natural and foreseeable" consequences but outside of the execution of a common criminal plan. Unlike the ICTY, the International Criminal Court (ICC) does not have the luxury of a mode of liability encompassing crimes that fall outside the common purpose.

As the mandate of the ICTY has come to an end at the close of 2017, it is important to reflect on what the legacy of the ICTY might mean for holding accountable those committing atrocities in conflicts today and in the future. This article considers the challenges in prosecuting conflict-related sexual violence in international criminal courts and tribunals. It looks at the manner in which sexual violence was found to fall outside the common purpose in a number of Kosovo cases before the ICTY and puts forward potential tools that could be used to ensure that, in the minds of judges, sexual violence plays a prominent role in the common criminal purpose.

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I INTRODUCTION

Lauded as a demonstration of international law's success in condemning sexual violence, nearly 60 per cent of the 161 individuals indicted by the International Criminal Tribunal for the former Yugoslavia (ICTY) were charged with sexual violence crimes.[1] One third of those convicted have been found guilty of crimes involving sexual violence.[2]

ICTY Chief Prosecutor, Serge Brammertz, attributes the success in prosecuting sexual violence to the mode of liability of extended joint criminal enterprise.[3] Joint criminal enterprise is a form of individual criminal liability, applicable where a group of persons act pursuant to a common criminal purpose.[4] Basic joint criminal enterprise imputes liability to individuals for crimes intended as part of that common purpose.[5] Extended joint criminal enterprise extends liability to crimes that, while outside the common criminal purpose, were natural and foreseeable consequences of its execution.[6]

On 23 January 2014, the ICTY Appeals Chamber in *Prosecutor v Šainović* reversed acquittals of three high-level military and political officials for persecution through sexual violence charged in relation to their role in the forcible displacement of hundreds of thousands of Kosovo Albanians in 1999.[7] Four days later, the Appeals Chamber in the *Prosecutor v Đordević* case also reversed the acquittal of another high-level political official for persecution through sexual violence, arising from his role in the same forcible displacement of Kosovo Albanians.[8] In each instance, the Appeals Chamber found that

1 Interview with Serge Brammertz, Chief Prosecutor of the ICTY (Jamille Bigio, Council on Foreign Relations, Council in the Women and Foreign Policy Program, 13 June 2017) transcript provided by Council on Foreign Relations (New York).

2 See the Legacy website of the ICTY "Crimes of Sexual Violence" (September 2016) <www.icty.org> and the analysis there.

3 Interview with Brammertz, above n 1.

4 *Prosecutor v Tadić (Judgment)* ICTY Appeals Chamber T-94-1-A, 15 July 1999 at [190].

5 At [196].

6 At [204].

7 *Prosecutor v Šainović (Judgment)* ICTY Appeals Chamber IT-05-87-A, 23 January 2014. The accused were Nebojša Pavković, Commander of the 3rd Army of the Vojska Jugoslavije, Nikola Šainović, the Deputy Prime Minister of the Federal Republic of Yugoslavia, and Sreten Lukić, head of the Ministry of Interior Police staff of Kosovo. Vladimir Lazarević, the fourth appellant in the proceeding, appealed his convictions and sentence on grounds unrelated to joint criminal enterprise.

8 *Prosecutor v Đorđević (Judgment)* ICTY Appeals Chamber IT-05-87/1-A, 27 January 2014. The accused

persecution through sexual violence, while falling outside the common purpose, was a natural and foreseeable consequence of the mass forcible displacement to all those accused.

In 2016, the International Criminal Court (ICC) convicted Germain Katanga, leader of the militia group *Forces de Résistance Patriotique d'Ituri* (FRPI) in the Democratic Republic of Congo, of charges of: murder as a crime against humanity; and murder, attacking a civilian population, destruction of property and pillaging as war crimes. General Katanga was convicted on the basis of his role in a common criminal plan to wipe out a village.[9] He was acquitted of sexual violence crimes.[10] The reason he was acquitted was that, under the Rome Statute, where a group of persons acts with a common criminal purpose (for example a militia group executing a massacre) an individual may only be found criminally responsible for those crimes that fall within the common purpose of that criminal group.[11] The ICC found the common criminal purpose did not include sexual violence crimes.[12]

Šainović, *Đordević* and *Katanga* illustrate how sexual violence often appears to fall outside the common criminal purpose. That trend can be attributed to pervasive assumptions about the nature of sexual violence, which relegate sexual violence into the realm of less serious, less violent, and less public crimes.

This perception that sexual violence is somehow less serious cannot be countenanced; not only because it fails to rightfully place sexual violence amongst the most serious crimes, but in practice it results in sexual violence being considered to fall outside the common criminal purpose and consequently, at the ICC, outside the limits of individual liability. This article considers the place of sexual violence in international law, the prejudices that prevent its parity with other violent crimes, and what lessons can be learned for effectively articulating the common criminal purpose to prove why sexual violence should be included within it.

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was Assistant Minister to the Serbian Minister of Internal Affairs and Chief of the Public Security Department, Vlastimir Đorđević.

9 *Prosecutor v Katanga (Judgment)* ICC Trial Chamber II ICC-04/04-01/07, 7 March 2014.

10 At [1664].

11 Rome Statute of the International Criminal Court 2187 UNTS 3 (opened for signature 17 July 1998, entered into force 1 July 2002), art 25(3).

12 *Katanga*, above n 9, at [1664].

II SEXUAL VIOLENCE AND INTERNATIONAL CRIMINAL LAW

Sexual violence has been the subject of centuries of inaction in international law.[13] A historically patriarchal system, international criminal law has "neglected to enumerate, condemn, and prosecute" sexual violence.[14]

Sexual violence has been trivialised compared to the masculine concept of "more serious" physical violence at international law.[15] Trivialisation subordinates sexual violence to other crimes.[16] The perception that sexual violence is less serious than other violent crimes is represented in international humanitarian law instruments. For example, rape and sexual violence are distinctly absent from the grave breaches provisions of the Geneva Conventions and the fundamental guarantees of Additional Protocol I.[17] Where international humanitarian law instruments include sexual violence, those instruments evaluate the crime based on the harm done to the victim's honour, modesty or chastity.[18] For example, the Fourth Geneva Convention describes rape, enforced prostitution and any form of indecent assault as an attack on a woman's "honour".[19] Moreover, Additional Protocols I and II categorise crimes of sexual violence as "outrages upon personal dignity", as distinct from acts of "violence to the life, health, or physical or mental well-being of persons".[20]

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13 Michelle Jarvis and Elena Martin Salgado "Future Challenges to Prosecuting Sexual Violence under International Law: Insights from ICTY Practice" in Anne-Marie de Brouwer, Charlotte Ku, Renée Römkens and Larissa van den Herik (eds) *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Intersentia, Cambridge, 2013) 101 at 102.

14 Kelly D Askin "Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles" (2003) 21(2) Berk J Int L 288 at 295.

15 Alona Hagay-Frey *Sex and Gender Crimes in the New International Law*: *Past, Present, Future* (Martinus Nijhoff Publishers, Leiden, 2011) at 3.

16 At 36.

17 Patricia Viseur Sellers "Individual(s') Liability for Collective Sexual Violence" in Karen Knop (ed) *Gender and Human Rights* (Oxford University Press, Oxford, 2004) 153 at 190.

18 Valerie Oosterveld "Sexual Slavery and the International Criminal Court: Advancing International Law" (2004) 25 Mich J Intl L 605 at 613; and United Nations Division for the Advancement of Women *Sexual Violence and Armed Conflict: United Nations Response* (United Nations Department of Economic and Social Affairs, April 1998) at 6.

19 Hagay-Frey, above n 15, at 69; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) 75 UNTS 287 (opened for signature 12 August 1949, entered into force 21 October 1950), art 27.

20 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) 1125 UNTS 3 (opened for signature 12 December 1977, entered into force 7 December 1978), art 75(2); and Protocol Additional to the Geneva

Rape and sexual violence are not secondary to other violent crimes. Sexual violence has grave consequences for victims and their communities.[21] It can include considerable physical violence, including pain, injury, sexually transmitted infection, infertility or unwanted pregnancy. Sexual violence may also elicit a wider range of harms.[22] Psychological trauma includes distress, shame, isolation and guilt, sleeping and eating disorders, depression, and self-harm or suicide. Such harms include psychological damage to the victim and to her body politic.[23] Victims may be ostracised by their families or communities. Victims' spouses, partners or children also experience the trauma of guilt, indignity or shame, particularly if they witnessed the attack.[24]

Despite improvements in recent years, the misconception that sexual violence constitutes less serious offending can still have a considerable impact in practice. For example, at the establishment of the International Criminal Tribunal for Rwanda (ICTR), Human Rights Watch and the International Federation for Human Rights reported there was a widespread perception among the Tribunal investigators that rape is somehow a "lesser" or "incidental" crime not worth investigating.[25] In the early days of the ICTY, investigators were recorded making such observations as: "I've got ten dead bodies, how do I have time for rape?"[26]

Rape and other acts of sexual violence tend to be considered "opportunistic" or unrelated to the wider conflict in which they are committed.[27] Sexual

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Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) 1125 UNTS 609 (opened for signature 12 December 1977, entered into force 7 December 1978), art 4(2).

21 Rebecca L Haffajee "Prosecuting Crimes of Rape and Sexual Violence at the ICTR: The Application of Joint Criminal Enterprise Theory" (2006) 29 Harv JL & Gender 201 at 218.

22 Fionnuala Ní Aoláin, Dina Francesca Haynes and Naomi Cahn "Criminal Justice for Gendered Violence and Beyond" (2011) 11 Int CLR 425 at 428–429.

23 At 429.

24 Peter Maurer "Q&A: The ICRC's Approach to Sexual Violence in Armed Conflict" (2014) IRRC 96(894) 449 at 450.

25 Rhonda Copelon "Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law" (2000) 46 McGill LJ 217 at 224; and Human Rights Watch Africa, Human Rights Watch Women's Rights Project and *Fédération Internationale des Ligues des Droits de l'Homme Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath* (New York, Human Rights Watch, 1996). This report was compiled on the basis of research and interviews conducted in Rwanda in March and April 1996, including an interview with the Deputy Prosecutor of the International Criminal Tribunal for Rwanda.

26 Peggy Kuo "Prosecuting Crimes of Sexual Violence in an International Tribunal" (2002) 34 Case W Res J Int'l L 305 at 311.

27 See, for example, Brammertz, above n 1, and his comments in relation to a judicial perception of sexual

violence is often linked to sexual desire and viewed as "a detour, a deviation, or the acts of renegade soldiers … pegged to private wrongs and … [thus] not really the subject of international humanitarian law".[28] As will be discussed, where cases do come before the courts, the perception that rape is less serious, less violent and unconnected to wider conflict makes it difficult to link sexual violence to the common criminal plan or purpose, especially where the accused are high-level senior political or military leaders who are not the direct perpetrators.[29]

Like any crime, an instance of sexual violence during conflict might be an individual act unrelated to the wider conflict. However, rape is often not simply an unfortunate by-product of conflict. It can be directly linked with conflict, and orchestrated and foreseeable.[30] As the ICC Office of the Prosecutor has observed, situations before international criminal tribunals and courts show sexual violence is often widespread and used systematically as a "tool of war or repression".[31] The term "rape as a weapon of war" refers to sexual violence as being systematic, pervasive and orchestrated.[32] Sexual violence can be used to dishonour and demoralise the enemy, to destabilise, disempower and terrorise whole communities, or to effect genocide through deliberate impregnation or termination of existing pregnancies to disrupt the victims' on-going existence as a defined ethnic group.[33]

The United Nations Security Council has made some progress towards acknowledging the seriousness of sexual violence crimes. It has emphasised the obligation on all states to ensure that all victims of sexual violence, particularly

violence as a kind of "collateral damage".

28 Susana Sacouto and Katherine Cleary "The Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court" (2009) 17 AM U J Gender Soc Pol'y & L 339 at 348; and Jarvis and Salgado, above n 13, at 102.

29 Barbara Goy, Michelle Jarvis and Giulia Pinzauti "Contextualizing Sexual Violence and Linking it to Senior Officials: Modes of Liability" in Baron Serge Brammertz and Michelle Jarvis (eds) *Prosecuting Conflict-Related Sexual Violence at the ICTY* (Oxford University Press, Oxford, 2016) 220 at 244.

30 Blake Evans-Pritchard "ICC Restates Commitment on Crimes of Sexual Violence" (10 June 2014) Institute for War and Peace Reporting <www.iwpr.net>.

31 Office of the Prosecutor *Policy Paper on Sexual and Gender-Based Crimes* (International Criminal Court, June 2014) at [75].

32 Nicola Henry "The Fixation on Wartime Rape: Feminist Critique and International Criminal Law" (2014) 23(1) S & LS 93 at 95.

33 Lucy Fiske and Rita Shacke "Ending Rape in War: How Far Have We Come?" (2014) 6 CCSJ 123 at 127.

women and girls, have equal protection under the law and equal access to justice, recognising that:[34]

> … women and girls are particularly targeted by the use of sexual violence, including as a tactic of war to humiliate, dominate, instil fear in, disperse, and/or forcibly relocate civilian members of a community or ethnic group.

Where sexual violence is seen as a tool of war and considerable violence, it is easier to conceptualise it as part of the tapestry of crimes committed in wartime. The jurisprudence of the ad hoc war crimes tribunals has, to some extent, represented a step forward, because sexual violence crimes have come to be seen as constituting war crimes, crimes against humanity, torture and a form of genocide.[35] After initial strategic and investigative hurdles, the ICTY has concluded a body of successful prosecutions for sexual violence.[36] Moreover, the ICTR's landmark judgment in *Akayesu* significantly advanced the idea that rape is a form of genocide, stating that such acts are one of the "worst ways" to commit "infliction of serious bodily and mental harm on the victims".[37]

However, there is still work to be done. When considering individual criminal liability, sexual violence must be placed within the wider context of armed, and especially ethnic, conflict.[38] Often sexual violence is accepted as a natural and foreseeable consequence of the execution of a common criminal purpose to take, or maintain, control of a particular territory. But, as alluded to, sexual violence is regularly found to fall outside the common purpose. In this respect, the forms of individual criminal liability available at the ICC pose a particular challenge.

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34 Resolution 1820 (2008) S/Res/1820 (2008) at 1.

35 Navanethem Pillay "Address – Interdisciplinary Colloquium of Sexual Violence as International Crime: Sexual Violence: Standing by the Victim" (2012) 35(4) Law & Soc Inquiry 847 at 848; Sellers, above n 17, at 190; *Prosecutor v Akayesu (Judgment)* ICTR Trial Chamber I ICTR-96-4-T, 2 September 1998; *Tadić*, above n 4; *Prosecutor v Furundžija (Judgment)* ICTY Trial Chamber IT-95-17/1-T, 10 December 1998; *Prosecutor v Delalić (Judgment)* ICTY Trial Chamber IT-96-21-T, 16 November 1998; *Prosecutor v Kunarac (Judgment)* ICTY Trial Chamber IT-96-23-T, IT-96-23/1-T, 22 February 2001; and *Prosecutor v Krstić (Judgment)* ICTY Trial Chamber IT-98-33-T, 2 August 2001.

36 Niamh Hayes "Sisyphus Wept: Prosecuting Sexual Violence at the International Criminal Court" in William A Schabas, Yvonne McDermott and Niamh Hayes (eds) *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Ashgate Publishing, Surrey, 2013) 7 at 11.

37 *Akayesu*, above n 35, at [731].

38 Office of the Prosecutor, above n 31, at [75].

III THE CHALLENGE OF PROSECUTING SEXUAL VIOLENCE AT THE ICC

A Individual liability at the ICC

The ICC is a permanent United Nations court with jurisdiction over the most serious crimes of concern to the international community.[39] The Rome Statute, taking effect in 2002, is the founding document of the ICC. The Preamble records "during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity" and recognises that such grave crimes "threaten the peace, security and well-being of the world".[40] State signatories are determined to put an end to impunity for the perpetrators of these crimes and thus contribute to their prevention.[41]

To establish liability in relation to a high-level military or political leader at the ICC, the prosecutor must first prove commission of the underlying crime.[42] Individual criminal responsibility of the accused is then triggered for individuals who, by means of formal or informal groups, participate in collective criminal conduct related to that crime.[43] The modes of individual responsibility applied at the ICC are contained in arts 25 and 28 of the Rome Statute.[44]

Article 25(3) differentiates between four levels of participation: commission (art 25(3)(a)); instigation and ordering (art 25(3)(b)); assistance (art 25(3)(c)); and contribution to a group crime (art 25(3)(d)). The two relevant paragraphs involving common purpose liability are arts 25(3)(a)[45] and 25(3)(d). They provide:

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39 Rome Statute, art 1.

40 Preamble to the Rome Statute.

41 Preamble to the Rome Statute.

42 Article 25(3).

43 Article 25(3).

44 Article 28 relates to command responsibility and as such is not relevant for our purposes.

45 Article 25(3)(a) concerns commission of the crime through, again, several different levels: direct perpetration, where the accused physically carries out the elements of the offence; co-perpetration, where two or more people act together; indirect perpetration, where the accused acts through an agent; and indirect co-perpetration, where two or more people act together to bring about their criminal plan by using other persons as their agents: Women's Initiatives for Gender Justice *Modes of Liability: A review of the International Criminal Court's current jurisprudence and practice* (Expert Paper, November 2013) at 29. The formulation of four levels of liability was, however, challenged by Judge Van den Wyngaert in her opinion in *Prosecutor v Ngudjolo (Concurring Opinion of Judge Van den Wyngaert)* ICC Trial Chamber II ICC-01/04-02/12, 18 December 2012.

> Article 25
>
> Individual criminal responsibility
>
> …
>
> 3) In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
>
> a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
>
> …
>
> d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
>
> i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
>
> ii) Be made in the knowledge of the intention of the group to commit the crime;
>
> …

Article 25(3)(a) is a form of principal liability whereas art 25(3)(d) is a form of accessorial liability.[46] Liability under art 25(3)(a) requires essential contribution to the common plan.[47] Article 25(3)(d) is a residual or catch-all mode of liability that encompasses the broad category of contribution "in any other way … to the commission or attempted commission of such a crime by a group of

46 *Prosecutor v Lubanga (Decision on the confirmation of charges)* ICC Pre-Trial Chamber I ICC-01/04-01/06, 29 January 2007 at [337]. The Trial Chamber in *Katanga*, above n 9, at [1384] discusses the distinction between principal and accessorial liability and how that distinction plays out within art 25(3). The Trial Chamber observed the term "principal" describes persons "whose conduct *constitutes* commission of the crime per se" whereas the term "accessory" describes persons "whose conduct is solely *connected* to the commission of a crime by another person".

47 *Lubanga*, above n 46, at [347].

persons acting with a common purpose".[48] Case law requires contribution "in any other way" to at least be "significant".[49]

Aside from different requisite levels of contribution, the *Mbarushimana (Confirmation of Charges Decisio*n) Pre-Trial Chamber defined "a group of persons acting with a common purpose" in the context of art 25(3)(d) as "functionally identical" to an "agreement or common plan between two or more persons" under art 25(3)(a).[50]

In relation to framing the common purpose, the *Katanga* Trial Chamber stated, in the context of art 25(3)(d), that:[51]

> … definition of the criminal purpose of the group presupposes specification of the criminal goal pursued; its scope, by pinpointing its temporal and geographic purview; the type, origins or characteristics of the victims pursued; and the identity of the members of group, although each person need not be identified by name.

The purpose must be to commit a crime or encompass its execution.[52] A political and strategic goal that also entails criminality or the execution of a crime may constitute a common purpose.[53] Proof that the common purpose was previously arranged is not required; it may materialise extemporaneously.[54]

Participants in the common purpose, in the context of art 25(3)(d), must harbour the same intent: they must mean to cause that consequence which constitutes the crime or be aware that the crime will occur in the ordinary course of events.[55] That mens rea requirement reflects art 30 of the Rome Statute, which in turn defines the requirements of intent and knowledge.[56] An accused must intend to engage in the conduct that constitutes a contribution

48 At [337].

49 By use of the term "significant contribution" the Trial Chamber stressed a contribution "which may influence the commission of the crime" and noted "[c]onduct inconsequential and immaterial to the commission of the crime" was not sufficient to constitute contribution within the meaning of art 25(3)(d). See *Katanga*, above n 9, at [1632].

50 *Prosecutor v Mbarushimana (Decision on the confirmation of charges)* ICC Pre-Trial Chamber I ICC-01/04-01/10, 16 December 2011 at [271].

51 *Katanga*, above n 9, at [1626].

52 At [1627].

53 At [1627].

54 At [1626].

55 At [1627].

56 At [1637].

and also must be aware that such conduct contributed to the activities of the group of persons acting with a common purpose.[57] Knowledge is inferred from the relevant facts and circumstances and must be connected to the group's intention to commit the specific crimes.[58]

While the ICTY has considered joint criminal enterprise is "closely akin"[59] and "substantially similar" to art 25(3)(d) of the Rome Statute,[60] the ICC has rejected joint criminal enterprise, instead favouring art 25(3) as an exhaustive list of the modes of liability available.[61] Importantly, therefore, the ICC does not have a direct equivalent to extended joint criminal enterprise, where liability can be founded in crimes that are not within the common criminal purpose but are nevertheless natural and foreseeable consequences of its execution. The framing of the common purpose is therefore crucial for the successful prosecution of sexual violence at the ICC.[62]

B Prosecutor v Katanga

Prosecutor v Katanga and Ngudjolo Chui was the first case involving sexual violence crimes to complete full trial at the ICC, the Court giving judgment in 2014.[63] The case centred on an attack on a village in the Ituri region of the Democratic Republic of Congo by militia groups, the *Force de résistance patriotique en Ituri* (FRPI) and the *Front des nationalistes et intégrationnistes* (FNI) on 24 February 2003. Generals Katanga and Ngudjolo were the alleged commanders of the FRPI and FNI, respectively.[64]

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57 At [1639].

58 At [1642].

59 *Lubanga,* above n 46, at [335].

60 *Tadić*, above n 4, at [222].

61 *Prosecutor v Lubanga (Warrant of Arrest)* ICC Pre-Trial Chamber I ICC-01/04-01/06, 10 February 2006; Stefano Manacorda and Chantal Meloni "Indirect Perpetration *versus* Joint Criminal Enterprise: Concurring Approaches in the Practice of International Criminal Law?" (2011) 9 JICJ 159 at 163–64.

62 Goy, Jarvis and Pinzauti, above n 29, at 259.

63 *Katanga*, above n 9.

64 On 21 November 2012, Trial Chamber II severed the cases against Ngudjolo and Katanga. Ngudjolo was charged with seven counts of war crimes and three counts of crimes against humanity. However, he was subsequently acquitted of all charges under art 25(3)(a) as the Chamber concluded that the three key witnesses called by the Prosecution to establish Ngudjolo's authority as lead commander of the Lendu militia as required under that article were not credible. The Appeals Chamber confirmed the Trial Chamber's reasoning. See *Prosecutor v Ngudjolo Chui (Judgment pursuant to article 74 of the Statute)* ICC Trial Chamber II ICC-01/04-02/12, 18 December 2012 at [7]–[10]; and *Prosecutor v Ngudjolo Chui (Judgment on the Prosecutor's appeal against the decision of Trial Chamber II*

General Katanga was charged under art 25(3)(a) with seven counts of war crimes[65] and three counts of crimes against humanity.[66] The Trial Chamber unanimously acquitted Katanga of all charges under art 25(3)(a) liability.[67] The Chamber found that the "absence of a centralised and effective chain of command" meant that the militia were not an organised apparatus of power, nor did Katanga have the extent of control requisite for liability under art 25(3)(a).[68] The majority, Judge Van den Wyngaert dissenting,[69] then re-characterised the mode of liability for all charges, with the exception of using child soldiers, in order to consider Katanga's responsibility as an accessory to the crimes under art 25(3)(d).[70]

The majority found the underlying charges were established because the evidence proved beyond reasonable doubt that the Ngiti combatants of the Walendu-Bindi *collectivité* had committed the crimes.[71] The manner in which the village was attacked from all directions, and the fact the villagers were "systematically targeted" in accordance with a "regular pattern and violence" confirmed the "existence of a common purpose of a criminal nature" held by the Ngiti militia with regard to the village population.[72] The Trial Chamber subsequently convicted Katanga as an accessory for the crimes of wilful killing, attacks against the civilian population, pillaging and destruction of property.[73]

The Trial Chamber acquitted Katanga as an accessory for the crimes of rape and sexual slavery.[74] The Chamber concluded that rape and sexual slavery

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entitled "Judgment pursuant to article 74 of the Statute") ICC Appeals Chamber ICC-01/04-02/12-A, 7 April 2015.

65 Wilful killing, directing an attack against a civilian population, destruction of property, pillaging, using child soldiers under the age of 15 years, sexual slavery and rape: *Katanga*, above n 9, at [7].

66 Murder, sexual slavery, and rape: at [7] and [10].

67 *Katanga*, above n 9, at [1421].

68 At [1420].

69 The Judge's view was that the re-characterisation of the facts went well beyond the facts and circumstances of the Confirmation Decision and failed to respect Katanga's rights to a fair trial and dissented fundamentally on the reading of the evidence as a whole, finding that the evidence as to art 25(3)(d) liability was insufficient to meet the standard of beyond reasonable doubt: *Prosecutor v Katanga (Minority Opinion of Judge Van den Wyngaert)* ICC Trial Chamber II ICC-04/04-01/07, 7 March 2014 at [2]–[3].

70 *Katanga*, above n 9, at [1484].

71 At [1652].

72 At [1656]–[1657].

73 At [1691].

74 At [1664].

did not fall within the common purpose.[75] There was no evidence to establish that the sexual violence crimes were committed "on a wide scale and repeatedly" during the attack, or that the "obliteration of the village of Bogoro perforce entailed the commission of such acts". [76] Moreover, it was not established that rape or sexual slavery had been committed by the Ngiti combatants before the attack on Bogoro,[77] which may have pointed towards the necessary inclusion of sexual violence in the Ngiti militia's design to attack the predominately Hema population. Finally, the Chamber found that "women who were raped, abducted and enslaved were specifically 'spared'" and "evaded certain death by claiming to be other than of Hema ethnicity".[78]

A unique challenge in the *Katanga* case was that, in part, the finding that the sexual violence crimes did not fall within the common criminal purpose was a result of the fact that the female victims of the sexual violence were not of the same ethnicity as other victims targeted by the common criminal purpose. While that particular issue poses an extra level of complexity outside the focus of this article, a more general observation can be made: sexual violence, alone, was found to have been outside the common purpose of the Ngiti combatants. Accordingly, General Katanga was not convicted for commission as a principal or as an accessory. This is in contrast to the other violent crimes established to be within the common purpose.

IV INDIVIDUAL LIABILITY AT THE ICTY: JOINT CRIMINAL ENTERPRISE

A Individual liability at the ICTY

The ICTY was a United Nations ad hoc tribunal formally established in 1993 with jurisdiction over the crimes that took place during the conflicts in the Balkans in the late twentieth century. The ICTY was established in an international environment that sought justice for sexual violence crimes in armed conflict.[79] The United Nations Security Council singled rape out as one of the particularly reprehensible crimes committed during the conflict in

75 At [1664].

76 At [1663].

77 At [1663].

78 At [1663].

79 Jarvis and Salgado, above n 13, at 101.

former Yugoslavia and expressed its commitment to establishing accountability for these crimes as a core part of the ICTY's mandate.[80] Despite that political climate, the ICTY faced initial strategic and investigative hurdles.[81] In the early days of the ICTY, the rate of convictions for sexual violence was low compared to other forms of violent crimes.[82]

The turning point, according to the ICTY's Chief Prosecutor, came with the Tribunal's acceptance that military and political leaders could be individually responsible for foreseeable crimes.[83] For example, where a leader sent troops into a village intending that physically violent crimes would be committed it may also have been foreseeable to her or him that sexual violence would take place. If sexual violence is foreseeable, the leader in question can be convicted for those physically violent and sexually violent crimes.[84]

Under the ICTY Statute,[85] personal liability is triggered for individuals who, by means of formal or informal groups, participate in collective criminal conduct. Individual responsibility may involve personal commission or liability for actions of others. Article 7(1) provides:

> A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

The concept of joint criminal enterprise as a mode of liability was established principally in the *Tadić* appeal judgment.[86] Although the Statute makes no explicit reference to "joint criminal enterprise", participation in a joint criminal enterprise is also a form of commission under art 7(1).[87] Joint criminal enterprise imputes criminal responsibility to a defendant for her or his participation

80 SC Res 808, S/Res/808 (1993); and SC Res 827, S/Res/827 (1993).

81 See the comment cited above in Kuo, above n 26, at 311: "I've got ten dead bodies, how do I have time for rape?"

82 See Interview with Brammertz, above n 1.

83 See Interview with Brammertz, above n 1. In fact, William Schabas has described extended joint criminal enterprise as the "magic bullet" of the Office of the Prosecutor, raising his concern regarding the potential for broad interpretation of its liability-imposing provisions: Schabas "Mens Rea and the International Criminal Tribunal for the Former Yugoslavia" (2003) 37(4) New Eng L Rev 1015 at 1032.

84 Interview with Brammertz, above n 1.

85 As adopted by SC Res 827 (1993), above n 80.

86 *Tadić*, above n 4.

87 *Prosecutor v Kvočka (Judgment)* ICTY Appeals Chamber IT-98-30/1-A, 28 February 2005 at [79].

in a group's common criminal purpose. Any person who contributes to the commission of crimes by the group in execution of the common criminal purpose may be liable for crimes within the common purpose and those that, while outside the common purpose, were reasonably foreseeable.[88]

There are three categories of joint criminal enterprise: basic, systemic and extended. The actus reus requirements for all categories are identical:[89]

i) a plurality of persons;

ii) the existence of a common purpose, which amounts to or involves the commission of a crime provided for in the Statute; and

iii) contribution to the common purpose.

A plurality of persons must be identified, but it is not necessary to identify every person by name.[90] The plurality need not be organised in a military, political, or administrative structure.[91] In cases where the principal perpetrator of a particular crime is not a member of the joint criminal enterprise, members of a joint criminal enterprise may still be held liable for crimes committed by the principal perpetrator where the crime in question forms part of the common purpose.[92] More importantly, where the principal perpetrator is not a member of the joint criminal enterprise, the court must establish the crime can be imputed to at least one member of the joint criminal enterprise and that this member acted in accordance with the common plan.[93]

A common criminal purpose can be expressly criminal, for example, a purpose to kill. It may also amount to or involve the commission of a crime, for example to ensure continued control over a territory to be achieved through forcible displacement.[94] The purpose need not be premeditated. It may materialise extemporaneously.[95]

Contribution to the common purpose need not involve the physical commission of a crime. It may take the form of assistance in, or contribution

88 *Tadić*, above n 4, at [190].

89 At [227].

90 *Prosecutor v Brđanin (Judgment)* ICTY Appeals Chamber IT-99-36-A, 3 April 2007 at [430].

91 *Tadić*, above n 4, at [227].

92 *Brđanin*, above n 90, at [410].

93 At [430].

94 Discussed in the context of *Prosecutor v Milutinović* below.

95 *Tadić*, above n 4, at [227].

to, the execution of the common plan or purpose.[96] Although the contribution need not be necessary or substantial, it should at least be a significant contribution to the crimes charged.[97] For example, in a common purpose to kill, participation may involve inflicting non-fatal violence upon the victim or providing material assistance to the perpetrators.

The mens rea requirements differ according to the category of joint criminal enterprise:[98]

i) Basic joint criminal enterprise requires a voluntary contribution to the common purpose and the accused to intend, together with other members, the crime committed as part of the plan.[99]

ii) Systemic joint criminal enterprise addresses the specific subject matter of concentration camps[100] and as such is not relevant for the purposes of this article.

iii) Extended joint criminal enterprise concerns circumstances where a member or tool of a member of the plurality commits an act that, while not a crime intended by the plurality, was nevertheless a natural and foreseeable consequence of executing the common purpose.[101] The *Tadić* Appeals Chamber gave the following example:[102]

> … the participants must have had in mind the intent, for instance, to ill-treat prisoners of war … and one or some members of the group must have actually killed them. In order for responsibility for the deaths to be imputable to the others, however, everyone in the group must have been able to *predict* this result.

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96 *Prosecutor v Vasiljević, (Judgment)* ICTY Appeals Chamber IT-98-32-A, 25 February 2004 at [100].

97 *Brđanin*, above n 90, at [430]. The Trial Chamber in *Prosecutor v Milutinović (Judgment)* ICTY Trial Chamber IT-05-87-T, 26 February 2009 at [105] observed that the accused's acts and omissions "must form a link in the chain of causation". Relevant for our purposes, an accused's leadership status and approving silence militates in favour of finding that her or his participation was significant. Other factors to consider include the size of the enterprise, the functions performed by the accused and her or his efficiency in performing them and any efforts made by the accused to impede the efficient functioning of the joint criminal enterprise.

98 *Tadić*, above n 4, at [228].

99 At [196].

100 At [202].

101 At [204].

102 At [220].

Something more than negligence is required for extended joint criminal enterprise.[103] The requisite standard is of advertent recklessness.[104] While the accused need not intend the result, the accused must have been aware the actions of the group were most likely to lead to that result.[105] There need not be a "probability" that a crime would be committed, only that the possibility of a crime being committed is "substantial" such that it is foreseeable to the accused.[106]

B Introduction to the ICTY Kosovo cases

In 1989, the Socialist Federal Republic of Yugoslavia (SFRY) comprised six republics and two autonomous provinces. The autonomous provinces, Kosovo and Vojvodina, also formed part of the Socialist Republic of Serbia. After the SFRY broke apart, a political crisis developed in Kosovo throughout the 1990s, during which time the newly formed Federal Republic of Yugoslavia (FRY) and Serbia sought to restrict the substantial autonomy previously enjoyed by Kosovo.[107]

The crisis culminated in an armed conflict involving forces of the FRY and Serbia and the Kosovo Liberation Army (KLA) from mid-1998. During that armed conflict excessive and indiscriminate force was used by the FRY army, the Vojska Jugoslavije (VJ) and Ministry of the Interior Police force (MUP). Diplomatic efforts failed and, in March 1999, NATO forces began an aerial bombardment campaign against targets in the FRY. During the NATO air campaign, the FRY and Serbian forces implemented a widespread and systemic campaign of terror and violence resulting in mass displacement of the civilian population. In the first week of the NATO bombing, over 300,000

103 *Tadić*, above n 4, at [220].

104 At [220].

105 At [220]. In New Zealand, the term "advertent recklessness" is used to describe subjective recklessness, see for example *Cameron v R* [2017] NZSC 89, [2018] 1 NZLR 161 at [67] and the footnotes there; and *Couch v Attorney-General* [2010] NZSC 27, [2010] 3 NZLR 149 at [46]. However, some questions have been raised as to whether the recklessness standard at the ICTY is objective or subjective. See further Antonio Cassese *International Criminal Law* (2nd ed, Oxford University Press, New York, 2008) at 200–201; and A Danner and J Martinez "Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law" (2005) 93(1) CLR 75 at 106.

106 *Prosecutor v Karadžić (Decision on Radovan Karadžić's Motions Challenging Jurisdiction (Omission Liability, JCE-III — Special Intent Crimes, Superior Responsibility))* ICTY Appeals Chamber IT-95-5/18-AR72.1, IT-95-5/18-AR72.2, IT-95-5/18-AR72.3, 25 June 2009 at [18].

107 *Milutinović*, above n 97, Vol I at [213]–[221].

Kosovo Albanians crossed borders to Albania and Macedonia. By 1 May 1999, that number was 715,158.[108]

C Prosecutor v Milutinović

Prosecutor v Milutinović (upon appeal, *Šainović)* involved six accused tried for the forcible displacement of Kosovo Albanians in 1999. The accused were alleged to be responsible for deportation, forcible transfer, murder and persecution through, among other things, sexual violence.[109]

The Trial Chamber was satisfied there was a plurality of persons acting in a joint criminal enterprise.[110] Šainović, Pavković and Lukić were found to have been members of this joint criminal enterprise.[111] Milutinović was acquitted.[112] Ojdanić[113] and Lazarević[114] were deemed not to have been joint criminal enterprise members but rather aiders and abettors.

According to the Trial Chamber findings, the common purpose of the joint criminal enterprise was to ensure continued control by the FRY and Serbian Authorities of Kosovo, which was to be achieved by a widespread and systematic campaign of terror and violence to forcibly displace the Kosovo Albanian population both within and outside Kosovo.[115]

When making this finding, the Trial Chamber considered the wider context of historical and political ethnic divides, including "widespread and systemic" attacks to create an "atmosphere of terror", including the "excessive use of force".[116] Evidence of this common purpose included a discernible pattern of forcible displacement, the destruction of Kosovo Albanian identity

108 *Prosecutor v Milutinović (Judgment Summary)* ICTY Trial Chamber IT-05-87-T, 26 February 2009 at 3.

109 *Milutinović*, above n 97, Vol I at [6]. The crime of persecution consists of an act or omission which discriminates in fact and denies or infringes upon a fundamental right laid down in international customary or treaty law (the actus reus); and was deliberately carried out with the intention to discriminate on one of the listed grounds, specifically race, religion or politics: *Prosecutor v Kvočka*, above n 87, at [320].

110 Vol III at [97].

111 Discussed in more detail below.

112 On the basis the Chamber was not satisfied beyond reasonable doubt he made a significant contribution to the joint criminal enterprise: *Milutinović (Judgment Summary)*, above n 108, at 12.

113 On the basis it was not proved beyond reasonable doubt that he shared the intent to ensure continued state control over the province by way of deportation and forcible transfer: at 13.

114 Also on the basis it was not proved beyond reasonable doubt that he shared the intent to ensure continued state control over the province by way of deportation and forcible transfer: at 13.

115 *Milutinović*, above n 97, Vol III at [95].

116 Vol III at [41], [48] and [90]–[91].

documents, the context of ethnic conflict, the disarming of Kosovo Albanians and the arming of Serbs and Montenegrins, attempts to obstruct justice, and partial responsibility for the failure of international peace negotiations.[117]

The Trial Chamber concluded the common purpose was to be achieved through deportation and forcible transfer alone.[118] As there was no clear pattern of murder, sexual assault or destruction of cultural property, the Trial Chamber was not satisfied those crimes fell within the common purpose.[119]

Following the establishment of the first two actus reus requirements, the Trial Chamber individually assessed the contribution of each member to the joint criminal enterprise and mens rea in the following ways.[120]

1 Pavković

Pavković was Commander of the third army of the VJ. The Trial Chamber was satisfied Pavković's actions were voluntary and that he had the intent to ensure continued control by the FRY and Serbian authorities over Kosovo through forcible displacement.[121] "Ineffective" and "manifestly insufficient"[122] measures to protect civilians "contributed to the creation and maintenance of an environment of impunity" among Pavković's soldiers.[123] Information Pavković received before and during the NATO air campaign combined with his awareness of allegations of "excessive and indiscriminate use of force" were indicative of his intent to participate in forcible transfer and deportation.[124]

Pavković's contribution to the joint criminal enterprise was found to have been significant. He possessed extensive de jure powers and command authority over VJ forces and influence that extended further.[125]

The Trial Chamber found that murder in multiple locations and sexual assaults in Beleg and Ćirez were foreseeable to Pavković. Pavković was "aware of the strong animosity" between the Serbs and Kosovo Albanians and

117 *Milutinović*, above n 97, Vol III at [40], [72], [85], [87]–[88] and [92].
118 At [469], [784] and [1133].
119 At [94].
120 At [98].
121 At [772].
122 At [777].
123 At [782].
124 At [774].
125 At [785].

of the context in which the displacement took place. Pavković's "detailed knowledge of events on the ground" put him on notice that murders and sexual crimes would be committed by the VJ and MUP.[126] Pavković issued specific orders that steps were to be taken to prevent the civilian population from being robbed, raped or mistreated, thereby indicating the foreseeability of the crimes to him. He also wrote reports referring to murder and rape committed by volunteers and MUP forces.[127] Accordingly, Pavković was convicted of sexual assault as persecution for the events that occurred in Beleg and Ćirez.[128]

The Appeals Chamber confirmed the Trial Chamber's reasoning. It also reversed the Trial Chamber's finding that three additional sexual assaults committed in Priština in April and May 1999 were not committed with discriminatory intent.[129]

2 *Šainović and Lukić*

Šainović was the Deputy Prime Minister of the FRY.[130] Lukić was the Head of the MUP Staff for Kosovo.[131] The Trial Chamber was satisfied both Šainović's and Lukić's actions were voluntary.[132] Given their awareness of the humanitarian catastrophe[133] and Lukić's awareness of crimes being committed by MUP and VJ members,[134] as well as their continued involvement in the joint criminal enterprise, they were found to have had the intent to forcibly displace the Kosovo Albanian population.[135]

Šainović contributed significantly to the joint criminal enterprise, as his role was to "orchestrate" events in Kosovo by conveying the FRY President's

126 At [785].

127 At [785].

128 At [788]. I note here the Trial Chamber's analysis applied the "probability" threshold to foreseeability, determining whether it was foreseeable to the accused that the sexual assault would be committed: Vol I at [111].

129 *Šainović*, above n 7, at [579]–[600].

130 *Milutinović,* above n 97, Vol III at [285].

131 At [945].

132 At [462] and [1117].

133 At [462]–[463] in relation to Šainović.

134 At [1117], [1123]–[1124] and [1129].

135 Vol III at [463]–[466], and in regard to Lukić at [1117], [1123]–[1124] and [1129].

instructions and co-ordinating the VJ and MUP.[136] Lukić's contribution was significant because he was directly involved in day-to-day operations as de facto commander over MUP forces. He acted as a bridge between high-level military and political leaders and those on the ground in Kosovo.[137]

The Trial Chamber considered, however, that sexual assaults were not reasonably foreseeable to either of the accused. Evidence of Šainović's and Lukić's knowledge only showed specific knowledge of sexual offences in May 1999. The evidence therefore did not demonstrate that sexual assaults committed in March and April in Beleg and Ćirez were reasonably foreseeable.[138] The Trial Chamber therefore acquitted Šainović and Lukić of committing persecution through sexual assault.[139]

Judge Chowhan issued a partially dissenting opinion regarding the foreseeability of sexual assault of Kosovo Albanian women to Šainović and Lukić. The one paragraph judgment recorded Judge Chowhan's view that, in the context of an armed conflict in which "able-bodied military and security forces" use violence to remove civilians from their homes, "prudence and common sense" as well as instances of sexual violence in historic conflicts in the region meant that sexual assaults "were certainly foreseeable realities".[140]

A majority in the Appeals Chamber reversed both Šainović and Lukić's acquittals for persecution through sexual violence in Beleg, Ćirez and Priština.[141] The Appeals Chamber used the lower threshold of possibility to determine foreseeability, that having been determined in the intervening time as the applicable standard in *Karadžić*.[142] It was therefore the case "that the possibility a crime could be committed is sufficiently substantial as to be foreseeable to the accused".[143]

The majority found that in light of the accuseds' awareness of the atmosphere of aggression, violence, ethnic animosity, and the forcible displacement of Kosovo

136 *Milutinović*, above n 97, Vol III at [467].

137 At [1131].

138 At [472]–[1135]. As in relation to Pavković, the Trial Chamber applied a higher standard of foreseeability, that of "probability".

139 At [472]–[1135].

140 *Prosecutor v Milutinović (Partially dissenting opinion of Judge Chowhan)* ICTY Trial Chamber IT-05-87-T, 26 February 2009.

141 *Šainović*, above n 7, at [1582] and [1592].

142 At [1557].

143 At [1557].

Albanian women, which rendered them especially vulnerable, both Šainović and Lukić "must have been aware" that sexual assaults could be committed on discriminatory grounds.[144] The accuseds were aware of various criminal acts and acts of violence, including allegations of "excessive and disproportionate" force used by police and military, displacement of civilians, property related crimes such as looting and arson, harassment of civilians, breaches of international humanitarian law against the Kosovo Albanian population and the existing "humanitarian catastrophe".[145] In addition, Lukić was regularly informed of events and there was evidence he knew of specific incidents of rapes as well as the general risk of their commission in May and April of 1999.[146] Šainović learned of specific instances of rapes in May 1999.[147] The "inescapable conclusion" was Šainović and Lukić knew Kosovo Albanian women who were forced out of their homes were "rendered particularly vulnerable".[148]

Judge Liu, the Presiding Judge, dissented on the foreseeability of sexual violence to Šainović. According to him, the evidence did not establish Šainović was informed before 17 May 1999 of the commission of rapes or sexual violence against women by the Serbian forces.[149] He considered the majority's reliance on the totality of the circumstances was "unpersuasive and speculative".[150] It was not the only reasonable conclusion on the facts, taking into account Šainović's position as political coordinator, his distance from sites where crimes occurred, his distant relationship to the direct perpetrators and the information available to him.[151] Judge Liu noted he was:[152]

> … mindful that in the context of [extended joint criminal enterprise] liability, it is not essential that an accused be aware of the past occurrence of a crime in order for the same crime to be foreseeable to him.

However, he considered that "foreseeability must be established in light of the

144 At [1581] and [1591]. Judge Liu dissented in relation to Šainović.

145 At [1581] and [1591].

146 At [1589] and [1591].

147 At [1582], [1586] and [1591].

148 At [1581] and [1591].

149 *Prosecutor v Šainović (Partially dissenting opinion and declaration of Judge Liu)* ICTY Appeals Chamber IT-05-87-A, 23 January 2014 at [8].

150 At [7].

151 At [7]–[8].

152 At [8].

information available to the accused and the particular circumstances of the case".[153]

The majority declined to enter new convictions against Šainović and Lukić regarding persecution through sexual violence. They considered the discretion to enter a new conviction must be exercised on proper judicial grounds, balancing factors such as fairness to the accused, the interests of justice, the nature of the offences, the circumstances of the case on the one hand and considerations of public interest on the other.154

Judge Ramaroson dissented from the majority's decision not to enter new convictions. Refusing to enter convictions resulted, in the Judge's view, in leaving unpunished crimes of persecution in the form of sexual violence.[155] The decision not to enter convictions failed to determine the indictments entered by the prosecution, undermined judicial truth and left victims without any real answer.[156]

3 Đorđević

Prosecutor v Đorđević concerned Vlastimir Đorđević, the Assistant Minister of the Serbian MUP responsible for all police units and personnel in Serbia, including Kosovo, between 1 January and 20 June 1999. He was charged for his participation in the deportation and forcible transfer of Kosovo Albanian civilians.[157]

Đorđević was originally charged in the indictment in the *Miluntinović* case but his case was severed when he was not captured.[158] Although tried separately and by a different bench due to his late capture, Đorđević was found to be a member of the plurality of persons involving Šainović, Lukić and Pavković, among others.[159]

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153 At [8].

154 *Šainović*, above n 7, at [1604], citing *Prosecutor v Jelisić (Judgment)* ICTY Appeals Chamber IT-95-10-A, 5 July 2001. As a result, no convictions were entered against Šainović and Lukić despite the Appeals Chamber finding the Trial Chamber incorrectly found the accuseds not guilty of the crimes of persecution through sexual assaults.

155 *Prosecutor v Šainović (Dissenting Opinion of Judge Ramaroson)* ICTY Appeals Chamber IT-05-87-A, 23 January 2014 at [7].

156 At [8].

157 *Prosecutor v Đorđević (Judgment)* ICTY Trial Chamber II IT-05-87/1-T, 23 February 2011 at [2].

158 *Prosecutor v Miluntinović (Order replacing third amended joinder indictment and severing Vlastimir Đorđević from the trial)* ICTY Trial Chamber IT-05-87-PT, 26 June 2006.

159 At [2127].

A common plan was found to have existed among the senior political, military and police leadership to modify the ethnic balance of Kosovo by waging a "campaign of terror" against the Kosovo Albanian civilian population.[160] The Trial Chamber considered the:[161]

> … effect of the actions of Serbian forces to terrorise Kosovo Albanians was so grave that many fled from their homes … it is clear their decision to leave was not a matter of a choice but was driven by fear of the consequences of staying.

The Trial Chamber also held that in order to achieve these goals, forcible transfer, deportation, murder and the destruction of homes and villages, as well as cultural property were all intended by the plurality as a means to implement the plan.[162] These crimes were committed in the course of pre-planned and coordinated actions by Serbian forces. Orders and directives pertaining to the operations did not explicitly order the crimes, but were vaguely framed and deliberately so, such that commanders and units could implement them as they saw fit.[163]

Đorđević was found to have voluntarily and significantly contributed to the campaign of terror given his role as a senior MUP official; his contribution to the deployment of paramilitary units; his concealment of the murder of civilians; and his failure to take any measures to ensure the investigation or punishment of those involved.[164]

The Trial Chamber accepted two instances of sexual assault had occurred in Priština and in Beleg.[165] However, the Trial Chamber was not satisfied that such assaults had been committed with the discriminatory intent required for the crime of persecution, noting that no specific evidence was provided to

160 *Đorđević* ICTY Trial Chamber, above n 157, at [2126].

161 At [2129].

162 At [2135]. Note that, while *Đorđević* involved essentially the same plurality of persons as *Miluntinović*, the Trial Chamber considered the common criminal plan to include murder and destruction of cultural property alongside forcible displacement and deportation. This led to a number of peculiarities and inconsistencies between the cases. See also Judge Güney's dissent in the *Đorđević* Appeals Chamber case where he discusses this inconsistency: *Prosecutor v Đorđević (Partially Dissenting Opinion of Judge Güney)* ICTY Appeals Chamber IT-05-87/1-A, 27 January 2014 at [4]–[11].

163 *Đorđević* ICTY Trial Chamber, above n 157, at [2132].

164 At [2154]–[2157].

165 At [1796]. Five other allegations of sexual assault were found to be unproven in absence of further evidence, see [1792] and [1794]–[1795].

show such intent.[166] While the victims in each of the incidents were Kosovo Albanians and the perpetrators were members of the Serbian forces, the Chamber considered that because of the limited number of incidents relied upon, the ethnicity of two victims alone was not a sufficient basis to establish the perpetrators acted with discriminatory intent.[167]

The Appeals Chamber reversed the acquittals on charges of sexual violence, finding that the crime of persecution had been established with the requisite discriminatory intent.[168] The Appeals Chamber found the Trial Chamber erred in finding the evidence was insufficient to prove sexual assault in three instances of persecution through sexual assault made in relation to a girl in Priština,[169] and two women in Beleg, alongside the sexual violence accepted by the Trial Chamber above.[170] The Appeals Chamber found in all five instances, sexual assault was committed with the requisite discriminatory intent for the crime of persecution.[171]

The Appeals Chamber also had "no doubt" that sexual assaults were a natural and foreseeable consequence of the common purpose.[172] The Appeals Chamber noted the Trial Chamber's finding that a "core element of the common plan was the creation of an atmosphere of violence and fear or terror among the Kosovo Albanian population" by committing violent crimes. The common plan was aimed at modifying the ethnic balance of Kosovo. Women, as well as men and boys, were targeted and killed with the intent to instil fear.[173] Massive columns of displaced Kosovo Albanians left their towns and villages, escorted by Serbian forces who continued to intimidate and abuse the civilians. In these circumstances, the civilians were "left highly vulnerable, lacking protection, and exposed to abuse and mistreatment by members of the Serbian forces".[174] Men and women were frequently separated by Serbian forces acting with near impunity, rendering women especially vulnerable to being

166 *Đorđević* ICTY Trial Chamber, above n 157, at [2150] and [1796].

167 At [1796].

168 *Đorđević* ICTY Appeals Chamber, above n 8, at [901].

169 At [853]–[859].

170 At [860]–[869].

171 At [886]–[901].

172 At [922].

173 At [921].

174 At [921].

subjected to violence, "including violence of a sexual nature as one of the most degrading and humiliating forms".[175]

Given Đorđević's knowledge of the conduct of operations, the overall security situation on the ground in Kosovo, and specific commission of serious crimes (looting, torching of houses, excessive use of force and murder), there was a sufficiently substantial possibility sexual assaults might be committed, which made these assaults foreseeable to him. He willingly took that risk when he participated in the joint criminal enterprise.[176] The Appeals Chamber was satisfied that, in light of his knowledge of the persecutory nature of the campaign, it was foreseeable to Đorđević that sexual assaults might be carried out with discriminatory intent.[177]

The Appeals Chamber, Judge Güney and Judge Tuzmukhamedov dissenting in part, found Đorđević guilty of committing persecution through sexual assaults as a crime against humanity in relation to the five allegations. Convictions were entered accordingly.[178]

Judge Tuzmukhamedov in the Appeals Chamber issued a partially dissenting opinion on the foreseeability of sexual violence crimes to Đorđević. He considered the majority "loosely" connected the general context of the conflict in Kosovo with the accused's position in order to conclude that it was foreseeable to him that these crimes might be committed.[179] The Judge was doubtful whether the majority's inference of the foreseeability of sexual assaults from the commission of other distinct types of crimes was appropriate. He noted the majority did not point to specific evidence establishing Đorđević knew of the factors placing women in a vulnerable position at the relevant time.[180] The outcome was problematic with respect to the principle of individual guilt and Judge Tuzmukhamedov questioned how Đorđević could have successfully defended himself against the majority's generalisations.[181]

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175 At [922].

176 At [924]–[926].

177 At [926].

178 Judge Güney, noting the approach that was preferred by the majority in the corresponding *Šainović* case, considered convictions should not be entered on appeals: *Đorđević (Partially Dissenting Opinion of Judge Güney)*, above n 162, at [6].

179 *Prosecutor v Đorđević (Dissenting Opinion of Judge Tuzmukhamedov)* ICTY Appeals Chamber IT-05-87/1-A, 27 January 2014 at [64].

180 At [66].

181 At [67].

V LINKING SEXUAL VIOLENCE TO THE COMMON PURPOSE

A Evidence: the starting point

It is of course acknowledged that every case must be decided on its particular facts and the evidence before the court or tribunal. There will be some cases in which the prosecutors will not have been able to gather enough evidence upon which to ground a conviction. That is because there are considerable hurdles to gathering evidence that may result in a fruitless investigation. Evidence of sexual violence is not always obvious — it is not a burnt village or dead bodies. Documentary evidence is uncommon in comparison to victim testimony. Victims may not want to re-live trauma and may be unfamiliar with and mistrustful of court processes.[182] Victims and witnesses may also face social ostracism. These factors can all impact upon the willingness of witnesses to participate in criminal proceedings.[183] For example, ICTY Chief Prosecutor Brammertz tells of a victim reporting in 2017 that she had been raped in 1994. The victim reported the crime in 2017 because she waited for her husband to die first. She said she would never have reported the rape while he was alive.[184] This can result in a dearth of evidence upon which the prosecution can rely to establish the requisite legal elements for liability.

In some cases, though, there is evidence pointing towards a common purpose involving sexual violence crimes. The strength of that evidence may vary. This is not an easy line to tread and judicial minds do differ. For example, the concern that the available evidence was not enough to ground a conviction was raised by Judge Van den Wyngaert, who dissented fundamentally in *Katanga* on the reading of the evidence as a whole. The Judge considered the evidence going to art 25(3)(d) liability was insufficient to meet the standard of beyond reasonable doubt.[185] While her comments were not directed specifically at sexual violence crimes, she does provide a poignant warning against the relaxation of legal standards:[186]

182 Michelle Jarvis and Kate Vigneswaran "Challenges to Successful Outcomes in Sexual Violence Cases" in Serge Brammertz and Michelle Jarvis (eds) *Prosecuting Conflict-Related Sexual Violence at the ICTY* (Oxford University Press, Oxford, 2016) 33 at 42.

183 Ní Aoláin, Haynes and Chan, above n 22, at 438.

184 Interview with Brammertz, above n 1.

185 *Katanga (Minority Opinion of Judge Van den Wyngaert),* above n 69, at [317].

186 At [310].

> Sympathy for the victims' plight and an urgent awareness that this Court is called upon to "end impunity" are powerful stimuli. Yet, the Court's success or failure cannot be measured just in terms of "bad guys" being convicted and innocent victims receiving reparation. Success or failure is determined first and foremost by whether or not the proceedings, as a whole, have been fair and just.

The same concerns were echoed in the ICTY cases discussed above. Judge Tuzmukhamedov and Judge Liu dissented as to the foreseeability of sexual violence in *Đorđević* and *Šainović*, respectively.[187] Both Judges expressed concerns about the majority's use of general circumstances, rather than specific evidence, when reversing the Trial Chambers' acquittals. To have any legitimacy, a conviction for sexual violence requires an adequate evidential foundation. That is undeniable.

However, even where there is an evidential foundation pointing towards the inclusion of sexual violence within the common purpose, the challenge for the prosecution is well articulated by Barbara Goy, Michelle Jarvis and Giulia Pinzauti as they reflect on their time prosecuting at the ICTY:[188]

> While in principle the foreseeability requirement applies to all categories of crimes—not just sexual violence—in practice we have seen that particular challenges emerge in persuading fact-finders that sexual violence is foreseeable. Our experience suggests a risk that sexual violence crimes may be conceptualized differently from other violent crimes because of their sexual component and that this may result in higher evidentiary standards being applied to prove foreseeability in sexual violence cases.

The ostensible sexual nature of sexual violence crimes can obscure the violence of a violation of bodily integrity.[189] It can mean, as discussed, that sexual violence is viewed as an individual, opportunistic act, unrelated to the wider wartime context and is difficult to conceptualise as falling within the common

187 Judge Tuzmukhamedov also sat on the *Šainović* appeal. In that appeal, he disagreed with the majority that the Trial Chamber found that Šainović made a significant contribution to the common purpose and thus participated in the joint criminal enterprise: *Prosecutor v Šainović (Dissenting Opinion of Judge Tuzmukhamedov)* ICTY Appeals Chamber IT-05-87-A, 23 January 2014 at [2]. Therefore he did not need to consider the issue of foreseeability of sexual crimes in relation to Šainović.

188 Goy, Jarvis and Pinzauti, above n 29, at 245.

189 Jarvis and Vigneswaran, above n 182, at 35.

purpose.[190] Judges may therefore, subconsciously, require a higher level of proof in cases of sexual violence than in other types of cases.[191]

This article does not advocate for entering convictions for sexual violence where there is no evidential basis for it. What it does advocate for is for sexual violence to be treated with parity to other international crimes. In essence, this article does not argue that sexual violence should be treated *differently*, but it advocates for sexual violence to be treated *the same* as other criminal acts.

B Sexual violence as within the common purpose

The ICC cannot afford to treat sexual violence differently. As a crime regularly relegated to the "natural and foreseeable but not intentional", sexual violence will not fall within the stringent common purpose provisions at the ICC. With this in mind, what can be learned from how sexual violence is approached? And how can the law as it stands be utilised to elevate sexual violence to be considered alongside other violent crimes?

A number of factors are relevant to establishing the place of sexual violence within the common purpose. Individually they are unlikely to provide a stand-alone foundation upon which to prove sexual violence fell within the common purpose and, of course, it will depend on the evidence available. But, cumulatively, these factors help to place sexual violence in context.

1 Orders and the ordinary course of events

In the case where sexual violence is explicitly ordered — "kill their men and rape their women" — such an order would evince a clear intention of rape or sexual violence as well as murder. But the experience of international criminal courts and tribunals demonstrates there are often no explicit orders to commit sexual violence (as can also be the case with other violent crimes).[192] It is incorrect, however, to assume sexual violence can only be committed in pursuance of a broad campaign of crimes and intended by senior officials where it has been

190 Goy, Jarvis and Pinzauti, above n 29, at 224.

191 Priya Goplan, Daniela Kravetz and Aditya Menon "Proving Crimes of Sexual Violence" in Baron Serge Brammertz and Michelle Jarvis (eds) *Prosecuting Conflict-Related Sexual Violence at the ICTY* (Oxford University Press, Oxford, 2016) 111 at 145.

192 Office of the Prosecutor, above n 31, at [81].

ordered.[193] Pursuant to the Rome Statute, a consequence may also be intended if there is knowledge the consequence will happen in the ordinary course of events.[194] Evidence such as patterns of prior or subsequent sexual violence or specific notice will help the prosecution to prove an awareness on the part of the accused that such crimes would occur in the "ordinary course of events".[195]

In addition to an evidential pattern, evidence of an accused's awareness of environmental factors relating to the wider conflict and facilitating potential sexual violence will be helpful.

Awareness of broader environmental factors was relevant to *Šainović* and *Lukić*. A majority of the Appeals Chamber found in light of Šainović's awareness of the atmosphere of aggression, violence, ethnic animosity, and the forcible displacement of Kosovo Albanian women that rendered them especially vulnerable, both Šainović and Lukić "must have been aware" that sexual assaults could be committed on discriminatory grounds.[196] The "inescapable conclusion" was Šainović and Lukić knew Kosovo Albanian women forced out of their homes were "rendered particularly vulnerable".[197] While the sexual assaults occurred in March and April 1999, Lukić was regularly informed of events and there was clear evidence he knew of specific incidents of rapes as well as the general risk of their commission in March and April 1999.[198] Šainović also learned of specific instances of rapes in May 1999.[199] The accused's awareness of broader contextual factors indicates an awareness sexual violence, as a crime prevalent in wartime, would happen in the ordinary course of events.

As found in *Milutinović*, the strongest evidence establishing foreseeability of sexual violence for Pavković was his reference to sexual violence crimes in his authored reports and orders.[200] But the Trial Chamber also referred to his knowledge of environmental factors, such as "ineffective" and "manifestly insufficient" measures to protect civilians contributing "to the creation and

193 Jarvis and Vigneswaran, above n 182, at 40.

194 Rome Statute, art 30(2)(b).

195 Office of the Prosecutor, above n 31, at [81].

196 *Šainović*, above n 7, at [1581], [1591].

197 At [1581], [1591].

198 At [1589], [1591].

199 At [1582], [1586], [1591].

200 *Milutinović*, above n 97, Vol III at [785].

maintenance of an environment of impunity" among Pavković's soldiers.[201] He was "aware of the strong animosity" between the Serbs and Kosovo Albanians and of the context in which the displacement took place. Pavković's "detailed knowledge of events on the ground" put him on notice murders and sexual crimes would be committed. Where Pavković was shown to have specific knowledge of incidents of sexual violence as well as an awareness of environmental factors facilitating its commission, there is certainly scope to argue he was aware sexual violence would happen in the ordinary course of events.

The Appeals Chamber's findings in relation to Đorđević are grounded in his awareness of the broader conflict rather than direct notice of incidents of sexual violence. Đorđević knew of the conduct of operations, which included the targeting of women, as well as men and boys, with the intent to instil fear.[202] Displaced civilians were left highly vulnerable to Serbian forces acting with near impunity and men and women were frequently separated, rendering women especially vulnerable to being subjected to sexual violence. Without specific knowledge it would be more difficult to show Đorđević had knowledge sexual violence would happen in the ordinary course of events. However, his awareness of the broader conflict, where sexual violence was facilitated by factors such as ill-disciplined forces, would be relevant to his foreseeability of sexual violence.[203]

2 *Violent circumstances of sexual violence*

It is also necessary to link sexual violence to its violent context. Such emphasis is necessary to ensure sexual violence is not subconsciously subjected, due to misconceptions about the nature of sexual violence, to a higher evidential standard of proof than other violent crimes.[204]

ICTY prosecutors pose the question of how realistic it is to conclude a joint criminal enterprise member intended to expel the population without also agreeing on the specific means to induce people to leave.[205] They refer to the approach taken in the *Stakić* Appeals Chamber decision.[206] In that case, the

201 At [777]–[782].

202 *Đorđević* ICTY Appeals Chamber, above n 8, at [921].

203 At [922].

204 Goy, Jarvis and Pinzauti, above n 29, at 258.

205 At 226.

206 They also refer to *Prosecutor v Kvočka (Judgment)* ICTY Trial Chamber ICTY-98-30/1-T, 2 November 2001 at [319]–[320] in which sexual violence was recognised as part of a system of ill-treatment used to persecute and subjugate prisoners in a camp. This was upheld on appeal: *Prosecutor v Kvočka*

common purpose consisted of a discriminatory campaign to ethnically cleanse the Municipality of Prijedor by deporting and persecuting Bosnian Muslims and Bosnian Croats in order to establish Serbian control.[207] Joint criminal enterprise participants were found to have "consented to the removal of Muslims from Prijedor by whatever means necessary".[208] Persecution through sexual violence in the Trnopolje, Keraterm, and Omarska prison camps was part of the discriminatory campaign to ethnically cleanse the Municipality of Prijedor.[209]As a result, Stakić was convicted of persecution through rape and sexual assault pursuant to basic joint criminal enterprise.[210]

The prosecutors' question here is relevant. If Đorđević, Šainović, Pavković and Lukić shared a common plan to modify the ethnic balance of Kosovo by waging a "campaign of terror" against the Kosovo Albanian civilian population (in the case of Đorđević)[211] and wage a widespread and systematic campaign of terror and violence to forcibly displace the Kosovo Albanian population both within and outside of Kosovo (in the case of Pavković, Šainović, and Lukić), can they realistically be said not to have intended murder, sexual violence and destruction of cultural property, or not known these would happen in the ordinary course of events?

There is also some scope for the ICC to adopt the reasoning of the *Krajišnik* Appeals Chamber, where it accepted a crime, while not originally part of the common purpose, can become a common purpose where:[212]

i) leaders are informed of violent crimes;

ii) did nothing to prevent their recurrence;

iii) persisted in the implementation of the common plan (thereby giving rise to an inference they endorsed the expanded means of achieving goals); and

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(*Judgment)*, above n 87, at [84]–[86]. In that case, the Trial Chamber concluded the Omarska camp operated as a system of ill-treatment with the aim to persecute and subjugate non-Serb detainees through a number of crimes, including rape.

207 *Prosecutor v Stakić* (*Judgment*) ICTY Appeals Chamber ICTY-97-24-A, 22 March 2006.

208 At [92], quoting *Prosecutor v Stakić* (*Judgment*) ICTY Trial Chamber II IT-97-24-T, 31 July 2003 at [496].

209 At [73].

210 At [84]–[85].

211 *Đorđević* ICTY Trial Chamber, above n 157, at [2126].

212 *Prosecutorv v Krajišnik* ICTY Appeals Chamber ICTY-00-39-A, 17 March 2009 at [163].

iv) the expanded crimes became incorporated into the common objectives.

Where a leader becomes aware of sexual violence, failure to stop pursuing the common plan does not just show disinterest in preventing crime; it shows the choice to allow these crimes to continue. When rape is seen as a tool to achieve a common purpose, rather than something simply tolerated, it is easier to conceive of sexual violence as falling within the common purpose. Rape, and the fear it invokes, is a means to an end in ethnically motivated conflict.[213]

The Trial Chamber in *Đorđević* explicitly linked murders to the common purpose because murder was used to forcibly displace the civilian population. Murder created an atmosphere of terror by illustrating to those civilians what they would be subjected to if they refused to leave.[214] Civilians were targeted and killed with the intent to instil fear.[215] Moreover, the crimes that fell within the common purpose, being forcible transfer, deportation, murder and destruction of property were not explicitly ordered. Orders were deliberately vague.[216]

The same reasoning can be applied to sexual violence. Men and women were frequently separated by Serbian forces acting with near impunity, rendering women especially vulnerable to being targeted and subjected to violence on the basis of their ethnicity, including sexual violence.[217] The Appeals Chamber considered civilians were "left highly vulnerable, lacking protection, and exposed to abuse and mistreatment by members of the Serbian forces".[218] Sexual assaults arose out of a will to discriminate against women on ethnic grounds,[219] and sexual assault by definition constitutes an infringement of a person's physical or moral integrity.[220]

213 Though, in the factual circumstances in *Prosecutor v Karadžić* ICTY Trial Chamber IT-95-5/18-T, 24 March 2016 at [3466], the ICTY Trial Chamber would tend to disagree.

214 *Đorđević* ICTY Trial Chamber, above n 157, at [2137].

215 *Đorđević* ICTY Appeals Chamber, above n 8, at [921].

216 *Đorđević* ICTY Trial Chamber, above n 157, at [2132].

217 *Đorđević* ICTY Appeals Chamber, above n 8, at [922].

218 At [921].

219 At [892], [893], [895], [897].

220 At [900].

3 *Scale and pattern of violence*

Sexual violence is often evidentially more difficult to prove than a crime such as murder. In both *Đorđević* and *Milutinović,* the number of sexual assaults established beyond reasonable doubt was significantly lower than that of murders and expulsions. However, this does not mean that the rapes did not occur or have the effect of expelling civilians from their homes. There is no reason to require that sexual violence achieve a high numerical threshold to establish it has the effect of striking fear into the hearts of civilians.[221]

In regard to the scale of the sexual assaults, in *Đorđević*, the Appeals Chamber was convinced that five instances of persecution through sexual assault occurred. Three young women held in detention in Beleg were found to have been sexually assaulted or raped multiple times by Serbian forces, and two Kosovo Albanian girls in a convoy in Priština were found to have been raped multiple times.[222]

The Appeals Chamber in *Đorđević* held, in the context of murders, that to assess whether a crime falls within the common purpose on the basis of the number of times it has been committed is to confuse the common purpose with the means by which it is to be achieved.[223] There is no minimum number of killings required in order to support a finding that murder is part of a joint criminal enterprise.[224] The same reasoning can be applied to common plan/purpose liability at the ICC.

Murder and sexual violence fell outside the common purpose to forcibly displace Kosovo Albanians through a widespread and systemic campaign of terror and violence in *Milutinović*.[225] The Trial Chamber concluded the common purpose was to be achieved through deportation and forcible transfer alone.[226] As there was no clear pattern of murder, sexual assault or destruction of cultural property, the Trial Chamber was not satisfied these crimes fell within the common purpose.[227] However, while a clear pattern may evince an intention a crime be committed as part of a common plan, the reverse is not necessarily true. Moreover, even in the context of disparate instances of crime

221 Jarvis and Vigneswaran, above n 182, at 40.

222 *Đorđević* ICTY Appeals Chamber, above n 8, at [869], [879].

223 At [189].

224 At [188].

225 *Milutinović*, above n 97, Vol III at [95].

226 Vol III at [784], [1133], [469].

227 Vol III at [94].

there may still be, in accordance with art 30 of the Rome Statute, knowledge the crime will take place in the ordinary course of events.

4 The temptation to frame the common purpose narrowly

A final observation is a word of caution against over-reliance on analogies with ICTY jurisprudence in the ICC. The burden of identifying, with specificity, the characteristics of the joint criminal enterprise, identification of its members and the crimes that constitute that joint criminal enterprise, combined with the requirement for significant contribution, make it advantageous to the prosecution to frame the joint criminal enterprise narrowly.[228] Given the lower standard of intent required to prove crimes outside the common purpose, combined with the ability to nevertheless convict for those crimes, there is no particular detriment to the prosecution in narrowly framing the common purpose.[229] But as the ICC has no fall-back provision, ICC prosecutors cannot afford to follow the example of their ICTY counterparts in framing the common purpose narrowly because, under the Rome Statute, crimes that fall outside the common purpose are not indictable. If sexual violence is considered to fall outside the common purpose, an accused before the ICC cannot be criminally liable for the commission of sexual violence. ICC prosecutions must therefore be wary of common purpose jurisprudence arising from the ICTY.

5 Guilt by association?

Liability pursuant to joint criminal enterprise "may be as narrow or as broad as the plan in which [the accused] willingly participated … even if the plan amounts to a 'nation wide government-organised system of cruelty and injustice.'"[230] For example, in the *Krajišnik* case, the ICTY Appeals Chamber overruled the Trial Chamber's adoption of a common criminal plan that was "impermissibly vague".[231] There is, therefore, a rightful concern regarding "guilt by association" in the context of common purpose liability.

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228 Jared Watkins and Randle DeFalco "Joint Criminal Enterprise and the Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia" (2010) 63(1) Rutgers L Rev 193 at 248.

229 John Ciorciari "Liberal Legal Norms Meet Collective Criminality" (2011) 109(6) Mich L Rev 1109 at 1113.

230 *Prosecutor v Rwamakuba (Judgment)* ICTR Trial Chamber III ICTR-98-44C-T, 20 September 2006 at [368].

231 *Prosecutor v Krajišnik* (*Judgment)* ICTY Appeals Chamber IT-00-39-A, 17 March 2009 at [156]–[157].

The Appeals Chamber in *Brđanin* addressed the very point of guilt by association in the context of extended joint criminal enterprise. The Appeals Chamber considered the doctrine provided sufficient safeguards against "overreaching or lapsing into guilt by association".[232] The Appeals Chamber emphasised joint criminal enterprise "is not an open-ended concept that permits convictions based on guilt by association".[233] It rehearsed the legal standards that must be met to a standard of beyond reasonable doubt before an individual is found guilty pursuant to joint criminal enterprise: the requisite intent, a plurality of persons; contribution; and the commonly intended or foreseeable crime did in fact take place.[234] The Appeals Chamber then stated:[235]

> Where all these requirements for JCE [joint criminal enterprise] liability are met beyond a reasonable doubt, the accused has done far more than merely associate with criminal persons. He has the intent to commit a crime, he has joined with others to achieve this goal, and he has made a significant contribution to the crime's commission. Pursuant to the jurisprudence, which reflects standards enshrined in customary international law when ascertaining the contours of the doctrine of JCE, he is appropriately held liable not only for his own contribution, but also for those actions of his fellow JCE members that further the crime (first category of JCE) or that are foreseeable consequences of the carrying out of this crime, if he has acted with *dolus eventualis* (third category of JCE).

The standard at the ICC for common purpose liability requires a number of similar hurdles to be passed before an accused can be convicted:

i) A conviction based on common purpose liability can only be established where all necessary elements are satisfied beyond reasonable doubt.[236]

ii) Liability pursuant to art 25(3)(a) requires an essential contribution, and liability pursuant to art 25(3)(d) requires a significant contribution

232 *Brđanin*, above n 90, at [426].

233 At [428].

234 At [426]–[432].

235 At [431].

236 Rome Statute, art 66(3).

to the commission of a crime.[237] At the ICC, a person who stands charged pursuant to art 25(3)(d) will not be individually liable for those crimes which form the common purpose but to which she or he did not contribute.[238] The requirement for a significant contribution limits the context in which an individual may be found liable.

iii) The criminal purpose requires specification of the criminal goal, its scope, the victims pursued and the identity of the members of the group.[239] As we have seen, particular crimes have been found to fall outside the common criminal purpose where no evidential basis for its inclusion has been proved, and that will restrict an individual's liability.

iv) The ICC demands a higher mens rea standard for conviction than the ICTY. It must be shown the accused intended the crime or had knowledge it would happen in the ordinary course of events.[240]

v) Where circumstantial evidence is relied on, a fact will only be proven beyond reasonable doubt where there is only one reasonable finding to be concluded from particular facts.[241] The accused will only possess the requisite intent if that is the only reasonable inference on the evidence.[242]

Therefore, there are a number of evidentially and legally difficult hurdles for the prosecution to overcome before a defendant can be convicted of a crime pursuant to joint criminal liability at the ICTY and even more so at the ICC. Where all the requirements for common purpose liability are met, as the ICTY Appeals Chamber stated, "the accused has done far more than merely associate with criminal persons".[243] Again, this article advocates for no more than the equal treatment of sexual violence alongside other violent crimes. It does not seek a lower standard, or convictions for sexual violence where those convictions are not justified. For those reasons, concerns about guilt by association are misplaced.

237 *Katanga*, above n 9, at [1620].

238 At [1619].

239 At [1626].

240 Rome Statute, art 30.

241 *Katanga*, above n 9, at [109].

242 As noted by the Appeals Chamber in *Brđanin*, above n 90, at [429] in the context of joint criminal enterprise liability.

243 *Brđanin*, above n 90, at [431].

VI CONCLUSION

In a speech shortly after his election as Chief Prosecutor in April 2003, Moreno Ocampo stated:[244]

> I deeply hope that the horrors humanity has suffered during the twentieth century will serve us as a painful lesson, and that the creation of the International Criminal Court will help us to prevent those atrocities from being repeated in the future.

Societies recently scourged by conflict provide sobering cause to believe that "tyranny begins where law ends".[245] Resistance to convictions for sexual violence crimes stems from the belief that these crimes are less serious than other violent crimes or unconnected to armed conflict and therefore outside the realm of international humanitarian law.[246]

A conviction based on systemic mischaracterisation of sexual violence as outside the common purpose cements the secondary status of these crimes at international law.[247] The truth-telling function of the criminal law is undermined when sexual violence is erroneously but regularly categorised as unintended, opportunistic and outside the common purpose.[248] This fails to place sexual violence within the wider conflict and confines these crimes to occurring as back-room, hushed instances of ill-discipline from individual soldiers. In practical terms, misconceptions regarding sexual violence have an even greater impact. The ICC does not have the luxury of confining sexual violence to the backbenches of extended joint criminal enterprise. Sexual violence crimes must be perceived and found to be within the realms to the common purpose for convictions to be entered.

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244 Luis Moreno Ocampo "Assembly of States Parties to the Rome Statute of the International Criminal Court: Statement by Mr Luis Moreno Ocampo" (press release, ICC-OTP-20030502-10, 22 April 2003); and Rome Statute, preamble.

245 Diane F Orentlicher "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime" (1991) 100 (8) Yale LJ 2537 at 2542; and Michael Broache "The Effects of Prosecutions on Sexual Violence in Armed Conflict during the 'ICC Era' 2002–2009" (paper presented at the Workshop on Sexual Violence and Armed Conflict: New Research Frontiers, Harvard Kennedy School, Harvard University, 2–3 September 2014).

246 Margaret deGuzman "Giving Priority to Sex Crime Prosecutions: The Philosophical Foundations of a Feminist Agenda" (2011) 11 Int CLR 515 at 517.

247 Sellers, above n 17, at 190.

248 See generally, Brigid Inder, Executive Director Women's Initiatives for Gender Justice "Expert Panel: Prosecuting Sexual Violence in Conflict – Challenges and Lessons Learned: A critique of the Katanga Judgment" (Global Summit to End Sexual Violence in Conflict, 11 June 2014).

This article has canvassed some factors that should be taken into account to shift pervasive assumptions that require sexual violence to be proven to a higher standard than other violent crimes. Prosecution of sexual violence crimes is a key component to ending global violence against women: forms of sexual violence must be punished and seen to be punished if the cycle of sexual violence is to be prevented.[249]

249 Linda Bianchi "The Prosecution of Rape and Sexual Violence: Lessons from Prosecutions at the ICTR" in Anne-Marie de Brouwer, Charlotte Ku, Renée Römkens and Larissa van den Herik (eds) *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Intersentia, Cambridge, 2013) 123 at 124.

WOMEN WITHOUT A VOICE:
Japan's silencing of its "comfort women" and the redemptive future the Tokyo Women's Tribunal offers to the gendered and colonial history of international law

Shontelle Grimberg*

The absence of women from the history of international law is glaringly obvious when examining women's ability to defend their fundamental human rights. This is especially the case when it comes to conflict-related sexual violence. The Jugun Ianfu, or "comfort women", system, which Japan implemented during World War II, is a prime example. It was a system of sexual slavery that degraded and humiliated women. The failure of the Allies' International Military Tribunal for the Far East (IMTFE) to provide justice for these women exemplifies the colonial and gendered nature of international law. Women, especially non-Western women, are not only excluded from the international arena, but are also made anonymous objects of the discipline. The creation of the Tokyo Women's Tribunal (TWT) was a step forward for the women in gaining some access to justice. However, since the TWT was a people's tribunal, it could not impose legal sanctions on Japan, only moral condemnation. In establishing itself as an extension of the IMTFE, there are clear legitimacy-based criticisms to be raised over the TWT's operational basis. This article argues that, despite these concerns, the TWT and other people's tribunals provide a means of reconstructing the history of international law and providing a less colonial and gendered composition of the discipline. The overall outcome is a more restorative vision of international law, in which people's justice can be achieved.

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I INTRODUCTION

World War II (1939–1945) was a period in which numerous populations, ethnic groups and individuals experienced untold terror and suffering at the hands of states. The Asia-Pacific War (1931–1945) occurred within this wider conflict and also involved heinous state crimes. In Europe, Nazi Germany sought to dominate, while in the Asia-Pacific, Japan was the colonial power in control of the region. For many historians and international lawyers, this period is one of the most traumatic to fill our history books, and continues, more than 70 years on, to occupy our collective conscience. However, it is the victims' testimony and the stories of those who experienced this conflict that are the most powerful and important. Their stories open the door to the past and allow us to experience a truer understanding of conflict.[1]

The testimonies of Japan's women, forced to serve as sex slaves within the Jugun Ianfu system, have been inaccessible until relatively recently. The Jugun Ianfu system involved the systematic taking of women as sex slaves, primarily from Asian countries such as Korea, to work in military-style camps known as 'comfort stations'. Many women were deceived as to the nature of these camps, while others were taken by force. The term 'ianfu' is a euphemism for those women who were forced into these 'sexual service' stations.[2] During the war, many Japanese citizens were aware of these stations and the State had "ubiquitous knowledge" of their existence.[3] However, the idea that women worked as sex slaves is an interpretation of history that Japan has actively suppressed.[4] Instead, popular culture portrayed women as consenting sex workers of Japan's Imperial State Army — a component of the wartime effort to liberate Japan from the colonial oppression of the West.

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1 In applying our own perspectives to the past, it is debatable whether one can gain a 'true' understanding of history. 'Truer' thereby recognises the limits of studying history, because while it may not be possible to gain a completely 'true' understanding of the past, it is certainly possible to gain a better understanding of that timeframe.

2 See Christine Lévy "The Women's International War Crimes Tribunal, Tokyo 2000: A feminist response to revisionism?" (2014) 39 Clio 125 at 126.

3 Yoshiko Nozaki "The 'Comfort Women' Controversy: History and Testimony" (2005) 3(7) The Asia-Pacific Journal 1 at 2.

4 The Governor-General's office initially denied the existence of the camps but now acknowledges them. See Etsuro Totsuka "Commentary on a Victory for 'Comfort Women': Japan's Judicial Recognition of Military Sexual Slavery" (1999) 8(1) Pac Rim L & Pol'y J 47 at 49.

With the Allies' establishment of the International Military Tribunal for the Far East (IMTFE) to deliver justice in the aftermath of World War II and Japan's surrender, one would expect this censored history to emerge.[5] Instead, it was buried further, with Japanese officials escaping prosecution.

This history of non-accountability changed in 1991, when Korean woman Kim Hak-soon shared her experience.[6] Motivated by her testimony, historian Yoshiaki Yoshimi investigated and discovered archived material in the Self-Defence Agency proving Japanese military and government leaders had organised these sex camps.[7] With other women coming forward and increasing pressure from groups such as Violence Against Women in War-Network Japan (VAWW-NET Japan), this censored history could no longer be ignored. The Tokyo Women's Tribunal (TWT) was the result of their efforts. The TWT was a people's tribunal that asserted itself to be an extension of the IMTFE by acting "'as if it were a reopening or a continuation' of the official IMTFE and its subsidiary trials".[8] The TWT therefore sought to draw its legitimacy from the IMTFE on the basis that it was undertaking the work the IMTFE ought to have done.[9]

The TWT's overarching focus was to hold the State and its officials accountable for the atrocities committed.[10] While it could not apply legal sanctions against Japan and its officials, because it was not a state-based tribunal, the TWT issued a judgment, which found the State, and its officials guilty of breaches of international law flowing from the sex camps.[11] The TWT thereby challenged the normative application of international law in which women, especially non-Western women, are excluded.

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5 The IMTFE (otherwise known as the Tokyo Tribunal) was convened on 29 April 1946. Its principal aim was to prosecute the military leaders involved in planning and executing war in the Asia-Pacific. It was largely influenced by the Nuremberg Tribunal. See Yuma Totani *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II* (Harvard University Asia Center, Cambridge (Mass), 2008) at 1 and 7.

6 Nozaki, above n 3, at 3.

7 At 3–4.

8 Karen Knop "The Tokyo Women's Tribunal and the turn to fiction" in Fleur Johns, Richard Joyce and Sundhya Pahuja (eds) *Events: the Force of International Law* (Routledge, Abingdon, 2011) 145 at 146.

9 At 157–160.

10 See Lévy, above n 2, at 126–127.

11 In finding the State accountable, the TWT applied the *Draft Articles on Responsibility of States for Internationally Wrongful Acts* [2001] vol 2, pt 2 YILC 31 [Draft Articles on State Responsibility]: *Prosecutors and People's of Asia-Pacific Region v Emperor Hirohito (Judgment)* Women's International War Crimes Tribunal For the Trial of Japan's Military Sexual Slavery PT-2000-1-T, 4 December 2001 [TWT Judgment] at 160–180, 182–253.

The significance of the TWT is heightened when one considers the situation in Japan today. Many revisionists assert that the Jugun Ianfu system was a justified component of Japan's "glorious history" and its reassertion against the West, especially the United States, which drew Japan into the War.[12] Many youth are also tired of apologising for this past.[13] Current Prime Minister, Shinzō Abe, has previously refused to acknowledge the non-consensual nature of the sex camps,[14] and has also rejected, earlier this year, new calls for an apology on the issue.[15]

Indeed, the Jugun Ianfu issue continues to be a contentious one. Although the Japanese government recognises the women's suffering, it does not acknowledge that the women were forcibly taken.[16] The official position remains — the women are still seen as prostitutes, and not as victims of Japan's system of sexual slavery.[17] This position is reflected in Japan's criticism of the government of the Philippines for authorising a memorial to the women in close proximity to the Japanese Embassy in Manila.[18] Additionally, Japan protested South Korea holding its first memorial in August of this year, known as "Memorial Day for Japanese Forces' Comfort Women Victims".[19] This is a significant step, on South Korea's part, in remembering the women, and continuing to hold Japan accountable for its atrocities.

Finally, South Korean President Moon Jae-in's recent condemnation of Japan's enslavement of the women, as a "crime against humanity," is significant.[20] These strong remarks highlight that the "long-standing disagreement between

12 See, for example, the comments of Gen Tamogami referred to in "Japanese general claims Japan was not an aggressor in Second World War" *The Telegraph* (online ed, London, 31 October 2008).

13 Kristine Kwok "Enough of all this second world war apology talk, young Japanese say" *South China Morning Post* (online ed, Hong Kong, 28 August 2015).

14 Rupert Wingfield-Hayes "Japan revisionists deny WW2 sex slave atrocities" (3 August 2015) BBC News <www.bbc.com>.

15 Tomohiro Osaki "Abe rejects Seoul's new call for apology on 'comfort women' issue" *The Japan Times* (online ed, 12 January 2018).

16 Nicole Percy "In the #MeToo era, women used as sex slaves by Japanese in WWII are still seen as prostitutes, not victims" *CBC News* (online ed, 7 July 2018).

17 Percy, above n 16.

18 Percy, above n 16.

19 Rebecca Tan "Despite protests from Japan, South Korea holds first memorial day for 'comfort women' enslaved in World War II brothels" *The Washington Post* (online ed, 14 August 2018).

20 Sofia Persio "South Korea and Japan Clash Over 'Comfort Women' Forced Into Sexual Slavery During World War II" *Newsweek* (online ed, 1 March 2018).

the two countries"[21] is far from over. Indeed, problematic aspects of Japan's attitude towards the issue, and the women, arose in 2015 negotiations with Korea, its former colony. These negotiations were held in order to provide one billion yen in compensation to the Foundation for Reconciliation and Healing, and an apology to the victims.[22] The agreement, however, appears to be concerned with furthering state economic interests, in which Japan could benefit from "future-orientated cooperation" from South Korea.[23] At the time, Japan also called for South Korea to remove a bronze statue, situated before the Japanese diplomatic embassy in Seoul, which was established in memory of the women.[24] While that request was subsequently dropped, concerns remain that the deal is flawed, as it "excludes [the] victims and the public".[25] The greater concern is that Japan's true history of sexual and colonial oppression, along with the lived experiences of the women, could once again be buried.

With this context in mind, this article explores the significance of the TWT in countering the gendered and colonial assumptions of international law and providing a means of holding Japan accountable for its system of sexual slavery. I begin with a historical analysis of Japan's rise as a colonial power and the systematic implementation of its Jugun Ianfu scheme during the Asia-Pacific War. I also canvass the international response of state-based tribunals to this history of conflict-related sexual violence, including the relevant law that was applicable at the time of the IMTFE judgment (part II). The following section examines the women's call for accountability of the Japanese State, and implicated officials, along with an analysis of the TWT's formation (part III). In the final section I explore the significance of the TWT's judgment to international law (part IV).

The focus of this article is to explore whether the TWT, a people's tribunal, provides a redemptive future in which the survivors of conflict-related sexual violence can be heard. Through studying this history we may arrive at a better

21 Persio, above n 20.

22 Benjamin Lee "South Korea-Japan Comfort Women Agreement: Where Do We Go From Here?" *The Diplomat* (online ed, Toyko, 6 September 2016).

23 Joyce Lee and Hyonhee Shin "South Korea says 'comfort women' deal flawed, but Japan warns against change" *Reuters* (online ed, Seoul, 28 December 2017).

24 Mike Firn "'Comfort women' statue threatens to derail Japan-South Korea accord" *The Telegraph* (online ed, London, 31 December 2015).

25 Lee and Shin, above n 23.

understanding of it,[26] and particularly, we reveal the inadequacies of international law in delivering justice to the victims of conflict-related sexual violence.

II UNCENSORING HISTORY: JAPAN'S JUGUN IANFU SYSTEM & THE FAILED RESPONSE OF THE STATE-BASED INTERNATIONAL TRIBUNALS

This section sets out the history that led to Japan's establishment of the Jugun Ianfu system during the Asia-Pacific War. It also examines the problematic history of international law, in which state-based tribunals failed to prosecute, and hold Japan accountable for its system of sexual slavery perpetrated against the women.

A Establishment of the Jugun Ianfu System

1 Japan's Rise as an Imperial Power

Japan's influence as an imperial power was evident throughout the Asia-Pacific War, which coincided with World War II, but was separate. This parallelism is evident in the antagonistic nature of Western and non-Western discourses in international law. Non-European countries have to both counter European power, and struggle to have their histories included within European-dominated international society. As Bull notes:[27]

> A *society of states* (or international society) exists when a group of states, conscious of certain common interests and common values, form a society [whereby] … they conceive themselves to be bound by a common set of rules and share in the working of common institutions.

Implicit in this common set of rules is the idea that associations would be between civilised Christian European states.[28] Japan therefore did not fit naturally within international society, even though it was initially a permanent member of the League of Nations.[29] Instead, its time in the League was characterised by inequality in power, where other member states, such as Great

26 Paul Cohen *History in Three Keys: The Boxers as Event, Experience and Myth* (Columbia University Press, New York, 1997) at xi.

27 Hedley Bull *The Anarchical Society: A Study of Order in World Politics* (2nd ed, Columbia University Press, New York, 1995) at 13.

28 At 15–16.

29 Marilyn Lake and Henry Reynolds *Drawing the Global Colour Line: White Men's Countries and the International Challenge of Racial Equality* (Cambridge University Press, Cambridge, 2008) at 284.

Britain and France, had control of the League's agenda.[30] Japan's later invasion of Manchuria in 1931, and its Jugun Ianfu system, thereby exemplified its desire to become a power capable of challenging European hegemony and normative understandings of international society.[31]

2 *Japan's Long History of Conflict-Related Sexual Violence*

In 1910, only 21 years before Japan invaded Manchuria, Japan annexed Korea.[32] In 1938, the National Mobilization Law (NML) was enacted, which was essential to Japan's colonial rule because it gave Japan control of Korea's raw materials and labour.[33] It also allowed the forcible removal of Korean citizens to Japan, thereby facilitating the movement of Korean women into the Jugun Ianfu system.[34]

The NML was enacted after Japan's invasion of the Chinese city of Nanking. During the invasion in late 1937, Japan's Imperial Army murdered hundreds of thousands of people and committed approximately 20,000 rapes.[35] This example, and others, show that sexual violence against women was an accepted method of warfare. This remains true today. Rape has been used as a weapon of war in many modern conflicts such as those in Yugoslavia, Rwanda, Iraq and Syria.[36]

3 *The Jugun Ianfu System: A Continuing Issue of Consent and Buried Shame*

The Jugun Ianfu system is associated with the subjugation of Korean women. However, other Asian countries suffered from this colonial blight on their soil.

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30 At 284–285.

31 Susan Townsend "Japan's Quest for Empire 1931-1945" BBC (online ed, 30 March 2011); Youli Sun "China's International Approach to the Manchurian Crisis, 1931-1933" (1992) 26 J*ournal of Asian History* 42 at 45.

32 Max Fisher "'Comfort women': Japan's 70-year sex slavery controversy, explained" (28 December 2015) Vox <www.vox.com>.

33 John Benson and Takao Matsumura *Japan 1868-1945: From Isolation to Occupation* (Pearson Education Limited, Harlow (Essex), 2001) at 42.

34 Yvonne Hsu "'Comfort Women' From Korea: Japan's World War II Sex Slaves and the Legitimacy of Their Claims For Reparations" (1993) 2(1) Pac Rim L & Pol'y J 97 at 97–98.

35 Takashi Yoshida "A Battle over History: The Nanjing Massacre in Japan" in Joshua Fogel (ed) *The Nanking Massacre in History and Historiography* (University of California Press, Berkeley, 2000) 70 at 71.

36 Nicola Henry "Theorizing Wartime Rape: Deconstructing Gender, Sexuality and Violence" (2016) 30(1) Gender & Society 44 at 44.

The programme commenced in the early 1930s in Shanghai and became prolific after the Sino-Japanese War.[37] By 1942, it covered vast regions of the Asia-Pacific including the Philippines, Malaysia, Indonesia, Singapore, Hong Kong, Taiwan and the Dutch East Indies.[38] According to documents discovered in Japan and corroborating documents in United States and Australian archives, the purpose of the stations was to prevent Japanese soldiers from continuing to rape the civilian population.[39] More specifically, it is believed that the Jugun Ianfu system was created in response to the Nanking massacre, and the mass rapes committed there.[40] Indeed, Japan appeared to be concerned with how countries like the United States, Europe and China would respond to these previous instances of extensive rape.[41] The irony is that, in responding to these fears, Japan created a system that in itself constituted a continued episode of mass rape and sexual slavery.

Japan's initial reference to the women as "auxiliary nurses" reinforces this.[42] Such terminology suggests that the women worked voluntarily at the stations to further the war effort. However, many women were forced into sexual slavery through deceitful recruitment processes or were taken from their villages. Women from poor, rural areas believed they would work as hospital assistants or file clerks.[43] Instead, they were forced to work as sex slaves, often far from family and friends.[44] Further, they could not return home. Japan's labelling of the women as auxiliary nurses[45] disguised the true nature of the stations.

The later reference to these camps as comfort stations and to the women as comfort women suggested that these camps were consensual sex facilities. With as many as 80,000–200,000 Asian women and a number of European

37 James Hoare and Susan Pares *A Political and Economic Dictionary of East Asia* (Routledge, London, 2005) at 79.

38 Karen Parker and Jennifer Chew "Compensation for Japan's World War II War-Rape Victims" (1993) 17 Hastings Int'l & Comp L Rev 497 at 503–504.

39 At 503.

40 At 503.

41 At 503.

42 Hoare and Pares, above n 37, at 79.

43 Parker and Chew, above n 38, at 505.

44 Chunghee Soh "From Imperial Gifts to Sex Slaves: Theorizing Symbolic Representations of the 'Comfort Women'" (2000) 3 *Social Science Japan Journal* 59 at 64.

45 Hoare and Pares, above n 37, at 79.

women forcibly taken to the facilities, these stations were obviously not consensual in nature.[46]

While Japan now acknowledges these camps existed, it denies that women were forcibly taken to them.[47] Its censorship of the issue means the victimisation of surviving women continues today. These denials are concerning because many women who survived the system returned to family and friends who both rejected and blamed them for their experiences.[48] Indeed, many surviving women buried the abuse they experienced.[49] Until Japan acknowledges the Jugun Ianfu system was a system of sexual slavery, complete justice will not be achieved.

B The International Response of the State-Based Tribunals

1 The Establishment of the International Military Tribunal at Nuremberg

In the aftermath of World War II, the Allies established the International Military Tribunal (IMT) at Nuremberg.[50] Its Charter was significant because arts 6(a) and 6(c) created two new crimes, respectively referred to as crimes against peace and crimes against humanity.[51] These crimes meant that high-ranking German officials could be held accountable for their wartime actions.[52] The broad definition of what constituted a crime against humanity meant that a state could be liable for crimes perpetrated against its own citizens and those in its occupied territories.[53] However, since the IMT Charter did not

46 Kelly Askin *War Crimes Against Women: Prosecution in International War Crimes Tribunals* (Kluwer Law International, The Hague, 1997) at 74. It is suggested the European women were taken to the sex stations as a means of reducing venereal disease amongst the Japanese soldiers. In contrast to their Asian counterparts, the Dutch comfort women were able to access some form of justice prior to the TWT proceedings. For instance, in 1948 the Batavia Military Tribunal carried out a war crimes trial, which prosecuted on the basis of sexual servitude. There were also other secret trials held four years after the defeat of the Japanese, which prosecuted those who had forced Dutch women into sexual slavery: at 86–87.

47 See Wingfield-Hayes, above n 14.

48 Fisher, above n 32.

49 Fisher, above n 32.

50 Totani, above n 5, at 1.

51 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal 82 UNTS 279 (8 August 1945) [IMT Charter].

52 Jocelyn Campanaro "Women, War, and International Law: The Historical Treatment of Gender-Based War Crimes" (2001) 89 Geo LJ 2557 at 2561.

53 At 2561.

refer explicitly to rape or sexual assault, many gender-based crimes were not prosecuted despite evidence of these abuses.[54] This position is concerning because the broad language of art 6(b) (crimes against peace) and art 6(c) (crimes against humanity) meant that rape could have been prosecuted under these provisions.[55]

2 *The Creation of the International Military Tribunal for the Far East in Tokyo*

The failure to prosecute rape and other forms of conflict-related sexual violence was also evident in the prosecution of war crimes in Tokyo. The IMTFE was established on 19 January 1946, under an order of General Douglas MacArthur, the Supreme Commander of the Allied Powers,[56] as the Asia-Pacific counterpart to the IMT. With its Charter based upon the IMT Charter, the IMTFE had the jurisdiction to try crimes against peace and crimes against humanity, alongside traditional war crimes.[57] It therefore had the capacity to prosecute wartime rape and did successfully charge a number of Japanese officials, but only in accordance with other crimes such as inhumane treatment and failure to respect family honour and rights.[58] Prosecution of the mass rapes committed under the Jugun Ianfu system was excluded.

During the trials, 28 Japanese military and political leaders, including Prime Minister Hideki, were called upon to face charges.[59] Since they were "Class A" defendants, in that they had been involved in the planning and directing of the war, the focus was on charges for crimes against peace.[60] Notably, Emperor Hirohito was not tried for his involvement in the war. The United States wanted Japan to successfully demilitarise and transition to a democracy.[61] American interests therefore heavily influenced the IMTFE,

54 IMT Charter, above n 51.

55 IMT Charter, above n 51.

56 Charter of the International Military Tribunal for the Far East TIAS 1589 (19 January 1946) at 20–21 [IMTFE Charter].

57 Campanaro, above n 52, at 2563.

58 See Patricia Sellers "Rape Under International Law" in Belinda Cooper (ed) *War Crimes: The Legacy of Nuremberg* (TV Books, New York, 1999) 159 at 1590–162.

59 BVA Röling and Antonia Cassese *The Tokyo Trial and Beyond: Reflections of a Peacemonger* (Polity Press, Cambridge (Mass), 1993) at 3.

60 Kayoko Takeda *Interpreting the Tokyo War Crimes Tribunal: A Sociopolitical Analysis* (University of Ottawa Press, Ottawa, 2010) at 12.

61 Madoka Futamura *War Crimes Tribunals and Transitional Justice: The Tokyo Trial and the Nuremberg*

leading many Japanese nationalists to label the trial a form of victor's justice.[62] Indeed, with the Chief Prosecutor Joseph Keenan being an American, the IMTFE operated through the lens of American and/or Allied interests. While the IMTFE strove to deliver "stern justice",[63] the principal goal was to hold Japanese officials accountable for waging war in the Asia-Pacific.[64] Breaches of fundamental human rights upon civilians from non-European states were not a primary concern. The IMTFE's work thereby furthered the normative understanding that the prosecution of conflict-related sexual violence perpetrated against women was beyond the agenda of international law.

3 *The IMTFE Trial: A Colonial Platter of Continued Oppression and Unfulfilled Justice*

This failure to provide justice to the women is heightened upon an analysis of the IMTFE proceedings. The IMTFE trial was conducted from 29 April 1946 to 12 November 1948.[65] Its eleven panel members represented the eleven nations that comprised the prosecution team: Australia, Canada, China, Great Britain, India, the Netherlands, New Zealand, the Philippines, the Soviet Union and the United States.[66]

Taking together the transcripts of its open session, and in chambers, the IMTFE produced approximately 53,000 pages of written record,[67] with a judgment 1,781 pages in length. The record contains detailed evidence, presented by the Allies, of the establishment and enforcement of the stations.[68] Nevertheless, the crimes committed against the women were not prosecuted at the IMTFE.

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legacy (Routledge, Abingdon, 2008) at 56.

62 Totani, above n 5, at 2.

63 Harry Truman, Winston Churchill and Chiang Kai-Shek "Potsdam Declaration: Proclamation Defining Terms for Japanese Surrender" (26 July 1945) at [10].

64 Totani, above n 5, at 1.

65 University of Virginia School of Law "The International Military Tribunal For the Far East" (The International Military Tribunal For The Far East: Digital Collection) <www.imtfe.law.virginia.edu>.

66 R J Pritchard "The International Military Tribunal for the Far East and Its Contemporary Resonances" (1995) 149 Mil L Rev 25 at 27.

67 At 27.

68 Nicola Henry "Memory of an Injustice: The 'Comfort Women' and the Legacy of the Tokyo Trial" (2013) 37(3) Asian Studies Review 362 at 367–389.

This is strange considering that, under the 1907 Hague Convention IV[69] and the 1929 Geneva Convention,[70] charges were brought against defendants for rapes committed during the Nanking Invasion.[71] The United Nations War Crimes Commission had also "compiled a list of 32 violations of laws and customs that warranted criminal punishment at the Nuremberg and Tokyo Trials", including rape and the "abduction of girls and women for the purpose of enforced prostitution".[72]

It seems that several factors prevented sexual enslavement from being addressed — the fixation on the charge of aggressive war crimes committed against victor nations, and the belief that wartime rape and prostitution during armed conflict were unspeakable issues that were to be determined in the private sphere.[73] The heavy emphasis on particular race, gender and national identities[74] meant that the women, especially those of non-European descent, were denied a voice in the proceedings. Through focusing on Japan's aggression against the United States, and other allied nations, Japan's history of colonial oppression was effectively ignored.

4 The IMTFE Trial: Forgotten Crimes and Justice Pal's Dissent

The IMTFE had a slew of forgotten World War II crimes.[75] For instance, the IMTFE did not hold Japanese scientists accountable for biological experimentation,[76] or their torture and vivisection of civilians and prisoners of war.[77] Instead, the scientists were granted immunity on the basis that their research would be provided to American authorities.[78] The Allied powers also excluded both Korean and Taiwanese prosecutors from the prosecutorial

69 Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (signed 18 October 1907, entered into force 26 January 1910).

70 Convention relative to the Treatment of Prisoners of War (signed 27 July 1929, entered into force 19 June 1931).

71 Henry, above n 68, at 367.

72 At 366.

73 At 368.

74 At 368.

75 At 367.

76 Tsuneishi Keiichi "Unit 731 and the Japanese Imperial Army's Biological Warfare Program" (2005) 3(11) The Asia-Pacific Journal 1 at 8.

77 Henry, above n 68, at 362.

78 Keiichi, above n 76, at 8.

effort.[79] The decision was made on the basis that, these countries were not only victims of Japanese colonialism, but had also been victimizers, and had assisted Japan in its war-time aggression and associated atrocities.[80] Consequently, the exclusion of prosecutors from countries such as Korea and Taiwan likely contributed to the failure to pursue atrocities committed within the Jugun Ianfu system.[81]

Indeed, with all defendants bar two being found guilty of "conspiracy to wage aggressive war",[82] the IMTFE did not acknowledge the human rights violations experienced by the women. The Allies' later release of the same war criminals to govern Japan against communist threats highlighted their indifference to the women's plight.[83]

The IMTFE's inadequacies are reflected in its inability to reach a unanimous decision. The dissent of Justice Radhabinod Pal of India is significant. Due to the difficulties in defining "aggressive war" and the illegitimacy of the charges brought, his Honour thought all the accused should be acquitted, and said:[84]

> I believe this is really an appeal to the political power of the victor nations with a pretense of legal justice. …
>
> … It has been said that a victor can dispense to the vanquished everything from mercy to vindictiveness; but the one thing the victor cannot give to the vanquished is justice. …

The Allies' assertion of power upon the vanquished nations meant the trial was a "pretense [at] legal justice" conceived through a very narrow victor's lens.[85] Further, the inability of victims of state abuse to access justice and have their testimonies heard meant that:[86]

> The tribunal essentially resolved the contradiction between the world of colonialism and imperialism and the righteous ideals of crimes against peace

79 Totani, above n 5, at 13.

80 At 13.

81 At 14.

82 Röling and Cassese, above n 59, at 4.

83 See Futamura, above n 61, at 144–151.

84 Neil Boister and Robert Cryer *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments* (Oxford University Press, Oxford, 2008) at 1422–1424.

85 At 1422.

86 John Dower *Embracing Defeat: Japan in the Aftermath of World War II* (Penguin Books Ltd, London, 1999) at 470–471.

> and humanity by ignoring it. Japan's aggression was presented as a criminal act without provocation, without parallel, and almost entirely without context.

The tribunal's ignorance of reality is displayed by the fact that it could have prosecuted gender-based crimes committed within the stations as constituting crimes against humanity.[87] Alternatively, prosecution on the basis of the connection between waging war and sexual enslavement was possible.[88] The judgment found that Japan had planned to "secure the military, naval, political and economic domination of East Asia and of the Pacific and Indian oceans, and of all countries and islands therein or bordering thereon".[89] The institutionalisation of the stations was part of this process of wartime domination.[90]

The failure to prosecute meant justice was not delivered to the women of Japan's Jugun Ianfu system. Although Japan's signing of the San Francisco Peace Treaty on 8 September 1951 meant that it accepted responsibility for its wartime aggression, Japan has not been held legally accountable for its other wartime crimes, including the abuse perpetrated against the women.[91]

5 *Relevant Law at the Time of the IMTFE Judgment*

The protection of women from sexual violence occupies a precarious position within international humanitarian law.[92] International law has generally failed to prosecute gender-based crimes committed during wartime.[93] This is because such crimes are not considered part of the actual conflict, and are often outside the scope of inquiry.

By the start of World War II and the Asia-Pacific War, Japan had ratified the Hague Convention of 1907.[94] That convention provided that "[f]amily

87 IMTFE Charter, above n 56, art 5(c).

88 Henry, above n 68, at 367.

89 At 367.

90 At 367–368.

91 Treaty of Peace with Japan (with two declarations) 136 UNTS 46 (signed 8 September 1951, entered into force 28 April 1952) [the San Francisco Peace Treaty], art 11, which required Japan to accept the judgment of the IMTFE and "other Allied War Crimes Courts".

92 See generally Kelly Askin "Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles" (2003) 21(1) Berkeley J Intl L 288.

93 Sellers, above n 58, at 160–161; while the Lieber Instructions of 1863 prohibited Union soldiers from committing rape during the Civil War, the 1929 Geneva Convention provides less explicit protection.

94 Laws and Customs of War on Land (Hague IV) 36 Stat 2277, TIAS 539 (opened for signature 18 October 1907, entered into force 26 January 1910) [1907 Hague Convention].

honour and rights, the lives of persons, and private property, as well as religious convictions and practice must be respected".[95] While this provision does not refer to rape, torture or prostitution, a woman's right to be free from such abuse is caught under the phrase "[f]amily honour and rights".[96] Preservation of a woman's bodily integrity therefore relies on patriarchal understandings of 'family honour'.[97] The 1907 Hague Convention, along with the 1899 Hague Convention, formed the code on the laws of war.[98] The Martens Clause of the 1907 Convention protects fundamental human rights:[99]

> Until a more complete code of the laws of war is issued, the High Contracting Parties … declare that, in cases not included in the Regulations adopted by them, the inhabitants and … belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

Following World War I, the Commission on the Responsibility of the Authors of War and the Enforcement of Penalties, of which Japan was a member, recognised rape and enforced prostitution as prosecutable war crimes.[100] However, the Commission's list was not codified in the Treaty of Versailles[101] as constituting crimes against humanity.[102] This position is problematic for women from Japan's colonies. As a matter of law Japan could not commit war crimes against these women because a 'war crime' was defined as being directed against persons from other states.[103]

However, customary international law, general principles of international law, and the concept of crimes against humanity, as articulated in art 5(c) of the

95 Article 46.

96 Article 46.

97 Article 46.

98 Convention With Respect To The Laws And Customs Of War On Land (Hague II) 32 Stat 1803 (opened for signature 29 July 1899, entered into force 4 September 1900).

99 1907 Hague Convention, above n 94, Martens Clause.

100 "Commission on the Responsibilities of the Authors of War and the Enforcement of Penalties" (1920) 14(1) AJIL 95 at 114.

101 Treaty of Peace with Germany 225 CTS 188 (signed 28 June 1919, entered into force 10 January 1920).

102 Hsu, above n 34, at 108–109. However, the UN War Crimes Commission adopted the Commission's list.

103 Tina Dolgopol "The Judgment of the Tokyo Women's Tribunal" (2003) 28(5) Alt LJ 242 at 243.

IMTFE Charter, demanded protection of and vindication for the women.[104] Crimes against humanity are "widespread" or "systematic" acts of the state perpetrated in connection with other war crimes or crimes against peace, "against a civilian population" or stateless persons before or during war.[105] The mass rape of the women, including those from Japan's colonies, meets these requirements. Had the IMTFE prosecuted on this basis, it would have furthered the understanding that wartime rape falls within "the laws of humanity" and is a jus cogens or erga omnes norm.[106] While the women were civilian internees, it would have reinforced art 3 of the 1929 Geneva Convention, which provides women "all the regard due to their sex".[107]

Similarly, the IMTFE could have recognised sexual slavery as a crime against humanity. While slavery was prohibited before World War II, the closest concept to sexual slavery was "enforced prostitution".[108] Further, a number of international instruments, including the 1815 Declaration Relative to the Universal Abolition of the Slave Trade,[109] the Treaty of London,[110] the General Act of Berlin of 1885,[111] the General Act of Brussels,[112] and the 1926 Slavery Convention,[113] condemned slavery practices.[114] Japan has not ratified the 1926 Slavery Convention, which is universally relied upon as providing the definition of slavery,[115] and which is further refined in the 1956 Supplementary Convention.[116] However, it had ratified the International

104 IMTFE Charter, above n 56. Article 5(c) captures "other inhumane acts committed against any civilian population, before or during the war".

105 Dolgopol, above n 103, at 243.

106 1907 Hague Convention, above n 94, Martens Clause.

107 Convention Relative to the Treatment of Prisoners of War 47 Stat 2021 (signed 27 July 1929, entered into force 19 June 1931) [1929 Geneva Convention].

108 "Commission on the Responsibilities of the Authors of War", above n 100, at 114.

109 Declaration Relative to the Universal Abolition of the Slave Trade 63 CTS 473 (signed 8 February 1815).

110 Treaty for the Suppression of the African Slave Trade 92 CTS 437 (signed 20 December 1841).

111 General Act of the Conference of Berlin Concerning the Congo 10 Martens Nouveau Recueil (series 2) 414 (signed 26 February 1885).

112 Convention Relative to the Slave Trade and Importation into Africa of Firearms, Ammunition, Spirituous Liquor 27 Stat 886 (signed 2 July 1890, entered into force 31 August 1891).

113 Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926 60 LNTS 253 (signed 25 September 1926, entered into force 9 March 1927) [1926 Slavery Convention].

114 Parker and Chew, above n 38, at 517.

115 1926 Slavery Convention, above n 113.

116 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery 266 UNTS 40 (signed 7 September 1956, entered into force 30 April 1957).

Labour Organization Convention (No 29) Concerning Forced Labour.[117] It was also a signatory to the 1904 International Agreement for the Suppression of the White Slave Traffic,[118] the 1910 International Convention for the Suppression of White Slave Traffic,[119] and the 1921 International Convention for the Suppression of the Traffic in Women and Children, which prohibited the trafficking of women.[120] The latter two treaties had carve-outs that allowed countries to exclude their colonies from their scope.[121] Under art 14 of the 1921 treaty, Japan announced that the Convention did not apply to its colonial territories.[122] However, the IMTFE could have condemned the operation of Japan's Jugun Ianfu system within its colonial territories, and other territories, on the basis that Japan had international obligations to prevent such abuse from occurring, or because crimes against humanity had been committed. Had the IMTFE taken this approach, the women could have accessed a non-colonial and non-patriarchal form of justice. Its failure to do so, or to even prosecute the crimes, meant these injustices were left unaddressed.

III THE WOMEN'S RESPONSE: A COLLECTIVE CALL FOR ACCOUNTABILITY

The failure of international state-based tribunals to properly hold Japan, and its officials accountable, compounded the suffering that the women had experienced in Japan's Jugun Ianfu system. This section details the women's response to this history, and their demand for the Japanese State, and implicated officials to be held accountable. Indeed, through sharing their lived accounts, the women began to garner the impetus to challenge Japan's position in denying its history of conflict-related sexual violence. The call for

117 International Labour Organization Convention Concerning Forced or Compulsory Labour (No 29) 39 UNTS 55 (adopted 28 June 1930, entered into force for Japan 1 May 1932) [1930 ILO Convention].

118 International Convention for the Suppression of the "White Slave Traffic" 1 LNTS 83 (signed 18 March 1904, entered into force 18 July 1905).

119 International Convention for the Suppression of White Slave Traffic 3 LNTS 278 (adopted 4 May 1910, entered into force 5 July 1920).

120 International Convention for the Suppression of the Traffic in Women and Children 9 LNTS 416 (opened for signature 30 September 1921, entered into force for Japan 15 December 1925).

121 Sue Lee "Comforting the Comfort Women: Who Can Make Japan Pay?" (2003) 24(2) U Pa J Int'l Econ L 509 at 526.

122 At 526.

accountability was most evident in the creation of the TWT, a people's-based tribunal, which provided a forum for the expression of the women's lived experiences.

A The Quest for Justice and Acknowledgment of the Truth

The 1990s was a turning point for the women. With the democratisation of the Republic of Korea in 1987 and the discovery of archived material linking Japan to the stations, the issue gained traction.[123] In 1991, one of the women, Kim Hak-soon, issued proceedings against Japan, which came to be known as the Asia-Pacific War Korean Victims Compensation Claim Case.[124] Her testimony inspired other women to come forward. Their aim was "to restore collective memory and compel the rewriting of history",[125] through seeking compensation and an apology from Japan. They hoped to bring Japan's crimes to light and dispel the idea that the women were consenting participants in the Jugun Ianfu system. Organisations such as the Korean Council for Women drafted into Military Sexual Slavery, Asia Centre for Women's Human Rights (ASCENT-Philippines) and VAWW-NET Japan pushed for this history to be known.[126]

A year after VAWW-NET Japan was created, following the International Conference on Violence Against Women in War and Armed Conflict Situations, the group proposed the creation of the TWT.[127] The proposal, made at the 1998 Asian Women's Solidarity Conference, held in Seoul, was accepted.[128] Preparatory conferences were held in Tokyo and Seoul in December 1998 and February 1999.[129] At these conferences, the TWT's International Organizing Committee was formed.[130] It was comprised of three groups: organisations representing the victimised countries, VAWW-NET Japan representing the

123 Nozaki, above n 3, at 2–4.

124 George Hicks "The Comfort Women Redress Movement" in Roy Brooks (ed) *When Sorry Isn't Enough: The Controversy Over Apologies and Reparations for Human Injustice* (New York University Press, New York, 1999) 113 at 117–119. Other comfort women joined the original case bringing a total of thirty reparation cases against Japan.

125 Dolgopol, above n 103, at 244–245.

126 At 243.

127 Christine Chinkin "Women's International Tribunal on Japanese Military Sexual Slavery" (2001) 95(2) AJIL 335 at 336.

128 At 336.

129 At 336.

130 At 336.

offending country, and the International Advisory Committee, which was comprised of members from Africa, Asia, Australia, Europe, and North and South America.[131] These groups were led by female representatives, reflecting that this movement for justice was an example of the women's collective solidarity.[132] Indeed, the justice sought was one that would uphold the truth — the validity of the women's lived experiences, and recognition of Japan's history of colonial oppression.

B Reparation: A Right Denied to Japan's Comfort Women

The *Chorzow Factory* decision confirmed that a state that breaches international law must make reparation.[133] Post-World War II, human rights instruments such as the Universal Declaration of Human Rights (UDHR)[134] and the International Covenant on Civil and Political Rights reflected this position.[135] However, despite growing recognition internationally in the 1990s of the abuses faced by the women, Japan failed to respond adequately. On 6 July 1992, Chief Cabinet Secretary Koichi Kato issued the following apology:[136]

> The Government again would like to express its sincere apology and remorse to all those who have suffered indescribable hardship as so-called 'wartime comfort women', irrespective of their nationality or place of birth.

The apology is questionable. Indeed, it does not dispel the idea that the women were non-consenting participants in the Jugun Ianfu system, and ultimately adheres to Japan's traditional version of its history.[137] Kato was also vague on the point of forcible recruitment, only mentioning that Tokyo "had been involved in … the control of those who recruited comfort women", showing

131 At 336.

132 At 336. Yun Chung-Ok represented the victimised countries, while Yayori Matsui represented VAWW-NET Japan. Indai Lourdes (Asia Centre for Women's Human Rights) was the representative for the International Advisory Committee.

133 *Case Concerning the Factory At Chorzów (Germany v Poland) (Jurisdiction)* (1928) PCIJ (series A) No 17.

134 *Universal Declaration of Human Rights* GA Res 217AA/RES/3/217A (1948) [UDHR].

135 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

136 Ministry of Foreign Affairs of Japan "Statement by Chief Cabinet Secretary Koichi Kato on the Issue of the so-called 'Wartime Comfort Women' from the Korean Peninsula" (press release, 6 July 1992).

137 Alexis Dudden "'We Came to Tell the Truth': Reflections On The Tokyo Women's Tribunal" (2001) 33(4) Critical Asian Studies 591 at 593.

a continued reluctance by Japan to accept legal responsibility for its system of sexual slavery.[138] Furthermore, no compensation was offered alongside the apology.[139]

In a statement issued on 4 August 1993, the Government recognised that the women were forced "generally against their will" into the stations.[140] While the Japanese Government recognised its military authorities were involved in this recruitment process, they deflected responsibility by saying that recruitment "was conducted mainly by private recruiters who acted in response to the request of the military".[141] However, following this government statement, an official apology was also released, in which Japan appeared more willing to address its past:[142]

> Through … extensive investigation, it [is] … clear … many women's honor and dignity were severely injured, and that this was done by an act with the involvement of the military authorities of the day.
>
> The government of Japan … unequivocally extend[s] its sincere apologies and remorse to all those, irrespective of place of origin, who suffered immeasurable pain and incurable physical and psychological wounds as comfort women.
>
> Japan is squarely facing the historical facts … She is taking [them] to heart as lessons of history. She is firmly determined never to repeat the same mistake by forever engraving such issues in her memories through the study and teaching of history.

Despite this, Japan later denied compensation to the women on the basis that the San Francisco Peace Treaty,[143] along with bilateral treaties with countries such as South Korea and the Netherlands, had fully and finally resolved

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138 Jennifer Lind *Sorry States: Apologies in International Politics* (Cornell University Press, New York, 2008) at 65.

139 At 65.

140 Ministry of Foreign Affairs of Japan "Statement by the Chief Cabinet Secretary Yohei Kono on the result of the study on the issue of 'comfort women'" (press release, 4 August 1993) [the Kono statement].

141 The Kono statement.

142 *Sub-Commission on Prevention of Discrimination: Statement of Japan (Right of Reply)* E/CN4/Sub2/SR23 (1993) as cited in Parker and Chew, above n 38, at 536.

143 San Francisco Peace Treaty, above n 91.

the issue.[144] Kim Hak-soon and other surviving women had also generally failed in their claims before the Japanese courts.[145] Therefore, Japan was only willing to go so far in acknowledging its past.[146] The Japanese Parliament's ambivalent response to a campaign by Japanese lawyers and non-governmental organisations for war compensation further exemplified this position.[147] While the Asian Women's Fund, established in 1995, accepted moral responsibility for the situation, it was privately funded, with no support from the State.[148] In failing to provide funding, Japan was again denying responsibility, and, more than forty years after the IMTFE's judgment, "forever engraving"[149] its approach of ignoring the past.[150]

C The Tokyo Women's Tribunal

The Women's International War Crimes Tribunal on Japan's Military Sexual Slavery, otherwise known as the TWT, was a people's tribunal that convened from 8–12 December 2000. It was modelled on people's tribunals including the Vietnam War Crimes Tribunal and the Italian Permanent Peoples' Tribunal.[151]

144 Chinkin, above n 127, at 335.

145 Most of the lawsuits brought by comfort women were dismissed on the basis that customary international law prevents an individual from claiming compensation from the State. Other reasons were: a claim could not be brought outside the statutory limitation period, and Japanese law at the end of World War II did not allow for compensation on an approach of no state liability. See Yayori Matsui "Women's International War Crimes Tribunal on Japan's Military Sexual Slavery: Memory, Identity, and Society" (2001) 19(4) East Asia 119 at 129.

146 In April of 1998 the Shimonoseki component of the Yamaguchi Prefectural Court found the Japanese Government in breach of the State Liability Act because it had failed to enact legislation to compensate the comfort women. See Totsuka, above n 4, at 47–48.

147 Matsui, above n 145, at 129.

148 At 130.

149 *Statement of Japan*, above n 142.

150 Japan's failure to provide reparation contrasts Germany's efforts to address its past. Following the Nuremberg trials, Germany implemented a number of programs to acknowledge suffering inflicted on persons by the Third Reich. The Federal Indemnification Law (BEG) was passed, which provided compensation for victims of wartime abuse. Under the BEG and other compensation schemes, the Federal Republic of Germany had paid in 2012, $89 billion in compensation to the Israeli State and victims of World War II. See David Rising "Germany increases reparations for Holocaust survivors" *The Times of Israel* (online ed, 16 November 2012) and Melissa Eddy "For 60th Year, Germany Honors Duty to Pay Holocaust Victims" *The New York Times* (online ed, 17 November 2012).

151 *Prosecutors and People's of Asia-Pacific Region v Emperor Hirohito (Judgment)* Women's International War Crimes Tribunal For the Trial of Japan's Military Sexual Slavery PT-2000-1-T, 4 December 2001 at [63]–[64] [TWT Judgment].

Its Summary of Findings was issued on 12 December 2000,[152] while its full judgment was delivered at The Hague on 4 December 2001.[153]

1 The TWT's Creation and its Overarching Focus on Truth-Finding

The successful proposal to establish the TWT, made at the Asian Women's Solidarity Conference in April 1998, is significant because it was part of, and reflected the growing role of, the global women's movement in ending state impunity.[154] Indeed, the TWT's International Organizing Committee, led by female representatives, was tasked with preparing a charter that would provide for individual criminal responsibility as well as state responsibility for the crimes of military sexual slavery and rape.[155] These crimes were considered to be war crimes and crimes against humanity.[156]

Leading up to the trial, groups were formed in participating countries to develop the TWT's legal framework.[157] Researchers focused on obtaining documentary evidence of the specific actions Japanese military and government officials had taken in establishing and running the stations,[158] whereas the three core organisational groups (The Korean Council for Women Drafted into Military Sexual Slavery, ASCENT-Philippines, and VAW-NET Japan) made contact with individuals and groups in the region. Their aim was to ensure that representatives from each country where the women were affected would participate in its proceedings.[159]

During these preparations, it became evident that the women wanted a component of the TWT's proceedings to be focused on the criminal responsibility of the Japanese government and its military officials.[160] Indeed, none of the officials had been prosecuted for the crimes committed against

152 *Prosecutors and People's of Asia-Pacific Region v Emperor Hirohito (Summary of Findings)* Women's International War Crimes Tribunal for the Trial of Japanese Military Sexual Slavery, 12 December 2000 [TWT Summary of Findings].

153 TWT Judgment, above n 151.

154 Matsui, above n 145, at 133–135.

155 At 120.

156 At 120.

157 Dolgopol, above n 103, at 243.

158 At 243.

159 At 243.

160 At 243.

the women.[161] However, even if found guilty, the deceased defendants could not be punished. The focus thereby turned on a public finding of criminal responsibility and documenting the truth.[162]

2 *The TWT's Legal Approach — The Prosecution's Indictment and its Rationale*

Chief Prosecutors Patricia Viseurs-Sellers and Ustinia Dolgopol charged high-ranking Japanese officials, along with Emperor Hirohito, for rape and sexual slavery as crimes against humanity.[163] An application for restitution and reparations was made on the basis that the Japanese State had incurred ongoing state responsibility.[164] The rationale for this combined claim came from the procedures of the International Criminal Court (ICC), which allowed victims of war crimes and crimes against humanity to bring a reparation claim.[165]

Concerning the criminal indictment, the focus was on crimes against humanity due to the pre-war status of Korea and Taiwan as colonies of Japan.[166] The prosecution also framed charges on the basis that the TWT was an extension of the IMTFE. This approach meant "the law applicable to the criminal aspects of the Tribunal would be that as applied or that which could have been applied if the Comfort System had been adjudicated by the IMTFE".[167] This position seemingly protected the TWT's decision from attack because it had applied and developed modern concepts of international law that were not available at the time of the IMTFE proceedings. It thereby allowed the TWT to analyse the principles of law that Japan had accepted when it signed the San Francisco Treaty.[168]

Regarding the reparation claim, it also meant that the prosecutors could argue that Japan was in breach of its obligations under international treaty and customary law during the war, while highlighting its ongoing violations

161 Dolgopol, aboven 103, at 243.

162 At 243.

163 Knop, above 8, at 151.

164 At 150.

165 Dolgopol, above n 103, at 243.

166 At 243.

167 At 243.

168 At 243.

in failing to provide reparation to the women.[169] The Judges also used the opportunity to develop international law, particularly the Draft Articles on State Responsibility.[170]

3 The TWT's Proceedings and Japan's Amicus Curiae

The TWT's proceedings took place in Tokyo from 8–10 December 2000. Approximately 1,500 people attended,[171] including 64 of the women who were victims, a number of whom gave evidence.[172] While witnesses could take the stand, they could also present evidence via pre-recorded video statements.[173] Those who chose this option were present at the trial and affirmed the statements made.[174]

During the proceedings, the women detailed the ongoing physical and psychological effects attributable to the time spent in the stations.[175] This collective sharing extended to women from modern-day conflicts, who detailed their stories during the trial's recesses.

While the Japanese Government was invited to participate, no response was given.[176] The TWT therefore appointed a Japanese lawyer acting as amicus curiae, in order to present the legal arguments Japan could have raised. The arguments included that the trial violated due process as "it put the deceased on trial", with the individual perpetrators to be indicted by name.[177] Furthermore, criminal state responsibility was to apply, and the proceedings sought to indict Emperor Hirohito.[178] Finally, in terms of the Japanese Government's position regarding post-war reparation, the statutory limitations acted as a bar; individuals had no right to sue the State and the peace treaties had concluded the reparation issue.[179]

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169 Dolgopol, above n 103, at 243.

170 At 243.

171 At 243.

172 Knop, above n 8, at 150.

173 See Dolgopol, above n 103, at 243; and Matsui, above n 145, at 120 and 123.

174 Dolgopol, above n 103, at 243.

175 At 244–245.

176 At 243.

177 Matsui, above n 145, at 124–125.

178 At 125.

179 At 125.

4 *The Tribunal's Reasoning — its Factual Findings and Judgment*

The TWT considered the issue of continuing harm under six categories: enduring health damage and physical suffering; reproductive harm; ongoing psychological harm; impediments to intimate relationships and social/community life; silence; and poverty and social/economic hardship.[180] The TWT thereby reinforced that the hardship experienced did not end with the women's liberation from the stations. Instead, for many, it continued in the form of drinking problems, nervous breakdowns and the inability to enjoy marital sex.

Regarding the criminal charges brought against Emperor Hirohito and Japanese officials, the TWT found the defendants guilty of rape and sexual slavery as crimes against humanity.[181] The Judges ruled that, as the Supreme Commander of the Army and Navy, Emperor Hirohito had "the responsibility and power to ensure that his subordinates obeyed international law and stopped engaging in sexual violence".[182]

Japan also incurred state responsibility for the harm experienced by the women, on the basis it had established and maintained the comfort system,[183] and on the basis that the "omissions of the state of Japan […] constitute continuing violations and obligations flowing from the original wrongful acts".[184] The State was therefore required to provide remedial measures, including a full apology and compensation.[185]

The judgment was met with rapturous applause.[186] In tears, the women expressed their gratitude to the Judges, who were also overcome with emotion.[187] While the prosecutors embraced, the standing ovation continued for several minutes.[188] This response indicates that the women felt their quest for justice had been answered.

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180 Dolgopol, above n 103, at 244–245.

181 Knop, above n 8, at 151.

182 Matsui, above n 145, at 126.

183 Knop, above n 8, at 151.

184 TWT Judgment, above n 151, at [940]–[941].

185 At [1066]–[1068], and [1076]–[1079].

186 Matsui, above n 145, at 126.

187 At 126.

188 At 126.

5 *Important Features — Prioritising Women's Voices and Redefining History*

The TWT's most important feature was that it prioritised the voices of the women. The TWT was formed to allow their collective voice to be heard and to address the failures of the IMTFE in providing justice:[189]

> [T]hese failures must not be allowed to silence the voice of survivors, nor obscure accountability for such crimes against humanity. [This tribunal] was established to redress the historic tendency to trivialize, excuse, marginalize and obfuscate crimes against women, particularly sexual crimes, and even more so when they are committed against non-white women.

Prioritising the voice of the survivors gave the women agency in condemning Japan for its wrongdoing and moored their otherwise anonymous experiences. The TWT's goal of bringing to life "the voice of the survivors"[190] was bolstered by the women being heard in other public fora, including the 1993 World Conference on Human Rights held in Vienna.[191]

A related feature of the TWT was its focus on redefining history, as evidenced in the Summary of Findings:[192]

> In the early 1990s, Asian women began to break almost five decades of painful silence to demand apology and compensation for the atrocities they and others suffered under Japanese military sexual slavery during the War in the 1930s and 1940s in the Asia Pacific region. The courageous revelations of the victimized survivors, euphemistically called "comfort women", inspired hundreds more survivors, throughout the Asia Pacific region, to speak out. Together, they have awakened the world to the horror of the Japanese military's institutionalization of rape, sexual slavery, trafficking, torture and other forms of sexual violence inflicted upon an estimated minimum of 200,000 girls and women. Robbed of their youth and their future, they were conscripted and trafficked through force, coercion, and deception and confined to "comfort stations" or, more accurately, sexual slavery facilities, where Japanese troops were situated, including on the front lines.

189 TWT Summary of Findings, above n 152, at [5].

190 At [5].

191 Matsui, above n 145, at 133.

192 TWT Summary of Findings, above n 152, at [1].

This introductory paragraph highlights that the women, their experiences, and their stories were to be at the front line in bringing the truth of Japan's history of sexual violence to light.[193] The title "breaking the history of silence" foreshadows a judgment that will focus on the international realm's traditional mind set of silence towards conflict-related sexual violence.[194] This break from the past is seen in the following paragraph of the Summary of Findings, which asks the reader to "listen to the voices of these … survivors":[195]

> I don't want to die as the ghost of a virgin.
>
> — Mun Pil-gi, Korea
>
> We want Japan to ask for forgiveness.
>
> — Yuan Zhulin, China
>
> We want justice. We want the Japanese government to take responsibility … We didn't come here to see Japan. We came here to tell the truth.
>
> — Esmeralda Boe, East Timor

The invitation to listen is compelling because the reader is invited to engage with the women, challenge her own understandings of the past, and thereby listen to, in Esmeralda's words, "the truth".[196]

Indeed, the TWT provided the forum for women who were victims of other conflicts to share their stories.[197] It was therefore a true people's tribunal. In finding Japan accountable for the comfort women system, and in emphasising the need for a "meaningful apology", the TWT had, for the first time, provided the women with a dignified response.[198] It therefore offered real justice, and signalled a new direction for international law. In listening to the women's lived experiences, the TWT emphasised that, where a state breaches fundamental human rights, it must be held accountable.

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193 TWT Summary of Findings, above n 152, at [1].

194 At [1].

195 At [1]–[2].

196 At [2].

197 "Public Hearing on Crimes against Women in Recent Wars and Conflicts" (11 December 2000) <www.iccwomen.org>.

198 TWT Judgment, above n 151, at [1066]–[1068].

IV THE VALUE OF THE TWT JUDGMENT: ADVANCING THE POSITION OF WOMEN IN INTERNATIONAL LAW

While the TWT allowed for the voice of the women to be heard, it acted on the fictional basis that it was an extension of the IMTFE. There is thereby a related concern, which is that this could create a distorted understanding of how international law should operate and uphold the rights of women subject to conflict-related sexual violence.[199] This section argues that the TWT was able to overcome these concerns and advance the position of women in international law.

A TWT Judgment: A Valid Mix of Fact and Fiction

The invitation to "[l]isten to the voices" of the surviving women is powerful because it asks us to reconstruct our understandings of the past.[200] Through listening to their stories, we are confronted with the reality of how this system of sexual slavery took place, and that the IMTFE and international law failed to provide justice to these women. In listening, we better see how our understandings of the past are formed according to the dominant narrative.[201] The TWT's judgment thus challenges how history has been written, and how international law has since progressed.[202]

In allowing the women to be heard, the TWT holds the discipline of international law accountable by questioning why it has ignored them, and the plight of women in general. This is particularly important because, while the prosecution of conflict-related sexual violence is on the rise, many women in modern-day conflicts still experience rape and other forms of gender-based violence. Further, although UN Security Resolution 1325 reaffirms the role of women in preventing and resolving conflicts,[203] and calls for states to prosecute conflict-related sexual violence,[204] many women and children are exploited, sometimes by those appointed to protect them.[205] As Major General Patrick

199 Knop, above n 8.

200 TWT Summary of Findings, above n 152, at [2].

201 Cohen, above n 26, at xi-xii.

202 See TWT Summary of Findings, above n 152, at [2].

203 "Landmark resolution on Women, Peace and Security" Office of the Special Adviser on Gender Issues and Advancement of Women <www.un.org>.

204 *On Women and Peace and Security* SC Res 1325, S/Res/1325 (adopted 31 October 2000) at [11].

205 Instances of recent abuse include United Nations peacekeepers having sexually abused women and

Cammaert notes in respect of conflict in the Democratic Republic of Congo, it "is more dangerous to be a woman than to be a soldier right now [in armed conflict]".[206]

Consequently, while the TWT highlights that women's voices must be heard, its return to the past appears to engage in a form of mythmaking, which mixes, elements of fact and fiction. Indeed, the TWT establishes itself as an extension of the IMTFE, capable of reversing the failings of both the IMTFE and international law itself. Further, in attempting to hold deceased State officials accountable for their crimes,[207] the idea that the TWT is a "fiction" has weight.[208] While Japanese State officials should be held responsible for the crimes committed, it is a fiction to assert that the deceased officials have actually been held accountable.[209] In mixing fact with fiction, the TWT's analysis of the past is one that engages in "what is sometimes called 'fact-ion'",[210] an important process for re-educating the Japanese people about Japan's history.

Further, in associating itself with the legitimacy of the IMTFE, an official state-based tribunal, in order to overcome limitation issues, the TWT prosecuted the accused on the basis of what the IMTFE could, and should, have done.[211] The TWT effectively creates "an imaginary past in which the IMTFE tried the case".[212] Its judgment also creates a legal prequel, where later developments associated with rape and sexual slavery are no longer radical shifts in international jurisprudence, but rather developments stemming from the judgment of the IMTFE, which should have characterised the law

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minors in Haiti. It is also alleged French peacekeepers were involved in the sexual abuse of African children in the Central African Republic from December 2013 to mid-2014. An independent UN Panel was announced to investigate these allegations further. See Aftab Ali "UN peacekeepers sexually abuse hundreds of women and minors in Haiti in exchange for food and medicine, new report will reveal" *Independent* (online ed, London, 10 June 2015) and Rick Gladstone "U.N. Creating Panel to Review Handling of African Children Sex Abuse Inquiry" *The New York Times* (online ed, 3 June 2015).

206 United Nations Development Fund for Women *Women Targeted or Afflicted by Armed Conflict: What Role for Military Peacekeepers?* (Report on Wilton Park Conference WP914, Sussex, May 2008) at 1.

207 See generally Knop, above n 8.

208 At 149. Knop uses the term 'fact-ion' to refer to the mixing of fact with fiction. While 'pre-quel' is utilised in the opposite context of sequel.

209 Knop, above n 8.

210 At 149.

211 At 158–160.

212 At 157.

in this manner.[213] This overlooks the hard work conducted by women who were active in the anti-trafficking movements during the IMTFE's actual proceedings.[214]

However, while the TWT judgment acts on certain fictions, its overarching intention is to show, through "technical legal demonstration that a different, more desirable past was possible and even plausible".[215] Where such mythmaking allows for a truer understanding of history and how society should operate, this approach should not be called "mythmaking"[216] at all. Rather, it unveils our collective past, so that the future can be seen clearly. Still, if the TWT reconstructs the IMTFE judgment where its outcome better provides justice to the women, but in the process applies the laws that were utilised in a manner contrary to their interests, one may question whether this approach allows the distortions of the past to be overcome.[217]

Despite these concerns, the TWT does, on the whole, offer a better means of addressing this history. In enforcing the understanding that rape and sexual slavery are crimes against humanity, the TWT countered, among other things, the gendered and colonial assumptions of international law. Indeed, its narrative is powerful in holding perpetrators, regardless of their position, to account.[218] It is also powerful in recognising the women as visible persons within the sphere of international law, with enforceable rights.

B The TWT Judgment and its Significance to International Law

1 Challenging the Gendered and Colonial Assumptions of International Law

The TWT was a people's tribunal, which means it could not impose legal sanctions on Japan and those responsible for the Jugun Ianfu system. However, it was established on three core principles: it was established in Japan, the accused state; it was a women's tribunal; and it was established through the efforts of grassroots organisers.[219]

213 Knop, above n 8, at 158.

214 At 159.

215 At 158.

216 Cohen, above n 26.

217 See generally Ronald Dworkin "Hard Cases" (1975) 88 Harv L Rev 1057.

218 Knop, above n 8.

219 TWT Judgment, above n 151, at [71].

The TWT arose within the global women's movement, and the wider context in which the United Nations (UN) was starting to address conflict-related sexual violence perpetrated against women.[220] A predominant focus of the UN World Conference on Human Rights was on preventing further human rights violations around the world, including those experienced by women.[221] This position was furthered when the UN General Assembly adopted the Declaration on the Elimination of All Forms of Violence,[222] and the Fourth World Conference on Women adopted a Platform for Action, which recognised rape and sexual slavery as crimes against humanity.[223] The International Commission of Jurists' report on comfort women,[224] and the reports of Special Rapporteurs Radhika Coomaraswamy on Violence Against Women[225] and Gay McDougall on Systematic Rape and Sexual Slavery, also reinforced the impetus to end violence against women.[226] Further, the creation of *ad hoc* tribunals such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) sought to enhance the position of women in international law, especially those who had experienced conflict-related sexual violence. For instance, the ICTY made it mandatory to prosecute sexual assaults committed during wartime conflicts.[227] Its statute explicitly lists rape as a crime against humanity under art 5(g),[228] which was a first for criminal tribunals.[229] The ICTR statute also provides for four types of sexual assault.[230] Under art 3(g) rape is

220 Matsui, above n 145, at 133.

221 World Conference on Human Rights (Vienna, Austria, 14–25 June 1993). In adopting the Vienna Declaration and Programme of Action, there was the call for "the full and equal enjoyment by women of all human rights", and the development of mechanisms to eliminate gender-based violence and sexual exploitation. See *Vienna Declaration and Programme of Action* A/CONF157/23 (1993) at [36]–[44].

222 *Declaration on the Elimination of Violence against Women* GA Res 104, A/RES/48/104 (1993).

223 Matsui, above n 145, at 134.

224 Ustinia Dolgopol and Snehal Paranjape *Report Of A Mission: Comfort Women — An Unfinished Ordeal* (International Commission of Jurists, Geneva, 1994).

225 *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences* E/CN4/1996/53/Add2 (1996).

226 *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-like Practices During Armed Conflict* E/CN4/Sub2/1998/13 (1998).

227 Campanaro, above n 52, at 2572.

228 *Statute of the International Tribunal for the Former Yugoslavia* SC Res 827, S/Res/827 (1993).

229 Campanaro, above n 52, at 2572.

230 Sellers, above n 58, at 165.

a prosecutable offence categorised as a crime against humanity.[231] Similarly, under art 4 (violations of art 3), rape is listed as "an outrage upon personal dignity", as are enforced prostitution and indecent assault. The Rome Statute of the ICC, under art 7(1)(g), also lists rape and sexual slavery as crimes against humanity.[232]

The TWT therefore operated at a time where ending gender-based and sexual violence was an overarching concern of the international community. The President of the TWT, Gabrielle McDonald, was formerly the President of the ICTY and had extensive knowledge of conflict-related sexual violence claims. The panel also comprised Justices Carmen Argibay, Christine Chinkin and Willy Mutunga. Justice Argibay had worked as a criminal judge in Argentina, Justice Chinkin was the President of the International Association of Women Judges,[233] and Justice Mutunga's experience included being the President of the Kenya Human Rights Commission and a professor at the University of Kenya.[234] While the TWT had a relatively gender-balanced and diverse ethnic composition, it was a women's tribunal focused on conflict-related sexual violence perpetrated against women. One of the Chief Prosecutors, Patricia Sellers, who wrote the indictment with Ustinia Dolgopol, had prosecuted gender-related crimes in the ICTY and ICTR.[235] One commentator's perspective is that the TWT's focus on gender prevented it from adequately addressing the colonial underpinnings of international law.[236] However, another commentator has noted:[237]

> [T]he Tribunal used international law to prosecute crimes committed against women of Asian countries under Western and Japanese colonial rule and military occupation. International law, which has hardly ever been applied to people of colonized and occupied countries, is now being used positively to prosecute the perpetrators at this Tribunal.

Through prosecuting Japan, Emperor Hirohito and other responsible officials, the TWT reinforced that those who commit gender-based crimes during wartime conflict must be held accountable. As surviving women could bring

231 *Statute of the International Tribunal for Rwanda* SC Res 955, S/Res/955 (1994).

232 *Rome Statute of the International Criminal Court* A/CONF183/9 (1998) [Rome Statute].

233 Matsui, above n 145, at 121.

234 At 121.

235 At 121.

236 Knop, above n 8, at 155–157.

237 Matsui, above n 145, at 132–133.

their claims to the TWT, this accountability extended to all women, regardless of their background or race. Consequently, while the TWT was part of a process that began with the ICTY and ICTR, it continued the momentum of enforcing women's rights, especially for those who experienced conflict-related sexual violence.

2 *Enforcing the Idea that Rape and Sexual Slavery Are Crimes Against Humanity*

The TWT judgment is significant because it operates on the basis that rape and sexual slavery are crimes against humanity.[238] The TWT's judgment recognises the Jugun Ianfu system allowed for "the rape and sexual slavery of tens of thousands of young girls and women from occupied or conquered territories in the Asia Pacific region".[239] It also recognises that the term "enforced prostitution" does not adequately describe the women's situation.[240] The TWT applies international instruments such as the 1907 Hague Convention,[241] the 1921 International Convention for the Suppression of the Traffic in Women and Children, [242] the 1929 Geneva Convention,[243] and the 1930 ILO Convention Concerning Forced Labour.[244] That approach clearly evidenced that sexual slavery constituted a crime against humanity at the time of the IMTFE judgment — even if not understood in those precise terms:[245]

> It is beyond dispute that acts constituting crimes against humanity listed in the Nuremberg and Tokyo Tribunal Charters – murder, extermination, enslavement, deportation, and other inhumane acts – were established crimes during the Asia-Pacific Wars. … [Thus, the] concept of crimes against humanity did not create crimes, but rather applied to conduct, which was already unquestionably criminal, a term which underscored its egregiousness.

This was obviously not the position of the IMTFE. Instead, the discourse around sexual slavery emerged in the 1990s as part of the women's movement.

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238 See TWT Judgment, above n 151, at [509]–[672].

239 At [794].

240 At [781]–[807].

241 1907 Hague Convention, above n 94.

242 1921 International Convention for the Suppression of the Traffic in Women and Children, above n 120.

243 1929 Geneva Convention, above n 107.

244 1930 ILO Convention, above n 117.

245 TWT Judgment, above n 151, at [514]; see also Dolgopol, above n 103, at 245.

While the IMTFE had the capacity to develop international law and recognise sexual slavery as a crime against humanity, it seems a stretch to contend that sexual slavery was a crime against humanity at that time. This reconstructs the past to better fit the desired outcome.[246] Reworking the past is, from a historiographical perspective, problematic because it does not recognise the impetus for change that followed, and in fact occurred, with the women's rights movement, the work of international tribunals such as the ICTY and ICTR, and the efforts of the surviving women themselves. The 1998 Rome Statute was the first to recognise rape and sexual slavery as crimes against humanity,[247] so in reality, such recognition is a recent development in international law.[248]

Although sexual slavery was not a new concept when the TWT commenced proceedings, its definition was relatively constrained. For instance, the ICC's elements of crime for sexual slavery focused on the "purchasing, selling, lending or bartering such a person or persons".[249] The ICTY's *Kunarac* decision,[250] which came out a few months before the TWT convened, provided a broader definition of enslavement in the 1926 Slavery Convention to cover "the status or condition of the person being enslaved".[251] The TWT uses both approaches in its definition of sexual slavery:[252]

> We find that the *actus reus* of the crime of sexual slavery is the exercise of any or all of the powers attaching to the right of ownership over a person by exercising sexual control over a person or depriving a person of sexual autonomy. Thus, we consider that control over a person's sexuality or sexual autonomy may … constitute a power attaching to the right of ownership. The *mens rea* is the intentional exercise of such powers.

246 Dworkin, above n 217.

247 Rome Statute, above n 232, article 7(1)(g). It also recognises they are war crimes under art 8.

248 The ICTR judgment of *Nyiramasuhuko* charged Nyiramashuko and her son for rapes committed during the Rwandan conflict on the basis that they were crimes against humanity and in breach of the Geneva Conventions. The judgment reflects growing recognition that rape and other gender-based crimes constitute crimes against humanity. See *Prosecutor v Nyiramasuhuko (Judgment)* ICTR Trial Chamber II ICTR-97-21-I, 26 May 1997.

249 *Report of the Preparatory Commission for the International Criminal Court: Addendum Part II Finalised draft text of the Elements of Crimes* PCNICC/200/Add 2 (2000), art 7(1)(g)–2.

250 *Prosecutor v Kunarac (Trial Judgment)* ICTY Trial Chamber IT-96-23-T & IT-96-23/1-T, 22 February 2001.

251 Dolgopol, above n 103, at 245.

252 TWT Judgment, above n 151, at [620].

This definition of sexual slavery paves the way for female victims of such abuse to have their bodily integrity protected. The TWT thereby provides a better understanding of how international law should uphold women's rights.

3 *Holding Japan's Deceased Officials Accountable and Countering the Rising Tide of Revisionist History*

For the surviving women, the TWT judgment was significant because both the State and its responsible officials were found guilty of the abuses committed against the women. It was the first time that Emperor Hirohito had been charged and prosecuted, along with eight other deceased military and government leaders, for the Jugun Ianfu system of sexual slavery and the rapes committed within it (counts one and two of the indictment).[253] Emperor Hirohito and Tomoyuki Yamashita were also charged for mass rape at Mapanique in the Philippines (count three).[254] The charges were brought as crimes against humanity.

The TWT rejected the argument that Head of State immunity was absolute and that it applied in the context of crimes against humanity.[255] This finding underscores the modern position that state officials cannot invoke immunity to escape culpability for breaches of fundamental human rights. Indeed, Emperor Hirohito and the eight other officials were found guilty. Under art 3(2) of the TWT's Charter, superior or command responsibility was invoked[256] because they "knew or had reason to know" their subordinates were involved in criminal activity within the camps, and had failed to take necessary and/or reasonable measures in preventing and punishing such perpetrators.[257] Pursuant to art 3(1), they also incurred individual responsibility[258] for allowing the crimes to be committed.[259]

The TWT's judgment is therefore significant in breaking the taboo against prosecuting war criminals and bringing an end to the impunity of wartime

253 The nine other leaders were Rikichi Andō, Shunroku Hata, Seishirō Itagaki, Seizō Kobayashi, Iwane Matsui, Yoshijiro Umezu, Hisaichi Terauchi, Hideki Tojo and Yoshijirō Umezu: see TWT Judgment, above n 151.

254 At [769].

255 At [56].

256 At [874].

257 At [677]–[738].

258 At [874].

259 At [739]–[767].

sexual violence these military and government leaders had indulged in.[260] The beginning of the post-war period saw the Japanese Emperor exempt from punishment for his wartime actions.[261] Military officials and other politicians argued they should not be punished[262] — if the Emperor was immune, they were too because they had been following the Emperor's orders.[263] The prosecution of war criminals has thereby been relatively unsuccessful in Japan.[264] With the Allied States also failing to hold Emperor Hirohito and leading Japanese officials accountable in the IMTFE, State representatives were able to continue indulging in the fiction that their crimes were justifiable. Indeed, many revisionists are seeking to rewrite a past where Japan was the liberator of the nation.[265] The visits made by Japanese ministers to Yasukuni shrine, which houses war criminals, highlight the danger that the glorification of war criminals will continue, and that Japan's unwillingness to confront its past as a colonial aggressor persists.[266] The TWT's judgment, which holds Japan responsible for its past, is therefore significant in countering this rising tide of revisionist history.

4 *Allowing Comfort Women to Hold the Japanese State Responsible and Achieve a True Form of Justice*

A true form of justice occurs when the survivors of state abuse hold the perpetrators of such abuse to account, and where the state and its people acknowledge the wrongdoing that has taken place.[267] This is true justice because history is redefined to collectively remember and uphold the truth of the survivors' testimonies.[268]

Indeed, the TWT judgment is significant because it challenges the premise that victims of state abuse cannot hold the perpetrating state and/or its officials accountable in international law. Applying the Draft Articles

260 See Matsui, above n 145, at 128–130.

261 At 128–130.

262 At 128–130.

263 At 128–130.

264 At 128–130.

265 Wingfield-Hayes, above n 14.

266 "Japanese politicians upset South Korea with visit to Yasukuni shrine" *The Guardian* (online ed, London, 18 October 2016).

267 Dolgopol, above n 103, at 244 citing psychologist Lepa Mladjenovic.

268 At 244–245.

on State Responsibility, the TWT found that Japan was in continuing breach of its obligations under international law.[269] While the TWT recognised that Allied States failed to prosecute Japanese officials and provide justice to the women, it also recognised:[270]

> … primary responsibility lies … with the state of Japan for its continuing failure over the last 56 years to prosecute … to officially and fully apologize, and to provide reparations and other meaningful remedies …

The TWT clarified that, in discussing primary responsibility, it was not the Japanese people who were on trial — excluding the "ascription of collective guilt" was not something that the TWT was prepared to deviate from in finding the State responsible for breaching international law.[271]

However, while the TWT did not put the "Japanese people on trial",[272] judgment against Japan renders a form of collective guilt, which forces those who deny Japan's responsibility to address the past.[273] As one commentator notes:[274]

> Social justice [is] an important part of recovery for survivors of sexual violence in armed conflict … [T]rauma is not the private matter of a woman, but a political issue. When the state takes responsibility for sexual violence, it can contribute to the survivor's recovery, and conversely, when it refuses to take responsibility for the crimes, it can impede the survivor's recovery.

The power of the TWT as a people's tribunal is that it furthers the goals of social justice.[275] In furthering the understanding that a state is also accountable to its citizens, and not just other states, the TWT judgment creates true justice, which counters normative understandings of international law. This outcome also counters the failures of traditional state-based tribunals to adequately protect human rights.[276] As the TWT notes:[277]

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269 Draft Articles on State Responsibility, above n 11, at [931].

270 TWT Judgment, above n 151, at [5].

271 At [7].

272 At [7].

273 See generally Cohen, above n 26, at 7.

274 Dolgopol, above n 103, at 244 citing psychologist Lepa Mladjenovic.

275 At 244.

276 Knop, above n 8, at 146–147.

277 TWT Judgment, above n 151, at [8].

> … this Tribunal steps into the lacuna left by states and does not purport to replace their role in the legal process. The power of the Tribunal, like so many human rights initiatives, lies in its capacity to … develop an accurate historical record, and apply principles of international law to the facts as found. The Tribunal calls upon the government of Japan to realize … its greatest shame lies not in uncovering the truth about these crimes, but in its failure to accept full legal and moral responsibility for the crimes.

Indeed, true justice involves the state taking meaningful steps to address its wrongdoing. This understanding is evoked by one of the women and is noted under the reparations section of the TWT's summary of findings: "I shiver at the memory of the soldiers; they have to kneel in front of us and beg us to forgive them … They should apologize and apologize".[278] Perhaps the strongest form of justice occurs when the state, and its responsible officials, provide a conciliatory response. This response could, as the TWT recommends in its judgment, involve establishing a truth and reconciliation commission, and creating a public historical record and memorial sites.[279] Such steps could allow for the victims to be remembered and to help to restore their dignity.

The TWT appears to understand that true justice is required. The judgment deals initially with the responsibility of Emperor Hirohito and the nine other officials,[280] before dealing with the responsibility of the State.[281] From a moral perspective, it is those officials who perpetrated, and failed to acknowledge, the acts who must bear primary responsibility. In applying the Draft Articles on State Responsibility, the TWT also strongly criticised the failure of subsequent Japanese officials to recognise the wrongdoing of their predecessors.[282] The TWT's judgment thereby leaves a powerful mark where both the State and individual officials are held accountable for breaches of the women's fundamental human rights.[283]

278 TWT Summary of Findings, above n 152, at 6.

279 TWT Judgment, above n 151, at [1086]–[1088].

280 At [673]–[876].

281 At [877]–[1053].

282 Draft Articles on State Responsibility, above n 11, at [938].

283 Knop, above n 8, at 146–147.

5 *Furthering the Growing Momentum of People's Tribunals in International Law*

Many see the ability of the TWT to promote the goals of international law as a fiction, because it is not a state-based tribunal with legal authority.[284] Its authority does not come from any positive source of international law. Instead, it has moral authority, which in this case stemmed from "the voices of global society … the peoples of the Asia pacific region and … the peoples of the world".[285]

Consequently, to assert that the TWT is illegitimate because it is a people's tribunal overlooks the fact that international law is inherently political. By allowing people to assert themselves, perhaps the TWT and other people's tribunals provide a more redemptive future for international law:[286]

> It is vitally important to realize that a people's tribunal does not merely play a supplementary role in filling the gaps in the order of states. Rather, it can participate in the formation of a new order of states. Thus, the Tribunal showed that international law is not an order created and implemented only by states; the people can and do play an increasingly important role in forcing states to abide by international law.

Moving forward, perhaps this is the defining claim of people's tribunals. The people and their associated communities have the right to be included in shaping the law.[287] This inclusion may be viewed as calling for accountability.[288] This is particularly so, where the people have no standing in state-mandated international fora to have their claims heard.[289] Still, the process is a legitimate one, because while such tribunals may not be authorised by states, they do meet other suggested elements of international legitimacy — "rationale, credibility, and recognition" by the people, and victims.[290]

While the traditional position is that such fora play a supplementary role in international law, in terms of their official procedures and validation of

284 At 146–147.

285 TWT Judgment, above n 151, at [8].

286 Matsui, above n 145, at 133.

287 Andrew Byrnes and Gabrielle Simm "Peoples' Tribunals, International Law and the Use of Force" (2013) 36(2) UNSWLJ 711 at 741.

288 See generally Craig Borowiak "The World Tribunal on Iraq: Citizens' Tribunals and the Struggle for Accountability" (2008) 30(2) New Political Science 161.

289 Byrnes and Simm, above n 287, at 741.

290 Borowiak, above n 288, at 181.

claims, these tribunals have a more extensive role than this.[291] They lay bare criminal responsibility for grievous breaches of human rights and provide a forum for those who have suffered abuse to share their testimonies.

These tribunals therefore have an important role to play in establishing the truth that lies behind the dominant narrative, preserving a more accurate record of history, and a reconciliation process that focuses on memory and justice for the people.[292] Further, in actively being able to participate in the proceedings, there could be a transformative process for the people, and for international law itself, which helps to remove some of the gendered and colonial aspects of the discipline.

Indeed, people's tribunals such as the Russell Tribunals on Vietnam (1966–1967) and Latin America (1973–1976), as well as the Permanent Tribunal of the Peoples (TPP) in Bologna (1979), have heard claims related to the human rights violations suffered by marginalised peoples. These people's tribunals have thereby reinforced the premise that the "dictates of public conscience can become a recognized source of law".[293] Indeed, with the TPP's operating system and principles being based on the Universal Declaration of the Rights of Peoples, the Tribunal has focused on a wide range of issues: self-determination, economic neo-colonialism, globalisation, the re-emergence of war, and declarations from the ICC of non-competency for economic-related crimes.[294] The scope of analysis for people's tribunals is wide-ranging. They also debunk the understanding that international law is to work in "the interests of the public and private holders of political and economic powers".[295]

The TWT has reinforced "a new order of states", where the women could hold Japan and its representatives accountable for their breaches of fundamental human rights.[296] As human rights protection takes greater hold, more of these non-state tribunals and organisations will likely gain prominence in the international arena. It is therefore possible that women's voices will be louder, and will be heard, in the future. The hope is that similar

291 Byrnes and Simm, above n 287, at 741.

292 At 741–742.

293 "Permanent Peoples' Tribunal" Lelio Basso <www.permanentpeoplestribunal.org>.

294 Above n 293.

295 Above n 293.

296 Matsui, above n 145, at 133.

tribunals could also contribute to a century in which there is less violence perpetrated against women.[297]

V CONCLUSION

The TWT was more than a process of allowing the voices of the survivors of the Jugun Ianfu system to be heard. It was a collective event whereby, in hearing the testimonies of the women, the Judges could engage with the women and with a truer version of history. While the TWT could be criticised because it bases its legitimacy on the IMTFE, a "fiction" that in certain respects distorts our understanding of international law,[298] it would be wrong to completely dismiss its significance. Perhaps the key benefit to be derived from its judgment is that a true history of international law may be achieved when social justice is provided to survivors of state abuse.[299] In order to realise such an end, it is necessary for their testimonies to be heard and re-lived. Inevitably, such a process requires a return to the past to create a more redemptive vision for the future. While one cannot revisit the past without fictionalising it, where there is a genuine attempt to understand the past there is always the hope that a more constructive future will ensue.[300]

Indeed, the TWT's return to the past provides a more redemptive, albeit reconstructed, future in which individual victims, including female victims of state abuse, are no longer anonymous objects of international law. While the TWT's rewriting of the past may be of concern, perhaps the greater danger occurs when there is no attempt to confront such history. For instance, where a state and its people fail to address their collective history there is the inherent danger that their understandings of the future will bear the distorted understandings of the past. Consequently, the TWT, in finding Japan and a number of its officials, including Emperor Hirohito, accountable to the women, Japan is forced to confront its history.

The power of the TWT is its ability to transcend time itself. In allowing the surviving women to be heard, the TWT provided some justice and a sense of dignity to the women. It also opened the door for other women subjected to conflict-related sexual violence to have their testimonies heard. In doing

297 Matsui, above n 145, at 139–141.

298 Knop, above n 8, at 146–147.

299 Dolgopol, above n 103, at 244–245.

300 Knop, above n 8, at 146–147.

so, the TWT's enduring judgment will likely be one of history as a collective experience. Indeed, the transcendental nature of the history of international law is reflected in the song the women sang during the TWT's opening ceremonies:[301]

> We are not afraid
>
> We are not afraid
>
> We are not afraid today
>
> Oh, deep in my heart
>
> I do believe
>
> We shall overcome someday

As these lyrics suggest, it is only when people come together that the individual voices of the traditionally repressed — including the anonymous voice of the female victim of state violence — will be heard. People's tribunals are a space in which the gendered and colonial assumptions of international law can be overcome and in which people's justice can be achieved.[302]

301 See Dudden, above n 137, at 594.

302 At 594.

REVIEW ESSAY

REFLECTIONS ON THE PERPETUAL CYCLE OF DISCRIMINATION, HARASSMENT AND ASSAULT SUFFERED BY NEW ZEALAND'S WOMEN LAWYERS AND HOW TO BREAK IT AFTER 122 YEARS: REVIEWING GILL GATFIELD'S *WITHOUT PREJUDICE*

Dr Anna Hood*

Gill Gatfield Without Prejudice: Women in the Law *(Brookers, Wellington, 1996); and Gill Gatfield* Without Prejudice: Women in the Law — Same Issue New Cover *1896–2016 (Gill Gatfield, Auckland, 2016; Thomson Reuters, Auckland, 2018).*

I INTRODUCTION

In 2018 the Me Too movement arrived, somewhat belatedly, in New Zealand. One of its primary achievements in its first few months in the country was to expose the prevalence of sexual assault and sexual harassment in the legal profession. On multiple occasions in the early months of the year, New Zealanders awoke to headlines detailing incidents where women had been sexually harassed and assaulted while interning and working in the legal profession.[1] The revelations generated calls for enquiries, surveys and reports

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1 See for example, Melanie Reid and Sasha Borissenko "The summer interns and the law firm" (14 February 2018) *Newsroom* <www.newsroom.co.nz>; Melanie Reid and Tim Murphy "Law Firm Faces New Sex Claims" (26 February 2018) *Newsroom* <www.newsroom.co.nz>; and Vaimoana Tapaleao "New Zealand former lawyer speaks out about sexual harassment at work: It was like a frat house" *New Zealand Herald* (online ed, Auckland, 1 March 2018).

and, as at early October 2018, a number of initiatives have commenced to try to understand and address the issue of the sexual assault and harassment of women lawyers.[2]

Those who are involved in these initiatives or have an interest in the treatment of women in the legal profession should read *Without Prejudice: Women in the Law* (*Without Prejudice*),[3] Gill Gatfield's meticulously researched book on the experiences and position of women in the New Zealand legal profession from 1896–1996.[4] While the book was written 22 years ago, it remains the most thorough, thought-provoking and valuable text on women in the law in this country and its pages contain information that is critical for us to understand if we are to have any hope of transforming the experiences of female lawyers in New Zealand.

Without Prejudice details the history of women in the law in New Zealand. It is divided into three parts: the Past (the 19th century to the 1980s); the Present (the 1990s); and the Future. In the first two parts, Gatfield sets out the countless ways that women have been excluded, marginalised, undervalued and discriminated against since they first sought admission to the profession in the late 19th century. She also provides in depth analyses about why women have been subject to the treatment they have and the attempts that individuals and groups have made at various times to fight back against the endemic discrimination. In Part III, Gatfield turns to consider how the multitude of issues she has uncovered could be addressed and sets out a variety of well-developed strategies.

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2 The New Zealand Law Society has set up a regulatory working group, chaired by Dame Silvia Cartwright, to investigate harassment and bullying in the legal profession. They have also established a confidential online portal where reports about harassment and unacceptable behaviour can be deposited. For more information, see "Law Society takes action against harassment and bullying" (29 March 2018) New Zealand Law Society <www.lawsociety.org.nz>. In September 2018, the Law Society also established a Culture Change Taskforce, chaired by Kathryn Beck, to drive and guide systems and culture change within the legal community, see "Law Society Taskforce focused on culture change" (25 September 2018) New Zealand Law Society <www.lawsociety.org.nz>.

3 Gill Gatfield *Without Prejudice: Women in the Law* (Brookers, Wellington, 1996). Gatfield republished the book in 2016, adding the subtitle — *Same Issue: New Cover 1896–2016*. Thomson Reuters has published that edition as an e-book in 2018. The references in this piece are from the 2016 edition: Gill Gatfield *Without Prejudice: Women in the Law — Same Issue New Cover 1896–2016* (Gill Gatfield, Auckland, 2016).

4 Ideally, everyone interested and engaged in the legal profession in New Zealand would read the book but it is of particular importance that those active in the reform space take the time to read and consider its chapters.

What makes the book so valuable to our current discussions is that it reveals that sexual assault and harassment are part of a much wider web of discriminatory practices to which female lawyers are subject, and that these discriminatory practices have deep roots and an array of causal factors. These facts suggest that we need to be wary of casting the current problems women face in the legal profession too narrowly and crafting solutions that seek to address the sexual assault and harassment of women without tackling the broader, systemic forms of discrimination that are deeply embedded in the profession.

In this piece, I discuss the central ideas that emerge in each part of *Without Prejudice* and provide some reflections on them. My hope is that by drawing attention to Gatfield's work and offering some thoughts on the arguments it puts forth, it will encourage a broader conversation around the treatment and position of women in the law so that we can tackle the wide array of discriminatory practices and systems in the profession while there is a spotlight on the law and there are people energised to achieve change.

II THE DIAGNOSIS: A DISCUSSION OF PARTS I AND II

As noted above, the first two parts of *Without Prejudice* explore the treatment and experiences of women in the legal profession from the 19th century through to the 1990s. They also seek to document and explain the discrimination women faced along with some of the efforts that were launched to try to overcome it. In the sections below, I set out some of the key points Gatfield makes in relation to these topics, provide some reflections on them and look at what those tackling the problems women face in the legal profession today can learn from the analysis in these parts of the book.

A Low Numbers in the Early Decades

Part I of *Without Prejudice* examines the history of women in the law in New Zealand prior to the 1990s. It opens with an account of the multi-year parliamentary battle to establish legislation allowing women to practise as lawyers in the late 19th century.[5] It then moves to detail the experiences of New Zealand's early women lawyers.[6] What is striking in these early chapters

5 Gatfield, above n 3, at chs 1–2.

6 At chs 3–5.

is just how few women chose to practise law in the first 60 years of being allowed entry into the profession in New Zealand. In 1911 only three women were in practice, by 1921 the numbers had increased by just one to four, and in 1936 there were only seven in total.[7] Unlike in other professions, the advent of World War II did little to swell the ranks of female lawyers with only 19 in practice by 1945.[8] Just over a decade later, in 1956, the numbers were still exceedingly low with just 28 women practising law, making them a mere 1.4 per cent of the profession.[9]

Gatfield lays the blame for the low levels of female lawyers largely at the feet of government economic and social policies.[10] She argues that incentives and concessions for men to enter university after both World War I and World War II,[11] and policies that stressed the importance of women staying home and raising children throughout the first part of the 20th century worked to discourage women from trying their hands at the law.[12] Gatfield presents a convincing case that these policies were powerful disincentives for women to enter the law. However, these disincentives, for the most part, would have applied to women seeking to enter any profession in this period. While women were by no means flocking to other professions, considerably more women did join many other professions. In both medicine and accountancy, for example,

7 At 454. See table A6: The Legal Profession and Lawyers, 1851–1991.

8 At 53.

9 At 454. See table A6: The Legal Profession and Lawyers, 1851–1991. The numbers of female law students during this period were similarly low, although there were slightly more female law students than female lawyers. One brief note on the accuracy of the law student figures: tracking down how many women were at law school in the closing years of the 19th century and the first part of the 20th century is extremely difficult. There are no comprehensive records of the numbers of law students from this time let alone a gender break down. Gatfield has compiled the number of female law students from the New Zealand Census of Population and Dwellings 1874–1906, Appendices to the Journals of the House of Representatives 1908–1944, and Education Statistics New Zealand 1945–1990. While these sources provide a reasonable estimate, I suspect the actual numbers may be marginally higher. The table in *Without Prejudice* suggests there were no women in New Zealand law schools in 1896 but we know that Ethel Benjamin was attending Otago Law School at this time. Further, the table shows that there were no female law students in 1920. The University of Auckland archive suggests, however, that there were at least two female law students in 1920: Freda Jacobs (later known as Fuzz Barnes) and Elin Erickson. Freda Jacobs never graduated and Elin died after graduating in 1925. It is questionable whether we will ever have an entirely accurate picture of the numbers of female law students from the early years of women in the legal profession. However, checking each university's archives may provide slightly more information in this quest.

10 Gatfield, above n 3, at ch 3.

11 At 46–50 and 53–54.

12 At ch 3.

the numbers of women were higher at every census than they were in law and jumped significantly during World War II.[13]

This raises the question as to whether there was something distinctive about the law that acted on top of the economic and social policies to discourage women. Issues raised in other chapters of Part I may go some way to providing an answer. Gatfield details the patriarchal maleness that pervaded the profession during this era,[14] and reveals how closed the profession was to those without family connections to existing practitioners.[15] Indeed 70 per cent of the women who went into practice between 1897 and 1959 had a lawyer in the family.[16] It would make sense that both factors weighed on the minds of women who were considering entering the profession and perhaps pushed them to other domains.

There is, however, room for more research to be done exploring this issue in greater depth. I wondered as I read this part of the book whether perhaps the reluctance of women to consider law also had something to do with the nature and scope of the law and how it was used in New Zealand during this period. This grew from wondering why more women from the women's movements of the time did not pursue a career in the law. Throughout the period under discussion, save for a brief period around World War I, New Zealand had a strong women's movement that fought for an array of social and political causes. Today law school lecture theatres are filled with socially and politically minded students hoping to employ the law to further social justice and achieve political change. It would appear, however, that their counterparts in the early 20th century did not see law as an avenue for pursuing such causes.

There is evidence in Gatfield's book for the idea that the practice of law in New Zealand was not, at that time, a space for tackling the social and political issues of the day. To start with, contrary to other western, common law jurisdictions, women won the right to practise law through parliamentary action, not through taking cases to court.[17] Further, most of the early women

13 For example, in 1936 there were 248 female accountants and in 1945 there were 470. In medicine, there were 83 female doctors in 1936 and 137 in 1945. These figures are set out in Deborah Montgomerie "A Personal Affair Between Me and Hitler? Public Attitudes to Women's Paid Work in New Zealand During World War II" (MA Thesis, University of Auckland, 1986) at ch 3.

14 Gatfield, above n 3, at ch 4.

15 At 59.

16 At 59.

17 At ch 1 and 329. This is in stark contrast to what happened in most other western, common law

who entered the profession were engaged in the women's movement and in advocating for social and political change but appeared to keep most of their legal practice separate from their women's movement activities.[18] For example, while Ellen Melville did some legal work for National Council of Women (NCW) it was largely around the financial and operational needs of the organisation, not the substantive causes for which NCW fought.[19] Further, on graduating with her law degree in 1898, Stella Henderson spoke of her desire to use the law "to help forward the social movements of the day" and "to be of service in helping to remove the unjust restrictions which the law imposes on our sex",[20] but never ended up practising and instead led a life fighting for social and political change as a journalist.[21] These facts suggest that the law and legal profession in New Zealand were, or at least were seen, as rather conservative with little potential for furthering social and political change. Whether this was in fact the case, and if it was, whether it discouraged members of the women's movement from pursuing the law, requires further research. It may well be that additional factors that have not yet been considered are part of the story behind the low levels of women in the law from the 1890s to 1950s and that future research in this area will reveal them.[22]

B The Discriminatory Treatment of Women Lawyers Across the 19th and 20th Centuries

From seeking to understand the low numbers of women in the profession in the first half of the 20th century, Gatfield moves on to focus on the challenges and forms of discrimination faced by the women who did choose to train and practise as lawyers during this time. She covers the myriad ways they were excluded from both law school life and professional practice including being barred from law libraries, social gatherings and classes that covered sexual

jurisdictions where women won the right to practise law through taking cases to the courts.

18 At 93–96. Ethel Benjamin was an exception to this trend: see at 93.

19 Veronica Kuitert "Ellen Melville 1882–1946" (MA Thesis, University of Auckland, 1986).

20 "Miss Stella Henderson" *White Ribbon* (New Zealand, June 1898) at 1–2, as quoted in Gatfield, above n 3, at 93.

21 At 93.

22 If there is something to the idea that the law provided few avenues for social and political change, it would be interesting to explore the extent to which this has changed. While many students nowadays profess a desire to use their law degrees to pursue social justice in their careers, I remain sceptical about the extent to which this happens in practice and the extent to which New Zealanders use the law and courts to further movements for change.

topics; being discouraged from attending court; having their court room attire controlled and having no changing facilities provided at court; being pigeonholed into particular areas of the law such as family law; and having to navigate a world where they were frequently the only woman, the old boys' network was pervasive and the press took an unnatural interest in charting their actions.[23] What is more, almost none of them partnered or had children.[24] Rounding out Part I of the book is a chapter that explores the ways that discrimination persisted and developed in the legal profession in the 1970s and 1980s, even though the number of women involved in the profession was increasing as were the efforts that women initiated to tackle inequity.[25]

Part II of the book draws on a nationwide survey of female and male lawyers that Gatfield conducted in 1992 with sociologist Alison Gray, as well as information from extensive interviews and focus groups that Gatfield conducted with individual lawyers and professional legal bodies, to provide a detailed analysis of the state of the profession for women in the 1990s.[26] It canvasses the fact that law school student numbers continued to rise but that beyond this, problems persisted for women with far fewer women than men entering the profession, women leaving the profession at three times the rate of men, women being paid less than men and women failing to rise to plum positions within the profession.[27] It also explores how women were asked about their plans for marriage, contraception decisions and children in job interviews;[28] how they continued to primarily be given work in a limited number of substantive areas if they did get a foot in the door;[29] and how the strong role that male power played in the profession generated the conditions for sexual harassment to become a normal part of life for many female lawyers.[30]

It is depressing to see how much of the discrimination that is documented in Parts I and II of the book remains pervasive today. In 2018, we have for

23 See chs 3–5.

24 See ch 3.

25 See ch 6.

26 For a discussion of Gatfield's research methods, see at xi–xvii.

27 See ch 7.

28 At 163–164.

29 At 174–176.

30 See ch 11, particularly at 253–254.

the first time more women than men in the legal profession.[31] However, numbers (as Gatfield perceptively predicted)[32] appear to count for very little as the experiences, positions and status of women in the law today mirror to a significant extent those of early women lawyers and many of the underlying issues and forms of discrimination persist. We know all too well from the media revelations earlier this year that sexual harassment (and worse) continues to plague the profession. Further, despite a number of law firms taking steps to increase workplace flexibility and provide childcare support, concerns about the difficulty of combining a legal career with motherhood remain at the forefront of many women lawyers' minds.

In addition to these factors, I have been concerned to learn in the last couple of years that the idea that women are best suited to certain areas of the law or are not necessarily cut out for the "serious" commercial aspects of legal practice are alive and well. Students at the University of Auckland's Faculty of Law talk about how commercial law subjects are "male subjects" while other, so-called "fluffy" subjects such as family law, international law and human rights law are "female subjects". These views are reinforced by the latest statistics from the New Zealand Law Society which show that significantly more men practise in company and commercial law, while more women practise in family law.[33] Concerns that women are screened out of certain legal jobs through problematic interview questions are also persistent. While I have not heard stories of women being asked about their approach to or choice of contraception in job interviews, female students discuss the fact that they still, at times, get asked about their marital status in interviews.[34]

What is more, after nearly three decades of more women than men graduating from law school, men continue to outrank women in the upper echelons of the profession with women making up just 30.9 per cent of partners in law firms,[35] 18.7 per cent of Queen's Counsel,[36] and 31.3 per cent

31 Geoff Adlam "Snapshot of the Profession" *LawTalk* (March 2018, Issue 915) at 49.

32 Gatfield, above n 3, at 322–323.

33 Adlam, above n 31, at 57.

34 On a personal note, when I interviewed for a graduate position with a top tier firm in Shortland Street in 2006, I was asked whether I liked baking muffins.

35 Adlam, above n 31, at 54.

36 At 51.

of the judiciary.[37] Concerns about the fact that men appear more frequently in the Court of Appeal and Supreme Court and women advance more slowly through the ranks of the legal profession prompted Jenny Cooper QC and Gretta Schumacher (under the auspices of the New Zealand Bar Association) to launch a formal study documenting the exact numbers of men and women appearing in the country's highest courts.[38] This study shows that women appear as lead counsel in New Zealand's higher courts at a disproportionately low level compared to their proportion of the profession; as an example, in each year over a six year period (2012–2017) women made up less than 30 per cent of lead counsel in the Court of Appeal.[39]

While the fact so little has changed for women lawyers in the years since Gatfield penned *Without Prejudice* is depressing, the encouraging news is that there is information in the book's pages that will be helpful in trying to tackle the situation we face. First, Gatfield provides extensive analysis about the causes behind the discrimination against women in the legal profession. These include biases in the recruitment and promotion processes of the profession;[40] the fact that the structure of legal practice, with its long hours and myopic focus on rewarding those who bill the most, is incompatible with many women's lives especially when they want to raise a family;[41] and the insidious effects of the health and strength of the old boys' network.[42] She also challenges common assumptions that emerged in the surveys and interviews she conducted including that women fail to advance in the law because they *choose* to prioritise having children over work and that they *choose* to leave private practice for reasons disconnected from any form of discrimination. She persuasively shows how problematic the idea of "choice" is in both contexts and how it is far more accurate to see women's experiences as the product of systematic gender discrimination.[43] She then turns to detailing the obstacles to change that existed in the 1990s including

37 "NZ Supreme Court leads in proportion of women judges" (22 June 2017) New Zealand Law Society <www.lawsociety.org.nz>.

38 Jenny Cooper and Gretta Schumacher *Gender Ratio of Counsel Appearing in Higher Courts: Report of the New Zealand Bar Association* (September 2018).

39 At 3 and 5.

40 Gatfield, above n 3, at 161–174.

41 At 205–216.

42 See generally chs 8 and 9.

43 See ch 10.

attitudes, paternalism, a culture of conformity and the fact that it was in the best interests of many men for the profession to continue as it was.[44] All of these issues remain relevant today; recognising and understanding them will help us think through the sorts of responses and solutions that need to be devised.

A second set of information in the book that is helpful for us to reflect on is the material Gatfield provides about previous attempts that have been made to improve the plight of women in the law. It is apparent that throughout the first century of women in the legal profession, the vast majority of changes to the experience and status of women were instigated by external forces, often with heavy resistance from members of the profession.[45] It was women's organisations and some progressive politicians, for example, who succeeded in lobbying for women to be allowed to practise in 1896 despite strong opposition from the various law societies around the country.[46] Similarly, in 1977 the Human Rights Commission Act 1977 was adopted because the women's movement pushed for change, despite strong resistance from the profession. This Act made it illegal for an employer to deny women access to employment opportunities in New Zealand on the basis of their sex. The profession was deeply concerned by this law and campaigned hard for an exemption to be made for partnerships but was ultimately unsuccessful.[47]

Gatfield does note instances where female lawyers (and very occasionally male lawyers) stood up against discriminatory practices and worked to achieve change especially in the 1980s and 1990s.[48] However, she casts doubt on the efficacy of much of the work done, explaining that a lot of it was focused on documenting the problems and seeking to educate people about the issues that existed.[49] She argues that lawyers became adept at conducting surveys and shining a light on gender issues in the profession but then doing little more. In her words, the "legal profession has a long history of denouncing discrimination and doing nothing".[50]

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44 See ch 14.

45 At 320.

46 See ch 2.

47 At 101–102.

48 See ch 13.

49 See, for example, at 290 and 297–298.

50 At 291.

In the past, I have had some sympathy with efforts that raise awareness of problems without necessarily going any further. I have believed that the mere fact a problem is unveiled, and a conversation had, has meant that people are likely to re-evaluate their behaviour and approaches. *Without Prejudice* has dispelled my faith in the power of conversation, at least in this context. The book drives home that while some consciousness raising practices may have resulted in some individuals reassessing their views (at least temporarily), it has never resulted in shifting the underlying structural problems in the profession. Thus, we have become trapped in a cycle whereby discrimination occurs, concerns are raised, the raising of concerns lulls people into a false sense of believing that change is happening, the structural problems that give rise to discrimination are left untouched and it is only a matter of time until discrimination rears its head again. The book sends a clear message that if we are to have any hope of escaping the deeply entrenched forms of discrimination in the profession, structural change will be required, and we conduct surveys and consciousness raising without more at our peril.

III SOLUTIONS: A DISCUSSION OF PART III

Gatfield's scepticism of unveiling problems without offering solutions is not only apparent from her condemnation of the lack of change undertaken by members of the legal profession around gender issues. It also comes through from the fact that in *Without Prejudice* she takes seriously the task of exploring what needs to be done and devotes five chapters to thoughtfully setting out and analysing ways to tackle the discrimination that has a stranglehold on the profession. She espouses an array of litigation avenues for targeting the perpetrators of sexual harassment and discriminations;[51] extols the value of businesses championing women, and the costs of them failing to;[52] details how to address some of the structural problems in the profession by, inter alia, centralising the Treaty of Waitangi in the delivery of legal services, implementing new approaches to decision-making, creating flexible working practices, improving childcare support and enhancing parental leave options;[53] suggests the implementation of equal employment opportunities audits and

51 See ch 15.

52 See ch 16.

53 See ch 17.

an enhanced role for law societies;[54] details how to improve the entry into, and experience of, women in the judiciary;[55] and calls for the government to step in if the profession fails to address the problems adequately.[56]

If Gatfield's prescription for the profession had been followed over the last 22 years, I have no doubt that the profession would be in a very different position today. I am not sure, however, that we would be living in a post-discrimination world. One of the main reasons for this is that I am not sure that the structural change suggestions go far enough. As noted above, Gatfield's vision for structural change identifies several key areas that need addressing. While these measures are important, they do not address the fact that the dominant model of success in the legal profession is, as set out by Gatfield, working as long and hard as possible and billing as many hours as possible.[57] Thus, while the proposed measures make it possible for women to practise, they also make the women who utilise them exceptions, people who are outside the mainstream and who have little hope of achieving "success" as defined by the profession. It creates risks that they will be side-lined, deprived of the best and most interesting work, and devalued. The measures also do little to confront the significant hierarchies and power imbalances in the profession. These are factors that, as Gatfield recognises at numerous points in the book, are at the heart of discrimination and harassment.[58]

Concerns about flexible working practices and parental leave making women the exception could be addressed by mainstreaming the initiatives so that all people felt comfortable taking advantage of them. This is, however, far easier said than done. Just how to achieve the mainstreaming of flexible working practices and parental leave is something that feminists the world over are grappling with. One of the most successful approaches has been legislative intervention in Norway that dictates that the parental leave a couple is entitled to will be significantly reduced if both partners do not take their share of the leave.[59]

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54 See ch 17.

55 See ch 18.

56 See ch 19.

57 This is summed up very well by Helen Melrose describing the culture of the legal profession: "the main goal is to be the best, meaning the hardest working, the highest fees, the most perfect law(yer), the longest hours — five twelve hour days and a day at the weekend … It's an outstanding example of what the maleness of it is all about", as quoted in Gatfield, above n 3, at 227.

58 See, for example, at 253–254.

59 Christa Clap "The Smart Economics of Norway's Parental Leave, and Why the US Should Consider

Another approach would be to work on changing the definition of success in legal workplaces so that it moves away from long hours and high financial returns and instead focuses on creating a legal system where all New Zealanders can access justice, social justice initiatives are pursued, less adversarial forms of practice are championed, and practitioners and clients are treated respectfully and with dignity. Such a shift would require deep cultural change and a fundamental modification of the profession's values. While I am a strong advocate for such changes, waiting for them to occur is likely to damn women to another century of oppression.

If changing the values and goals of existing legal workplaces is too complex, then an alternative path would be to legitimise, support and champion the pursuit of different models of lawyering so that they become more widely available, pursued and valued. One of the most interesting parts of *Without Prejudice* is where Gatfield highlights the fact that a number of women who were forced out of private practices in the 1980s and 1990s because of gender issues opened innovative women-only practices.[60] A number of these practices strove to practise law in different ways — for example, by taking more team-based approaches,[61] and being more accessible to clients.[62] These practices took on legal work to which the women felt connected and that often made a difference to the lives of other women,[63] and explored new ways of enabling people to balance work and family life, such as having childcare provided onsite at the office.[64]

While we should work to ensure that every woman who wants to enter and succeed in mainstream private practice can do so, we should also find

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It" *The Washington Post* (online ed, Washington, 11 January 2016). In 2018, the New Zealand Law Society released a Gender Equality Charter which includes a provision that signatories of the charter will "encourage and support flexible working to assist all lawyers to balance professional and personal responsibilities". While this is promising, overseas experiences cast doubt on the extent to which a soft measure such as this will be effective.

60 Gatfield, above n 3, at 224–230. She also draws attention to the fact that there is a long history of New Zealand women lawyers going out on their own and carving out new fields of practice for themselves. For the most part, including in the 1980s and 1990s, women ventured into new avenues of practice because they were shut out of, or significantly stifled in, the mainstream.

61 Frances Martin "Partners want to offer value" *The Evening Post* (Wellington, 12 August 1992) as cited in Gatfield, above n 3, at 227.

62 At 225.

63 At 226.

64 At 228–229.

ways to advance alternative forms of legal practice that suit the lives of women. It is highly likely that many such practices will also have a commitment to representing those unseen by the traditional system as many of the women-only practices in the 1980s and 1990s did. We are at a point in history where there is a desperate need for these sorts of practices. The legal system and legal services in New Zealand are broken: the amount of legal aid available is woefully low,[65] and many people in the country are unable to access legal assistance either because of the extortionate cost,[66] or because they live outside the main centres where lawyer shortages are endemic.[67] Innovative firms that dare to venture outside the mainstream and find new ways of delivering services and meeting the needs of the community should be lauded and supported, not viewed as fringe enterprises in the profession. Gatfield makes the important point that the sorts of alternative practices that emerged in the 1980s and 1990s are risky to set up and raise a host of financial challenges.[68] There is a real need for resources, support and recognition to be given to those seeking to experiment and find different models so that they not only get off the ground but thrive.

In putting forward these thoughts, I am keenly aware that they are woefully under-developed compared with Gatfield's detailed and considered solutions. I hope, however, that they will provide an opening for further research, discussion and consideration alongside the fully crafted ideas that Gatfield proposed in *Without Prejudice.*

IV MISSING CONVERSATIONS

While *Without Prejudice* covers a vast array of material, there are gaps in the work. Most significantly, the project does not explore the experiences of Māori women lawyers in great detail. Gatfield acknowledges this omission and expresses regret for it. She explains in the opening pages of the book that although initial research uncovered evidence of Māori women being impeded by discrimination on the basis of race as well as sex, Māori women's stories

65 Adam Goodall "Judges have been Talking About the 'Justice Gap' Crisis for Years" (1 November 2017) The Spinoff <www.thespinoff.co.nz>.

66 Goodall, above n 65.

67 See, for example, Andrew Ashton "Lawyer Shortage Biting Hawke's Bay Practices" *The New Zealand Herald* (online ed, Auckland, 5 February 2018).

68 Gatfield, above n 3, at 218–219.

are missing because she was not able to develop a Māori-controlled research methodology that met the approval of Māori women lawyers.[69] She also acknowledges that the book does not focus on the "concerns of lawyers with disabilities or who are … lesbian, gay or members of another ethnic or cultural minority in the profession" and records the need for comprehensive further research and analysis of these members of the profession.[70]

I would add to this list of omissions that the book does little to explore the experiences of women from other sexual minorities and lower socio-economic backgrounds. Gatfield does discuss at numerous points in the book that the vast majority of female lawyers, like their male counterparts, are drawn from the middle and upper classes. It would, however, be interesting and useful to hear the stories of those who did not come from privileged backgrounds and to consider some of the challenges and structural barriers they face in the legal profession.

There is an urgent need for intersectional work to be undertaken so that our understanding of the experiences and concerns of all women, not just white, middle class women, are understood and addressed. The forms of harm and discrimination to which women are subject are multi-faceted and compounded by one another. Efforts to address discrimination that focus exclusively on gender and block out other discriminatory treatment fail to see, let alone have any hope of stamping out, a multitude of harms that affect women on a daily basis.

One further area where there is scope for more work is for those with a theoretical bent to delve into the issues at play and apply theoretical lenses to them. Although the book is clearly informed by a deep understanding of feminism and feminist literature, it is not explicitly theoretical. The lack of heavy theoretical content is highly appropriate in this book and makes it accessible to a wide audience. However, in future projects, bringing a more direct theoretical lens to bear on the position of women in New Zealand's legal profession may well be quite productive for opening new avenues for consideration and ideas for transformation. It would be especially interesting to see postcolonial feminist and neoliberal theories applied to the gender and discrimination issues which are so prevalent in the profession.

69 At xiv.

70 At xix.

V CONCLUSION

Notwithstanding its lack of intersectionality, *Without Prejudice* contains important information and ideas for those grappling with the status of women in the legal profession today. It provides a deep understanding of the problems that embroil many women in the profession and what generates those problems, as well as providing well thought through, practical pathways for structural change. It is essential that we read and consider Gatfield's work if we are to turn the profession around and ensure that we are not having the same conversations in another 20 years' time, or worse, in 2096, two centuries on from when women were first admitted to practice.

CASE NOTE

YES, NO OR MAYBE? THE "ODD" RESULT IN *Christian v R*

Emily Blincoe*

I INTRODUCTION

It would appear to be self-evident that, as the feminist refrain goes, "yes means yes and no means no". However, given the infinite variety of human behaviour, many situations are not so neatly categorised. How should the criminal law treat sexual activity in the absence of either a "yes" or a "no"? That is the core issue in *Christian v R*, and a question to which the Court of Appeal and Supreme Court gave very different answers.

Mr Christian was convicted, following a jury trial, of three counts of sexual violation by rape.[1] The Crown case was that Mr Christian had repeatedly raped the complainant when she was between the ages of 13 and 16 while the two were living together. Mr Christian's defence was that no sexual activity had taken place. The trial Judge directed that, as neither consent nor reasonable belief in consent were at issue, the jury had to return a guilty verdict if they found that penetration had occurred in respect of each count.[2]

The first rape charge (count 2) related to an incident three or four weeks after the complainant moved in with Mr Christian. The jury found him guilty of that charge, but not guilty of an indecent assault charge (count 1) said to have occurred immediately before the rape. He was discharged on a second specific count of rape (count 3), relating to the second time he was alleged to have raped the complainant. Her evidence was that she could not remember the incident specifically. The jury found him guilty of the two representative

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1 Mr Christian was sentenced to 13 and a half years' imprisonment: *R v Tassell* DC Tauranga CRI-2012-087-1863, 25 July 2014, as cited in *Christian v R* [2017] NZSC 145 [*Christian* (SC)] at [1].

2 *Christian* (SC) at [17].

charges of rape, which related to the time they lived together, first in a house (count 4), and then in a house bus (count 5).

The verdicts on the representative charges meant the jury was satisfied beyond reasonable doubt that Mr Christian had raped the complainant at least once during the relevant time period relating to each charge.

Mr Christian appealed to the Court of Appeal, which upheld the convictions and found that there was no narrative capable of supporting a reasonable belief in consent.[3] Mr Christian appealed to the Supreme Court.[4] The majority of the Supreme Court dismissed the appeal on count 2 (the first rape charge). However, it allowed the appeal in respect of the two representative charges (counts 4 and 5), and ordered a retrial on the basis that the Judge misdirected the jury, and there was a reasonable possibility that the complainant could have consented. Chief Justice Elias, in a dissenting judgment, considered that the appeal should have been allowed in respect of all three counts, because the misdirection meant the jury had not been directed to consider all elements of the charge, which was itself a miscarriage of justice.

This case note considers three aspects of the case, contrasting the approaches taken by the Court of Appeal, the Supreme Court majority, and Elias CJ.

First, I set out the elements of rape on which a Judge must give direction, namely: penetration; lack of consent; and lack of reasonable belief in consent. I then consider the approaches each judgment took in regard to the significance of the trial Judge's failure to direct on the latter two requirements.

Second, I set out the contrasting interpretations of s 128A(1) of the Crimes Act 1961. That subsection provides that a failure to protest or resist does not in itself amount to consent to sexual activity. The Supreme Court majority agreed with the Court of Appeal that s 128A(1) also applies to reasonable belief in consent, meaning that a failure to protest or resist cannot be a basis for a reasonable belief in consent. Chief Justice Elias disagreed with this view. As to what *does* amount to consent when a complainant is silent and passive, the Supreme Court rejected the Court of Appeal's requirement for consent to be positively expressed. The Supreme Court majority found that consent, or reasonable belief

3 *Christian v R* [2016] NZCA 450 [*Christian* (CA)] at [72].

4 *Christian* (SC), above n 1.

in consent, could arise from "words used, conduct or circumstances" and that those circumstances could include "relationship expectations".

Finally, this case note considers the application of the law to the facts of the case. The Court of Appeal upheld all three convictions, on the basis that there was no credible narrative of consent or reasonable belief. The majority upheld the conviction on count 2, rejecting the challenges made to the credibility of the complainant and noting the lack of relationship expectations at that point. However, in relation to the latter counts, the Supreme Court found that there was a possibility that the jury could not have ruled out consent, albeit as a consequence of grooming. In my view, the evidence said to justify these different outcomes does not stand up to scrutiny.

II JURY DIRECTIONS: THE ELEMENTS OF RAPE

The trial Judge correctly told the jury in his Honour's summing up that the defendant could only be guilty if the jury was satisfied that: the defendant penetrated the complainant's genitalia with his penis; the complainant did not consent to the penetration; and the defendant did not believe, on reasonable grounds, that the complainant consented.[5] These are also the elements of rape as set out in s 128 of the Crimes Act. However, the Judge then said:[6]

> [17] The sole issue here, ladies and gentlemen, is whether or not there was penetration. Did it happen or not? The defence do not advance consent or belief in consent. The complainant said she did not consent. The defendant could not have a reasonable belief in consent when he says there was no sexual act that took place. If there was penetration, if the defendant did these things, then your verdict will be guilty. If he did not do them then your verdict will be not guilty.

The Judge took this approach despite a request from defence counsel that the summing up include a direction on reasonable belief in consent.

Mr Christian appealed on the basis that the Judge should have directed the jury to consider consent and reasonable belief in consent, notwithstanding his defence that no sexual contact occurred. The Court of Appeal approached this issue on the basis that:[7]

5 *Christian* (SC), above n 1, at [16].

6 *R v Tassell,* above n 1, as cited in *Christian* (SC) at [17].

7 *Christian* (CA), above n 3, at [45] (emphasis added).

> [45] The authorities are clear that in sexual violation cases where the defence is the all-or-nothing "it never happened" defence, the jury must still be directed on consent and reasonable belief in consent if the evidence *contains a narrative capable of supporting that reasonable possibility*. However, there will be no miscarriage of justice unless the evidence could support a defence founded on either of these factors.

The Court of Appeal found that there was no such credible narrative in relation to any of the charges (the reasons for which are discussed in detail below) and that accordingly, the trial Judge was "not required to leave consent to the jury".[8]

Both the majority in the Supreme Court and Elias CJ (who, in other respects, dissented from the majority decision) found that although some earlier Court of Appeal decisions approached this issue on the basis outlined by the Court of Appeal, this approach was in error because, as Elias CJ said, it "treated absence of consent and absence of reasonable belief in consent as if defences, rather than essential elements of the offence".[9] Chief Justice Elias stated that the presumption of innocence requires the Crown to prove all elements of the charge, regardless of how the defence is conducted.[10] The majority said that in cases where consent or reasonable belief are not put in issue by the defence, it would be sufficient for the Judge:[11]

> … to outline those elements of the offence, record that the defendant has not raised an issue with those elements but make it clear that the jury must nevertheless be satisfied beyond reasonable doubt that the complainant did not consent and that the defendant did not reasonably believe he or she did.

The majority added that, in outlining the evidence relevant to consent and reasonable belief, the Judge must be careful not to invite the jury to disbelieve the defendant's defence that no penetration occurred.[12]

The majority found that, as the Judge had erred, it was required to consider whether the failure to direct the jury led to a miscarriage of justice.

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8 At [64] and [72].

9 *Christian* (SC), above n 1, at [80].

10 At [80].

11 At [36].

12 At [36].

This decision turned on the majority's analysis of whether there was "scope for the jury to be in doubt as to the absence of consent or the absence of a reasonable belief in consent".[13] If there was no such scope, the misdirection was, according to the majority, immaterial.[14]

Chief Justice Elias, on the other hand, considered that the misdirection itself was a material error of law because "the jury was not properly directed on all counts as to the essential elements of the offence and as to its task."[15] She considered that the error was a radical one, because "it removed essential ingredients of the offence from jury consideration, despite the presumption of innocence and the onus borne by the Crown to establish guilt".[16] This was an error "capable of affecting the result".[17] On this basis, Elias CJ considered that the appeal must be allowed unless "the guilty verdict was inevitable, in the sense of being the only reasonably possible verdict".[18] She considered that, in this case, the convictions could not be safe because the jury had not made any assessment on the issues of consent and reasonable belief.[19]

III WHEN CAN AN ABSENCE OF A "NO" AMOUNT TO CONSENT?

Section 128A of the Crimes Act provides that a failure to protest or resist does not amount to consent.[20] Does it follow that there can be reasonable doubt as to the absence of consent or reasonable belief in consent when a complainant is silent and passive, not protesting or resisting, but also not indicating any desire or agreement to engage in sexual activity? Prior to 2005, Section 128A(1) provided that:[21]

> The fact that a person does not protest or offer physical resistance to sexual connection does not by itself constitute consent to sexual connection for the

13 At [37].

14 At [37].

15 At [81].

16 At [87].

17 *R v Matenga* [2009] NZSC 18, [2009] 3 NZLR 145 at [31], as cited in *Christian* (SC), above n 1, at [110].

18 *R v Matenga*, above n 17, at [31], as cited in *Christian* (SC), above n 1, at [110].

19 At [111].

20 Crimes Act 1961, s 128A(1).

21 The section was replaced in 2005 by the Crimes Amendment Act 2005, s 7. Both the Court of Appeal and Supreme Court considered that the provision remains materially the same.

purposes of s 128 of this Act.

Subsection (2) of the former s 128A provided that certain situations do not constitute consent, namely the actual, or threatened application of force to that person or another (or fear of such application); a mistake as to identity; or a mistake as to the nature and quality of the act.

The current section retains these provisions with slightly different wording. Subsection (1) now reads "A person does not consent to sexual activity just because he or she does not protest or offer physical resistance to the activity". The current version adds that a person "does not consent" if the person is:

i) asleep or unconscious;[22]

ii) so affected by alcohol or drugs that the person cannot consent or refuse to consent;[23] or

iii) is under an intellectual, mental or physical condition or impairment of such nature and degree that the person cannot consent or refuse to consent.[24]

Both the current and former sections provide that the section does not limit the circumstances in which a person does not consent.[25]

The first issue that both the Court of Appeal and Supreme Court were required to consider was whether s 128A(1) also applies to reasonable belief in consent — that is, whether or not a defendant can form a reasonable belief in consent based solely on a failure to protest or resist.

In the 1996 case of *R v Tawera*, the Court of Appeal found that a failure to protest is highly relevant to consent, but "does not really bear on the critical issue of belief in consent".[26] On the facts of that case, the Court said there was nothing in the evidence "which objectively indicated the complainant was not consenting", and found that the appellant had a reasonable belief in consent.[27] In my view, this is a questionable reading of the evidence, given that the 16 year-old complainant tried to turn her face away from the 48 year-old appellant when

22 Section 128A(3).

23 Section 128A(4).

24 Section 128A(5).

25 Crimes Act 1961, s 128A(8). See also s 128A(3) in the pre-2005 Crimes Act.

26 *R v Tawera* (1996) 14 CRNZ 290 (CA) at 293.

27 At 293.

he tried to kiss her, and pushed her thighs together while he was holding them.

The view that s 128A does not apply to reasonable belief in consent was questioned by the Supreme Court in *Ah-Chong v R*.[28] In that case, the Court suggested (in obiter) that given that passivity and a failure to protest cannot amount to consent, the same circumstances could not give rise to a reasonable belief in consent.[29] The Court also suggested that *Tawera* might be at odds with the underlying principle of s 128A.[30]

The Court of Appeal in *Christian* said the suggestion in *Ah-Chong* was "unsurprising" and that "if lack of protest cannot, by law, constitute consent, it is illogical and inconsistent to hold nonetheless that silence or physical passivity can still provide a sufficient platform for a reasonable belief in the same consent".[31] It found that:[32]

> … the complainant's silence by itself must not be taken as consent and nor can her failure to resist in some physical way. It follows that consent, however it might be expressed, must be actively expressed. Neither silence nor inactivity can provide any basis for an inference of consent. Thus, the law on consent does not impose an obligation on a complainant to say "no", either by words or conduct. Rather, there must be *the suggestion of "yes" in the complainant's words or conduct* …

In *Christian,* the Supreme Court majority agreed with the Court of Appeal that *Tawera* "is not consistent with the statutory language", and noted, too, that the case is difficult to reconcile with the underling purpose of s 128A, as well as a number of subsequent Court of Appeal decisions.[33] The Supreme Court majority said:

> [32] The word "consent" must have the same meaning when referring to the existence of consent and to the existence of a reasonable belief in consent. If a failure to protest or resist cannot, of itself, constitute consent, a reasonable belief that a complainant is not protesting or resisting cannot, of itself, found a reasonable belief in consent.

28 *Ah-Chong v R* [2015] NZSC 83, [2016] 1 NZLR 445.

29 At [54].

30 At [55].

31 *Christian* (CA), above n 3, at [50].

32 At [49] (emphasis added).

33 *Christian* (SC), above n 1, at [30].

The majority went on to say that:[34]

> in most cases the issue of a reasonable belief in consent will involve consideration of evidence of a belief based on something more than just a lack of protest and lack of resistance by the complainant. The question for the jury will involve an evaluation of all aspects of the evidence of [a] defendant's belief and of its reasonableness.

The Chief Justice disagreed, finding that s 128A is only directly concerned with consent, and not reasonable belief. She considered that reasonable belief "remains a question of fact on the evidence as a whole", and accordingly "[a]lthough the policy behind s 128A may itself be relevant to reasonableness of belief, it is not determinative as a matter of law."[35]

Turning to the question of what does amount to consent, the Supreme Court disagreed with the Court of Appeal's view that consent must be positively expressed. The Supreme Court majority considered that the Court of Appeal "went too far in stating that consent must be expressed in a positive way, as if that was a requirement regardless of the circumstances",[36] and that it "took more out of the statement in *Ah-Chong* than was warranted".[37]

The primary reason for this was that the statute itself does not "say that there can be no consent in the absence of evidence of positive consent".[38] The former s 128A(1) provides that a failure to protest or resist does not "by itself" constitute consent, and the current section provides that a person does not consent "just because" of a failure to protest or offer physical resistance. By contrast, the other subsections use the words "do not constitute consent" (in the former provision) and "does not consent" (in the current provisions). Accordingly, the Supreme Court majority said that:

> [45] … consent cannot be inferred only from the fact that the person does not protest or offer physical resistance. There must be something more in the words used, conduct or circumstances (or a combination of these) for it to be legitimate to infer consent.

The only elaboration the Supreme Court gave on the meaning of what

34 *Christian* (SC), above n 1, at [33].

35 At [105].

36 At [43].

37 At [43].

38 At [43].

"something more" or "circumstances" might mean in this context was to say that:

> [46] One such factor could be a positive expression of consent. But there could be others. For example, if the participants in the sexual activity are in a relationship in which expectations have developed over time and the sexual activity is in accordance with those expectations, that may be capable of evidencing consent if there is nothing to indicate that the mutual expectations are no longer accepted.

As noted above, the Supreme Court majority considered that the Court of Appeal went too far in requiring a positive expression of consent.[39]

The standard set out by the Court of Appeal was the "suggestion of a 'yes' in the complainant's words or conduct".[40] If that sets the bar too high, then how is consent to be understood? It is well established that consent must be "genuine, informed, and freely and voluntarily given".[41] This is reflected by the standard jury direction that consent means "a true consent, freely given by a person who is in a position to make a rational decision".[42] What mere circumstances (as distinct from words or conduct) would ever be sufficient to amount to consent that is genuine, informed, free and voluntary?

Perhaps the Supreme Court considered that the Court of Appeal's decision restricted the consideration of consent to words or conduct at the time of the sexual activity, with no scope for consideration of the broader background. If that is what the Court of Appeal was suggesting, then the Supreme Court was correct to say that background circumstances may sometimes be relevant. In my view, the Supreme Court's "circumstances" could be a reference to a pattern of words or conduct over time, which may be relevant (but not determinative). That is consistent with the standard jury direction that:[43]

> The material time when consent, and belief in consent, is to be considered is at the time the act actually took place. The complainant's behaviour and attitude before or after the act itself may be relevant to that issue, but it is not

39 At [43].

40 *Christian* (CA), above n 3, at [49].

41 *R v Brewer* CA516/93, 26 May 1994; and *R v S* (1992) 9 CRNZ 490, as cited in *R v Annas* [2008] NZCA 534 at [25].

42 *Christian* (SC), above n 1, at [19].

43 Institute of Judicial Studies *Criminal Jury Trials Bench Book*, as cited in *R v Adams* CA70/05, 5 September 2005 at [48].

> decisive. The real point is whether there was true consent, or a reasonably based belief in consent, at the time the act took place.

In my view, the Supreme Court must not be suggesting that 'relationship expectations' could arise from the *fact* of a relationship rather than the words or conduct of the parties within the relationship. To treat 'relationship expectations' as something separate from words or conduct and as a potential basis from which to infer consent or reasonable belief would come dangerously close to reintroducing an exception for spousal rape in cases where the complainant is silent and passive, a result which the Supreme Court surely did not intend.

IV APPLICATION TO THE FACTS OF THIS CASE

The lack of clarity in the Supreme Court majority's judgment is illustrated and compounded by its application of the law to the facts of *Christian*.

The specific evidence about consent in relation to each charge is set out below. By way of further general background, shortly after the complainant turned 16, her mother became suspicious and beat her until she confessed to having regular sex with Mr Christian. Her mother took her to the Police station, and the complainant then made a statement to the Police that "it" was consensual. When she gave evidence in Court, she said that the statement was made at Mr Christian's direction. A few months after making the statement, she swore an affidavit in support of a protection order against her mother, deposing that rumours of a sexual relationship with Mr Christian were "not true". Her evidence was that this was what Mr Christian told her to say.

A Count 2

In relation to the specific charge (count 2), the complainant's evidence was that this incident occurred when she was 13 or 14 years old, three or four weeks after she moved into Mr Christian's villa. He came into the room where the complainant was sitting on the couch. He removed her pants, pushed her legs open, and raped her. She remained silent throughout. The complainant said she was too scared to say anything but did not offer any encouragement, nor did she consent. She said, "I didn't even know what that word [consent] meant".[44]

44 *Christian* (CA), above n 3, at [5].

On appeal, the Court of Appeal noted the complainant's young age and Mr Christian's position of trust and power. Accordingly, the Court said, there was "no credible narrative of consent or reasonable belief in consent".[45]

The Supreme Court majority agreed. It found that there was no evidence contradicting the complainant's version of events leading to the first charge and no challenge to the evidence she gave as to consent; there was nothing before the jury to provide scope for doubt as to the absence of consent. It said, "there is an inherent lack of plausibility in the suggestion that she consented".[46]

Counsel for Mr Christian argued that although the jury accepted the complainant's evidence that the sexual relationship existed, it did not necessarily follow that the jury would have accepted her evidence as to the absence of consent.[47] This was because, unlike the existence of the sexual relationship, there was no corroborating evidence as to the lack of consent. Further, the complainant's credibility was said to be undermined by: the fact Mr Christian was found not guilty on count 1, said to occur just before the first rape, indicating the jury did not accept all of the complainant's evidence; her statement to the Police that "it" was consensual; and her affidavit denying that there was a sexual relationship.

Commenting only on the second of these factors, the Supreme Court majority rejected the argument that the untrue statement made at the Police station could have undermined the complainant's credibility, justifying a finding by the jury that her evidence as to consent was also untrue. The majority said:

> [56] That argument is problematic. As the jury must have found the sexual encounters between the appellant and the complainant happened, they must have rejected the defence proposition that the statement was untruthful because there was no "it" that could be consensual. That means that, in order to conclude that the statement to the Police was untruthful (and to call into question the credibility of the complainant as a consequence), the jury would have to have determined that the truth was that "it" was not consensual.

45 At [64].

46 *Christian* (SC), above n 1, at [53].

47 At [55].

The majority continued:

> [56] … In any event, given the context (that is, where the issue had arisen because of the mother finding out that the appellant and the complainant were having sex regularly) we do not consider "it" could possibly be interpreted as referring to the offence in count 2.

Further, the majority recorded that this was the first sexual encounter and so:

> [58] … there was no background relationship in respect of which some expectations of the kind described above could have arisen nor was there any dialogue between them before the sexual encounter occurred.

Finally, the majority found that there was no "air of reality" to the argument "that the jury may have found that the complainant's description of the sexual encounter was true in all respects other than her evidence as to her lack of any positive indication of consent, or her actual consent to the sexual activity".[48] As there was no evidence that the complainant consented, as opposed to failing to protest or resist, a conclusion by the jury that there was reasonable doubt in this respect could only be based on speculation.[49] The same considerations, the majority said, lead to the same conclusion as to reasonable belief in consent.[50] Any belief in consent that Mr Christian held could only have been based on a failure to protest or resist.[51]

The Chief Justice disagreed. Even though, on her approach, it was not necessary to consider the evidence because the failure to direct was in itself a miscarriage of justice, her Honour commented that "[q]uestions of credibility were live in the case and would have been directly relevant had the jury been directed to consider consent and reasonable belief in consent".[52] Accordingly, Elias CJ found it was not clear that the jury would have accepted the complainant's evidence as to consent and reasonable belief in consent.[53]

48 At [59].
49 At [59].
50 At [60].
51 At [60].
52 At [109].
53 At [109].

B Counts 4 and 5

Counts 4 and 5 were representative charges spanning the three-year period between September 1996 and September 1999. Count 4 related to the time during which the complainant lived with Mr Christian in the villa. She said that after the first time, she was subsequently raped "heaps of times";[54] that Mr Christian told her not to tell anyone; that he said he knew "heaps of people" (which she understood to refer to gang connections);[55] and that he said that if she told her mother she would get a hiding.[56] She said that "he just jumps on me and has sex with me and then gets off".[57] When asked if she had consented to this on any of the occasions, she answered "no", and when asked if she wanted it to happen she answered "no".[58]

Count 5 related to the period in which Mr Christian and complainant lived together in a house bus on the complainant's mother's property. The complainant said "he used to just come and have sex with me".[59] When asked if she wanted it to happen, she said:[60]

> I never wanted it to happen, but I know by the time we were in the bus out there that I felt like I couldn't say anything about it, or do anything about it, so I just said nothing and let him do it. But I never once said to him 'yes I want to have sex'.

She said Mr Christian told her they were "married in the eyes of the Lord" and threatened that if she left, he would kill her mother and sister.[61] She also said "she had been brainwashed into relying on him, being dependent on him" when asked why she returned to live with him following the police interview. [62]

In considering the application of the law to counts 4 and 5 in *Christian,* the Court of Appeal distinguished *R v Annas*.[63] That case had very similar

54 *Christian* (CA), above n 3, at [6].

55 *Christian* (SC), above n 1, at [62].

56 At [62].

57 At [62].

58 At [62].

59 At [63].

60 At [63].

61 At [63].

62 At [63].

63 *Christian* (CA), above n 3, at [65]. See also *R v Annas,* above n 41.

facts, except that the complainant said "yes" on the first occasion when the appellant asked if she would like him to teach her to "be a good lover".[64] In that case, the jury acquitted the appellant on the first specific rape charge, and convicted him on a representative charge. The Court of Appeal allowed the appeal against conviction on the representative charge. It split on the issue of consent, but refused to discount reasonable belief in consent and found the verdict unsupportable accordingly.[65]

In *Christian*, the Court of Appeal said that the starting point was the "opposite", as the first sexual encounter plainly lacked the complainant's consent or the appellant's reasonable belief in consent.[66] The Court of Appeal also listed "other relevant contextual factors" that demonstrated a lack of consent or reasonable belief in consent:[67]

i) the wide difference in age;

ii) the complainant's immature knowledge of sexual matters;

iii) the complainant's particular vulnerability because of isolation from and a poor relationship with her mother or any other support person;

iv) the appellant's status as a church leader and de facto guardian;

v) the evidence of the appellant's implicit threat to the complainant that she was not to tell anyone about the offending as he knew "heaps of people", which the complainant took to refer to his gang connections. The complainant also said in evidence that if she tried to leave the appellant would tell her that he would kill her mother and sister; and

vi) the appellant gave the complainant money and drugs such as cannabis.

The Court of Appeal rejected the suggestion that the fact that the complainant said to the Police in 1999 that "it" was consensual, and subsequently signed an affidavit saying that rumours of a sexual relationship were "not true", and that Mr Christian's letters from prison suggested a consensual relationship, provided a credible narrative for consent or reasonable belief in consent.[68]

64 *Annas*, above n 41, at [17].

65 At [30]–[40].

66 *Christian* (CA), above n 3, at [65].

67 At [66].

68 At [68]–[69].

The Supreme Court majority recounted the factors set out by the Court of Appeal and agreed that those factors pointed against any reasonable possibility of reasonable belief in consent.[69]

However, the Supreme Court found that, in relation to consent, there was a possibility that the jury, had it been properly directed, could not have ruled out consent, "albeit as a consequence of his grooming of her".[70] The majority accepted that "this was not the most likely outcome but it was a decision that needed to be left to the jury to decide."[71] Two aspects of the evidence underpinned this decision. The majority considered that the jury had to consider whether the statement to police that "it was consensual" may have been true "at least in the later stages".[72] The majority also noted the complainant's evidence that she was "brainwashed" into depending on Mr Christian.[73] Given that the outcomes to counts 4 and 5 were different when compared to count 2, scrutiny of the evidence relied on (to the extent it is set out in the judgments) is warranted.

C Comment on the Supreme Court's conclusions

The Supreme Court's finding that the jury was required to consider whether the statement "it was consensual" may have been true stands starkly against its reasoning on this issue in relation to count 2. In the Supreme Court's reasoning on that charge, as noted above, the majority rejected the relevance of the statement to the Police, on the assumption that in order to undermine the complainant's credibility the statement would have to be false. It also found that, due to the timing of the statement, it could not have related to count 2.

The first aspect of the majority's reasoning on this point in relation to count 2 was that the statement could either be false because "it" did not occur (the defence case, rejected by the jury in its verdicts), or because "it" did occur but was not consensual (the prosecution case) — both problematic positions for Mr Christian. However, the statement could also be true (and therefore undermine the complainant's evidence in Court that she did not consent). This possibility was not mentioned by the majority in its analysis in relation to count 2. In my

69 *Christian* (SC), above n 1, at [66]–[67].

70 At [67].

71 At [67].

72 At [67].

73 At [67].

view, the challenge to the complainant's credibility did not rely on the statement being false, but was a broader challenge based on the inconsistency between the statement, her affidavit only a few months later denying a sexual relationship, and her evidence in Court. With respect, the majority's reasoning on this point in relation to count 2 overlooks the fundamental point made by the Supreme Court in this case: that having rejected the defence case, the jury was still required to consider consent and reasonable belief on the basis of all the evidence.

The second aspect of the majority's reasoning was that the statement had no bearing on count 2 because it was made in the context of the complainant's mother finding out that the complainant and Mr Christian were having sex regularly. However, count 4 was a representative charge spanning the period immediately following count 2, and occurring while they were living together at the same address. In my view, there is no reason to consider that the complainant's statement might have been true in relation to every other time they had sex during that period, but could not possibly have related to the first incident. It is difficult to imagine any reason why the complainant would have made such a distinction.

The second piece of evidence highlighted by the majority in its conclusion on counts 4 and 5 was that the complainant said she was brainwashed into depending on Mr Christian. She said this in relation to count 5, specifically, the period in which she continued to live with him following the Police interview.[74] Accordingly, this evidence cannot possibly have related to count 4. The complainant also said she was "brain-washed into thinking it was alright", but it is not clear from the Court of Appeal judgment whether this related to count 4 or 5 or both,[75] and it was not mentioned by the Supreme Court. Further, although not highlighted in its conclusion, the Supreme Court majority may have placed some weight on the complainant's evidence that she "just said nothing and let him do it".[76] That comment was set out by the Supreme Court in its narration of the evidence only in relation to count 5 and not count 4.

Accordingly, to the extent the Supreme Court majority relied on the complainant's evidence as to her conduct at the time as a basis for inferring

74 *Christian* (SC), above n 1, at [63].

75 *Christian* (CA), above n 3, at [38].

76 *Christian* (SC), above n 1, at [63].

a reasonable possibility of consent, the evidence could only, in my view, have related to count 5.

More fundamentally, even if a jury may have interpreted those statements as giving rise to a reasonable possibility of consent it is unclear why, as a matter of principle, consent induced by grooming is capable in law of amounting to consent. Grooming, by its very nature, is the overbearing of the will of a younger complainant in order to falsely manufacture their compliance. This could have been an opportunity for the Supreme Court to consider whether consent that arises as a result of grooming could ever be "genuine, informed, and freely and voluntarily given".

This issue was considered by the Court of Appeal in *Annas*.[77] The complainant in *Annas* had initially said "yes", and the appellant had been acquitted on that charge but convicted on a subsequent representative charge. On appeal, two Judges found that actual consent could not be excluded beyond reasonable doubt, while one Judge disagreed.[78] All three Judges agreed that reasonable belief in consent had not been excluded and the appeal was allowed on that basis.[79] In the context of its analysis as to reasonable belief in consent, the Court noted that in the context of grooming, "a more thoughtful analysis might go behind the language used to why ostensible consent was given",[80] but concluded that to "assimilate grooming and seduction of a girl with absence of consent would change what has to date been the approach of the law".[81]

The difference in *Christian* is that there was no initial positive expression of consent, and the possibility of consent was premised only on the complainant's acquiescence. Whether groomed acquiescence can amount to true consent required deeper consideration than was given by the Supreme Court majority in *Christian*.

A final point is that the majority was sure of Mr Christian's guilt in relation to count 2. This is surely relevant and powerful evidence of Mr Christian's propensity to engage in non-consensual sex with this particular complainant during this particular time period. It is surprising that the Supreme Court

77 *Annas*, above n 41.

78 At [29].

79 At [30]–[39].

80 At [34].

81 At [37].

did not grapple with what is surely the flipside of 'relationship expectations' — if the first sexual encounter was, inevitably, a rape, does that not seriously undermine the possibility that the complainant consented every time they had sex subsequently?

The answer to these questions may well be that while the complainant's consent was unlikely, that was a matter for the jury. That is perhaps correct. But as I have attempted to demonstrate, it is difficult to discern a principled basis for the majority's distinction between count 2 and counts 4 and 5. The Chief Justice commented that the majority's conclusion that the same error (failing to direct the jury) was material in relation to count 2 but not to counts 4 and 5, was "odd".[82] I agree with that assessment.

V CONCLUDING REMARKS

The vexed issue of what amounts to consent in the absence of a "yes" or a "no" remains largely unclarified by the Supreme Court's decision. The requirement for "the suggestion of a 'yes' in the complainant's words or conduct" was rejected,[83] in favour of the possibility that "circumstances" by themselves, including 'relationship expectations' may be a sufficient basis to infer consent. That outcome is in my view difficult to reconcile with the very concept of consent.

The Supreme Court's decision that the Judge must direct on all elements of the charge reflects a fundamental principle of criminal law: regardless of the defence theory, the Crown must prove all elements of the charge beyond reasonable doubt. Having rejected the defence evidence that no sex occurred, the jury was still required to consider all the evidence and find, beyond reasonable doubt, that the complainant did not consent and that Mr Christian did not reasonably believe she consented.

As I have outlined, the Supreme Court majority's rejection of Mr Christian's arguments about the complainant's credibility in relation to count 2 is very difficult to reconcile on any principled basis with its finding that the same evidence was relevant to credibility in relation to counts 4 and 5. In my view, the issue of whether the complainant's credibility was undermined by her inconsistencies, notwithstanding her explanations, would have been equally

82 *Christian* (SC), above n 1, at [89].

83 *Christian* (CA), above n 3, as cited in *Christian* (SC), above n 1, at [38].

relevant to the issues of consent and reasonable belief in consent on all charges, had the jury been directed to consider those issues.

That leaves 'relationship expectations' as a possible, or perhaps primary, basis for the Supreme Court majority's different conclusions in relation to counts 4 and 5 compared to count 2. Although not explicitly referred to in those terms in the majority's reasoning on counts 4 and 5, the absence of a "background relationship" in which expectations "could have arisen" was noted in its conclusion on count 2.[84] The fact that 'relationship expectations' is the only "circumstance" suggested by the Supreme Court majority in its analysis of the law further suggests that this distinction underpinned its reasoning.

As the majority accepted, the complainant's (possible) consent could only have arisen as a result of Mr Christian's grooming of her. The majority also accepted that any belief in the complainant's consent could not have been reasonable given the dynamics of the relationship. What then, was the "expectation" held by the complainant from which the jury might have inferred consent? How could any such expectation be sufficient to distinguish this case from a failure to protest or resist? Does this case establish that acquiescence induced by grooming, even following a rape, may in some circumstances amount to consent?

The Supreme Court majority, both in its exposition of the law and in finding that it was possible a jury could not have ruled out the reasonable possibility of consent in relation to counts 4 and 5, failed to grapple with several issues:

i) how 'relationship expectations' could arise independently of words or conduct (in this case or generally);

ii) on what conceptual basis 'expectations' could be relevant to actual consent as opposed to reasonable belief in consent;

iii) why as a matter of principle consent induced by grooming may amount to true consent; or

iv) how an initial rape might be relevant to any assessment of 'relationship expectations'.

84 *Christian* (SC), above n 1, at [58].

Those questions remain unanswered. Yes still means yes and no still means no, but the space between those points is yet to be clearly mapped, despite the Supreme Court's decision in this case.

CASE NOTE

EMPLOYMENT STATUS OF RELIEF SUPPORT WORKERS: *Lowe v Director-General of Health*

Cassandra Kenworthy*

I INTRODUCTION

Janet Lowe was a support worker who occasionally provided relief care for individuals in their own homes. Ms Lowe is one of 35,000 care support workers in New Zealand.[1] These workers are predominantly women.[2] They are paid as little as $2.69 per hour,[3] and provide relief services for primary carers, who are also predominantly women.

The relief services these workers provide are funded by the Ministry of Health (the Ministry) and the relevant District Health Board (DHB), through a Carer Support payment (Carer Support). These payments are generally made by the Ministry when the person being cared for is under 65 years old and by the relevant DHB if the person is over 65 years old.

Ms Lowe challenged the Ministry's position that she was not an employee under the Employment Relations Act 2000 (the Act) and claimed she was a "homeworker" under s 6(1)(b). A "homeworker" is a special category of employee. Homeworkers are workers who work from their own or someone else's house, and historically have been considered particularly vulnerable to exploitation (for instance, workers who sew at home and are paid per item of clothing produced). They do not always meet the standard tests to be an employee, so are a specific carve-out in the definition of "employee" to ensure their rights are protected. Ms Lowe was successful in the Employment

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1 *Lowe v Director-General of Health* [2017] NZSC 115, [2018] 1 NZLR 691 at [115] [*Lowe* (SC)].

2 John Weekes "Supreme Court battle plans after setback for relief carers" *Stuff* (online ed, Auckland, 2 August 2016).

3 *Lowe* (SC), above n 1, at [116].

Court,[4] but that decision was overturned in the Court of Appeal.[5] The Supreme Court dismissed her appeal in August 2017.[6]

A successful claim of employee status would have expanded Ms Lowe's rights. She would become entitled to holiday and sick leave (depending upon her hours worked); entitled to be paid the minimum wage for every hour worked; would be able to pursue a personal grievance if she was unjustifiably dismissed from her employment; and her employer would owe her a duty of good faith. As she was held not to be an employee, her rights are those provided by the contract, and she has no recourse to the cheaper and more specialised employment relations institutes if there is a dispute regarding her working arrangements.

II CONTEXT

Eligibility for Carer Support is assessed by a Needs Assessment Co-ordination (NASC) organisation, which decides on eligibility and its extent.[7] Clients are approved for a certain number of days per year. These days can be used by the full-time carer of the client to engage a support carer.[8] A support carer can be anyone who is over 16 years of age, who is not the legal guardian, parent, spouse or partner of the client, and who does not live at the same address as the client.[9] The support carer is not approved by the Ministry or DHB in any way. The support carer, client and full-time carer determine how the support carer will provide services.[10]

Payment for the support carer is made by way of subsidy.[11] The support carer can claim the payment directly from the Ministry or DHB, or the full-time carer pays the support carer and then claims the payment.[12] It is open to the full-time carer to pay more than the relevant subsidy rate if they wish. The payment rate varies depending upon whether the support carer is GST[13]

4 *Lowe v Director-General of Health* [2015] NZEmpC 24, [2015] ERNZ 210.

5 *Director-General of Health v Lowe* [2016] NZCA 369, [2016] 3 NZLR 799.

6 *Lowe* (SC), above n 1.

7 At [9].

8 At [105].

9 At [107].

10 At [110].

11 See, for example, *Lowe* (SC), above n 1, at [30].

12 At [45].

13 Goods and services tax.

registered, a family member or a non-family member and whether the client is DHB or Ministry funded.[14] The daily rates range from $64.50 to $85.50 per day.[15] A "full day" is defined as providing between eight and 24 hours of care and a "half day" is four to eight hours of care.[16]

III LEGISLATIVE FRAMEWORK

This case turned on the definition of "homeworker" under s 5 of the Act. A homeworker is deemed to be an employee by virtue of s 6(1)(b) of the Act. A "homeworker" is defined as:[17]

> i) […] a person who is engaged, employed, or contracted by any other person (in the course of that other person's trade or business) to do work for that other person in a dwellinghouse (not being work on that dwellinghouse or fixtures, fittings, or furniture in it); and
>
> ii) includes a person who is in substance so engaged, employed, or contracted even though the form of the contract between the parties is technically that of vendor and purchaser.

Justices Arnold and O'Regan in the Supreme Court noted that provisions relating to homeworkers have been included in employment legislation since 1987.[18] They were originally designed to protect pieceworkers in the textile industries who worked from home and were often employed by an intermediary agent to carry out that work. These workers were seen as particularly vulnerable to exploitation, "resulting in long hours, underpayment and erratic pay as well as lack of training, lack of job security, [and] no promotion prospects".[19] While the relevant employment legislation provisions were originally intended to protect pieceworkers, the provisions of the Labour Relations Act 1987, Employment Contracts Act 1991 and the 2000 Act applied to a wider class of workers than just pieceworkers.[20]

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14 *Lowe* (SC), above n 1, at [116].

15 At [116].

16 At [108]; and see "How to Claim Carer Support" (2009) Ministry of Health <www.health.govt.nz>.

17 Employment Relations Act 2000, s 5, definition of "homeworker".

18 *Lowe* (SC), above n 1, at [11].

19 At [12].

20 At [13].

IV SUPREME COURT JUDGMENT

For Ms Lowe to be considered a homeworker and therefore an employee of the Ministry or the DHB, the following had to be established:[21]

i) She was engaged, employed or contracted by the Ministry or the DHB. Ms Lowe argued that she was "engaged" by those entities.

ii) The engagement was in the course of the Ministry or the DHB's trade or business. There was no argument that this was not the case.

iii) The engagement was to do work for the Ministry or the DHB.

iv) The work was to be done in a dwellinghouse. "Dwellinghouse" is defined in s 5 of the Act as:

> … any building or any part of a building to the extent that it is occupied as a residence; and, in relation to a homeworker who works in a building that is not wholly occupied as a residence, excludes any part of the building not occupied as a residence.

v) As an alternative to (i), she was in substance, engaged, employed or contracted as described above even though the contractual arrangement was one of vendor and purchaser.

Justice O'Regan, on behalf of Arnold J and himself, held that the appeal turned on points (i) and (iv) and dismissed the appeal.[22] The majority also held that Ms Lowe was not a "vendor" so ground (v) did not apply.[23] Justice William Young also dismissed the appeal, but on grounds (ii) and (iii) that "the 'trade or business' of the Ministry does not encompass the provision of respite care and the 'work' carried out by respite carers is not 'for' the Ministry."[24] As grounds (i) and (iv) were the main source of difference between the majority and minority, these are discussed below.

A "Engagement" by the Ministry or DHB — majority decision

In relation to point (i), O'Regan J held that oversight or control by one party over the other was not a necessary element of a contractual relationship.[25] His

21 At [7].

22 At [8].

23 At [39].

24 At [85].

25 At [43].

Honour recognised that independent contractors are often engaged because the contractor has expertise the hirer does not.[26] However, his Honour went on to state that the word "engage" contemplates the hirer selecting the person engaged.[27] In relation to the support carers, the Ministry and DHBs have no say in who is selected to be a client's support carer. That selection is left to the full-time carer of the client.

Justice O'Regan went on to comment that three other factors supported the view that the primary carer, not the Ministry or the relevant DHB, in fact engages the support carer. These were the fact that payments made by the Ministry or DHB could be made by way of reimbursement to the primary carer, that primary carers could elect to pay the support carer at a higher rate than the relevant support carer subsidy rate and that the primary carer could engage the relief carer for longer periods than those for which the Ministry or DHB were required to pay.[28]

Justice O'Regan contrasted this situation with an earlier decision of the Court of Appeal (*Cashman v Central Regional Authority*)[29] where the Court of Appeal held that some support workers who made the whole or part of their living providing care to aged or disabled people living in their own home were homeworkers.[30] The judgment distinguished between professional carers, and those that were caring for family members or friends. Only professional carers were considered employees.[31] *Cashman* was distinguishable on the basis that those carers were directly and undoubtedly contracted by the Regional Health Authorities (the predecessors to the DHBs).[32]

His Honour held that the concept of engagement requires that an event occurs which creates a relationship between the hirer and the engaged person.[33] In the case of Ms Lowe, there was no such event. His Honour noted that when Ms Lowe was engaged, the Ministry and DHB had no knowledge of the

26 At [43].

27 At [44].

28 At [45].

29 *Cashman v Central Regional Authority* [1997] 1 NZLR 7 (CA).

30 At 14.

31 At 14.

32 *Lowe* (SC), above n 1, at [69].

33 At [63].

engagement.[34] Their first notice was when Ms Lowe requested payment for her services. His Honour also dismissed the argument raised by the respondents that there were classes of professional and non-professional support carers and the professional carers were homeworkers.[35]

On point (i), O'Regan J held that any engagement of Ms Lowe was by the full-time carer and not the DHB or Ministry.[36] This particular scenario was not the subject of submissions.

Justice William Young would also have dismissed the appeal, but for different reasons to O'Regan J. He would have held that there was a contractual relationship between the Ministry or the DHB and Ms Lowe on the basis that Ms Lowe was entitled to be paid by them if the full-time carer did not pay her directly.[37] His Honour nonetheless held that she was not a homeworker because she was not "engaged" by the DHB or Ministry. His Honour considered that the full-time carer would need to be an agent of the Ministry or DHB if this were the case, that it would be "artificial" to regard a primary carer as the agent of the state when they were looking after a family member and that it was the primary carer, not the Ministry or DHB, that engaged Ms Lowe.[38] The Ministry or DHB were said to simply subsidise the cost of the primary carer doing so. His Honour went further and said that, on this basis, the "trade or business" of the Ministry does not encompass the provision of respite care and the "work" carried out by respite carers is not "for" the Ministry.[39] Justice William Young therefore found that requirements (ii) and (iii) were not satisfied.

B Nature of the relationship between the Ministry or DHB and the support carer — minority judges

Justice Glazebrook, for the minority of Elias CJ and herself, would have allowed the appeal.[40] Her Honour took as a starting point the fact that access to the Carer Support scheme was based on an assessment of the needs of the client

34 *Lowe* (SC), above n 1, at [44].
35 At [83]–[84].
36 At [44].
37 At [81].
38 At [85].
39 At [85].
40 At [178].

performed by a NASC organisation.[41] Her Honour noted that while the support carer gave the full-time carer a break, the service is for the client rather than the carer.[42] On this point, Glazebrook J disagreed with the majority judges and the Court of Appeal below, that the work is undertaken "for" the full-time carer.[43]

Her Honour held that the Ministry and DHBs were clearly paying for the support work to be performed for the client (of the DHB or Ministry, being the person with the disability).[44] It was irrelevant what that payment was called or whether the primary responsibility for payment lay with the full-time carer. The claim form made it clear that the Ministry and DHB promised to pay for the carer services if the full-time carer did not pay.

Justice Glazebrook also held that a contractual relationship existed between the Ministry or DHB and support carer on the basis that all parties understood the Ministry or DHB would pay for the services.[45] Alternatively, her Honour held there was offer and acceptance through the Ministry or DHB providing a claim form and the carer providing care and returning the claim form.[46] Her Honour found the work was clearly within the trade of the Ministry and the DHBs, as the respite care is a service provided for those entities' clients.[47] On this basis (provided the dwellinghouse requirement was met), the minority judges considered the definition of "homeworker" was met.[48]

The minority did not consider it necessary to determine whether support carers were also "engaged" but considered, under a purposive approach, that they were.[49] Justice Glazebrook considered that the definitions of "engage" and "homeworker" should be read widely to ensure employers could not use technicalities to avoid responsibilities under the Act.[50] Her Honour also noted that the terms "engaged, employed or contracted" are composite terms designed to cover all means of getting a person to work for an employer.[51]

41 At [137].
42 At [138].
43 At [138].
44 At [138]–[139].
45 At [141].
46 At [142].
47 At [143].
48 At [143].
49 At [144].
50 At [144].
51 At [146].

Her Honour rejected the submission that control was required for a homeworker to be engaged, because control is required for an employment relationship, whereas the homeworker definition is explicitly designed to capture workers who would not otherwise be considered employees.[52]

Her Honour considered it was misguided to focus on whether the Ministry or DHB specifically selected the support carer.[53] The Ministry or DHB specifically authorise the use of a support carer when the NASC organisation performs the needs assessment. Justice Glazebrook also held that an agency relationship between the Ministry or DHB and the full-time carer was present and the carer's authority was no broader than that of a manager of a company with agency to engage a new worker.[54] Her Honour rejected the conclusion of the majority judges that there was no agency relationship.[55]

C Dwellinghouse requirement

Regarding the fourth requirement under s 6(1)(b) of the Act that the work be performed in a dwellinghouse, O'Regan J for the majority noted that there was no requirement under the support carer arrangement that the work be performed at the client's house.[56] Justice William Young agreed with the majority judges on this point. The Ministry's witness in cross-examination said that clients could be taken out if they were well enough to do so. Had the case turned on this issue, the matter would have been referred back to the Employment Court for the issue to be argued fully, but O'Regan J expressed doubt that the support carers were required to undertake work in a dwellinghouse.[57]

The minority judges were of the view that work was performed in a dwellinghouse.[58] They specifically rejected the respondent's submission that for a person to be treated as a homeworker, they were required to work in a dwellinghouse.[59] The minority relied upon the fact that many of the carers do

52 *Lowe* (SC), above n 1, at [146].
53 At [153]–[154].
54 At [163].
55 At [166].
56 At [73]–[74].
57 At [74].
58 At [167].
59 At [170].

perform the work in a dwellinghouse and there was no requirement that all workers of a class be performing all of their work in a dwellinghouse before an individual in that class could be considered a homeworker.[60] Taking a purposive approach, the minority held that it should not be open to an employer to say that their workers could work from anywhere thereby avoiding workers being defined as "homeworkers" and therefore employees.[61]

On the basis of the majority judges' conclusion that the support carers were not "engaged" by the Ministry of Health or DHBs, the appeal was dismissed.[62]

V COMMENT

The Supreme Court's decision in *Lowe* will affect some 35,000 paid carers nationwide, who assist 24,000 people with disabilities.[63] These workers are paid significantly below minimum wage and have minimal statutory protections. Like those in the aged care industry, the Union that represents Ms Lowe has identified that these workers are predominantly women.[64]

The majority of the Supreme Court took a strict approach to the interpretation of the Employment Relations Act, an Act with the explicit objective of addressing the inherent inequality of power in employment relations. The majority failed to take a purposive approach to the definition of "homeworker" and did not consider whether contemporary forms of work should be captured by s 6 of the Act.

As a result, support workers are not entitled to the numerous protections of the employment relationship, including the Minimum Wage Act 1983, the Holidays Act 2003, and the protections against unjustified dismissals and disadvantages contained in the Employment Relations Act itself. In addition to the more regularly engaged employment rights, the Court's decision means that workers are unable to access any remedies under the Pay Equality Act 1972, which only applies to employees. Given the high number of women engaged as support carers and the clear analogies to residential care workers, this is a section of the workforce that could reasonably be expected to suffer pay parity

60 At [170].

61 At [171].

62 At [75].

63 At [115].

64 Weekes, above n 2.

issues. The Supreme Court's decision makes such a claim impossible.

Ms Lowe herself is on public record saying that the Ministry and DHBs are hiding behind "semantics"[65] which permit them to pay as little as $2.69 per hour for workers to provide respite care.[66] Carer Support is an essential service, particularly for full-time carers who are themselves compensated inadequately for their work and have brought legal challenges regarding their remuneration.[67]

Support workers represent the modern equivalent of exactly the type of workers the homeworker protections were originally intended to capture. They are workers who are isolated, unable to easily organise, and prone to working long hours for little pay. A purposive approach and broad application of the statute was needed and was available to the majority judges. It is disappointing that the Court's decision means that a public agency can construct a series of contractual relationships to avoid the obligations and responsibilities that should be owed to homeworkers. The Supreme Court's decision cuts across the very objective of legislative protections for homeworkers.

The Supreme Court's judgment is particularly disappointing, given it came after the *Terranova* case and after the settlement of that pay equity claim.[68] The *Lowe* decision has resulted in a two-tiered system, where those carers employed in rest homes are employees receiving an equitable wage, and those who are employed as relief carers in homes are paid a fraction of the minimum wage. This is work that may be attractive to women due to the potential for flexibility, notwithstanding the low remuneration. The Supreme Court's position creates the risk that support workers will not be prepared to provide their services at such rates, and primary carers will be unable to find support workers to provide relief work. Given that primary carers are often women too, this judgment represents a double blow for women caring for people with disabilities.

65 Weekes, above n 2.

66 *Lowe* (SC), above n 1, at [116].

67 See for instance, *Atkinson v Ministry of Health* (2010) 8 HRNZ 902 (HRRT).

68 *Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2014] NZCA 516, [2015] 2 NZLR 437.

CASE NOTE

WRONGFUL BIRTH AND LOST WAGES: *J v Accident Compensation Corp*

Anthea Williams*

Wrongful birth cases, where the claimant seeks damages for undergoing an unwanted pregnancy after receiving negligent advice or treatment, raise a difficult mix of legal and policy questions. New Zealand courts have juggled with such claims and their place within accident compensation legislation since the no-fault compensation scheme was first introduced in 1972.[1] Under the current statute, the Accident Compensation Act 2001 (the Act),[2] the courts have recognised that where a pregnancy arises from medical misadventure, such as a negligent sterilisation operation, the resulting pregnancy and birth may be a personal injury for which the claimant is entitled to compensation under the scheme.

In *J v Accident Compensation Corp* the claimant, Ms J, went further, seeking earnings related compensation (ERC) under the Act for being unable to work while she raised her child.[3] The Court of Appeal split 2–1, with the majority rejecting her claim. The majority held she had recovered from the covered injury (the pregnancy and birth) and was unable to work due to her parenting responsibility and choices.[4]

This note reviews the judgments and discusses gender issues arising in the case. In summary, the way Ms J's injuries are discussed significantly downplays

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1 For more information on the case law and legislative changes see Rosemary Tobin "Common Law Actions on the Margin" [2008] NZ L Rev 31 at 46–52.

2 Originally called the Injury Prevention, Rehabilitation, and Compensation Act 2001 but renamed in 2010. See Accident Compensation Amendment Act 2010, s 5(1)(a).

3 *J v Accident Compensation Corp* [2017] NZCA 441, [2017] 3 NZLR 804 [*J* (CA)].

4 At [32] per Cooper and Asher JJ.

the way in which she may remain injured after the birth. Second, the decision makes clear that the costs of the negligently performed sterilisation primarily rest on the complainant, the mother, and no common law remedy for her loss is available.

I begin by providing a short history of coverage for "wrongful birth" under New Zealand's accident compensation scheme, then summarise the background facts, the majority and minority opinions, and the issues before the Court of Appeal in Ms J's case.

I A SHORT HISTORY OF ACCIDENT COMPENSATION CORPORATION (ACC) COVERAGE FOR WRONGFUL BIRTH

Coverage of "wrongful birth" under the accident compensation scheme has varied with various iterations of the legislation and case law. A 1974 amendment to the original 1972 legislation included any "medical misadventure" as an eligible personal injury for compensation.[5] This was interpreted by the Courts (and therefore ACC) as including pregnancy resulting from a failed medical procedure, such as a failed sterilisation.[6] Pregnancy following a sexual assault was also covered as it was specifically included as "actual bodily harm" that could occur from a sexual crime.[7] Therefore under the 1972 and 1982 accident compensation statutes, following a wrongful birth an eligible claimant could recover a lump sum for the injury of the pregnancy and birth, expenses and lost earnings during that time.[8] However, coverage did not extend to pecuniary losses suffered after the birth. A claim for the costs of raising the child for the first six years of its life was denied in *XY v Accident Compensation Corp* in 1984 on the basis that the injury (the pregnancy) had ended and maintenance of a child was not a loss but an ordinary part of parenthood.[9]

5 Accident Compensation Act 1972, s 2(1) definition of "personal injury by accident", as amended by the Accident Compensation Amendment Act 1974, s 2(1).

6 See, for example, *Accident Compensation Commission v Auckland Hospital Board* [1980] 2 NZLR 748 (HC) at 753. Due to a comment by Cooke J in a dissenting judgment in *L v M* [1979] 2 NZLR 519 (CA) at 530, there was some doubt expressed in later judgments that such a medical misadventure would also amount to "personal injury", even though it was accepted to be covered by ACC.

7 Accident Compensation Act 1972, s 105B(1), inserted by the Accident Compensation Amendment Act 1974, s 6.

8 See Accident Compensation Act 1972, ss 105B(1) and 105B(2), and Accident Compensation Act 1982, s 2, definition of "personal injury by accident" at (a)(iv), and s 92.

9 *XY v Accident Compensation Corp* (1984) 2 NZFLR 376 (HC) at 381.

The significant legislative changes enacted in the Accident Rehabilitation and Compensation Insurance Act 1992 narrowed the scheme, and were considered by the courts to have removed coverage for pregnancy following medical misadventure.[10] The 2001 Act, however, was widely regarded as returning the scheme to more generous coverage, including for medical cases. Initially the Court of Appeal denied wrongful birth claims under the 2001 Act.[11] However in 2012, the Supreme Court in *Allenby v H* held that pregnancy resulting from a failed sterilisation was a personal injury caused by medical error under the 2001 Act.[12] Two of the three judgments considered that such a pregnancy was also covered under the 1992 Act and that the 1992 Act had not changed the law on that point.[13]

There are a small but steady number of wrongful birth claims to ACC.[14] It was reported that in the two years after the *Allenby* judgment, ACC paid out $40,470 on 18 accepted claims for negligently performed sterilisation operations, some of which pre-dated the *Allenby* case.[15] ACC refused 27 claims, primarily where it was decided the pregnancies were not a result of the treatment.

II *J v ACC*: FACTS

In 1998, Ms J underwent a sterilisation operation in order to avoid future pregnancies. The operation failed as the clips that should have been placed on her fallopian tubes were instead attached to her bladder wall reflection. Eight years later, Ms J discovered she was in the late stages of pregnancy and gave birth.

Ms J sought cover from ACC for the pregnancy arising from the failed sterilisation operation. ACC initially declined her claim but this was overturned on review. ACC then appealed to the District Court, where, in line with existing New Zealand authority at that time,[16] her claim was denied.

10 See, for example, *Accident Compensation Corp v D* [2008] NZCA 576.

11 See, for example, *Accident Compensation Corp v D*.

12 *Allenby v H* [2012] NZSC 33, [2012] 3 NZLR 425 at [95].

13 At [9] per Elias CJ, and at [71] per Blanchard J.

14 The Accident Compensation Corp is the Crown entity responsible for administering New Zealand's universal no-fault accident compensation scheme.

15 Deidre Mussen "Mums sue ACC for cost of raising unplanned children" *Stuff* (online ed, 25 September 2014).

16 See *Accident Compensation Corp v D*, above n 10.

However, following the 2012 decision of the Supreme Court in *Allenby* — that pregnancy resulting from medical misadventure could be covered as an injury under the Act[17] — ACC accepted her claim.

Initially, Ms J was granted cover for the physical effects of the pregnancy and birth. ACC determined she was entitled to ERC for approximately 11 weeks, which covered the immediate pre and post birth period, as "she was unable to work because of her pregnancy at that time".[18] It appears the cessation date was chosen (around 10 weeks past the birth) because at that time she "was discharged from medical services following the birth of her son".[19]

Ms J sought a review of ACC's decision to end her ERC at that date, which was dismissed. She successfully appealed to the District Court, where Judge Powell held that her responsibility to care for her son was a direct consequence of the pregnancy and nothing in the legislation required pregnancy as an injury to stop at the birth of the child or meant the consequences of the pregnancy could not be considered in determining entitlements.[20] ACC appealed to the High Court where Nation J found in ACC's favour.[21] Justice Nation considered Ms J's injury to be the pregnancy and held that following the birth of the child "because J's pregnancy was no longer operative" she could no longer be entitled to compensation.[22]

Justice Nation granted Ms J leave to appeal to the Court of Appeal on four questions of law, as follows.[23]

> i) Would it be inconsistent with the scheme of the Act governing entitlement to weekly compensation to extend cover to a mother who is entitled to cover for her pregnancy beyond the period when she is suffering the physical effects of the pregnancy?

17 *Allenby v H*, above n 12. This was a civil claim for damages by Ms H against the surgeon for her sterilisation operation. The surgeon applied to strike out her claim on the basis that she had cover under the Insurance, Rehabilitation and Compensation Act 2001. ACC appeared as an interested party to argue that she did not have coverage under the ACC scheme.

18 *J* (CA), above n 3, at [7].

19 *J v Accident Compensation Corp* [2015] NZACC 222 (DC) at [2] [*J* (DC)].

20 At [14] and [19].

21 *Accident Compensation Corp v J* [2016] NZHC 1683, [2016] 3 NZLR 551 at [2].

22 At [40].

23 *J v Accident Compensation Corp* [2016] NZHC 2769.

ii) In terms of s 103(2) of the Act, can a person be "unable" to engage in pre-injury employment on grounds other than physical or mental inability?

iii) Does the Act require that pregnancy, as an injury, stop at the birth of the child?

iv) Should s 103(2) be interpreted so as to allow a claimant to establish an inability to engage in employment because of the consequences of a pregnancy, namely the birth of a child, independent from the physical effects of the pregnancy itself?

Prior to the hearing in the Court of Appeal, Ms J sought leave from the Supreme Court to appeal directly to that Court under s 8 of the Supreme Court Act 2003 (a "leapfrog" appeal). The Supreme Court determined it did not have jurisdiction to hear the appeal because the High Court decision was pursuant to s 162 of the Act, which provides that decisions of the Court of Appeal on statutory appeals under the accident compensation legislation are final.[24]

II THE COURT OF APPEAL DECISION

A The accident compensation legislation

To receive ERC Ms J needed to come within s 103 of the Act. Her pregnancy was an eligible personal injury because it arose from a medical misadventure.[25] Of relevance, s 103 provides:

> **103 Corporation to determine incapacity of claimant who, at time of personal injury, was earner or on unpaid parental leave ...**
>
> i) The Corporation must determine under this section the incapacity of—
>
> a) a claimant who was an earner at the time he or she suffered the personal injury:
>
> b) a claimant who was on unpaid parental leave at the time he or she suffered the personal injury.

24 *J v Accident Compensation Corp* [2017] NZSC 3 [*J* (SC)]. See generally Accident Compensation Act 2001, s 162.

25 Following *Allenby v H*, above n 12, see *J* (CA), above n 3, at [6]. Pregnancies that are a result of rape are also an eligible personal injury.

...

iii) The question that the Corporation must determine is whether the claimant is unable, because of his or her personal injury, to engage in employment in which he or she was employed when he or she suffered the personal injury.

iv) If the answer under subsection (2) is that the claimant is unable to engage in such employment, the claimant is incapacitated for employment.

v) The references in subsections (1) and (2) to a personal injury are references to a personal injury for which the person has cover under this Act.

vi) Subsection (4) is for the avoidance of doubt.

The Court of Appeal split 2–1 on Ms J's claim. Justices Cooper and Asher rejected Ms J's claim. They considered Ms J had recovered from her pregnancy at the time the ERC was halted and that her inability to work arose not from the injury of pregnancy or birth but from the need to care for the resulting child.[26] Thus they answered the questions of law posed as follows:[27]

a) Yes: it is inconsistent with the scheme of the Act governing entitlement to weekly compensation to hold that a mother, who is granted cover for her pregnancy, is entitled to weekly compensation beyond the period when she is suffering the physical or mental effects of the pregnancy.

b) No: for the purposes of s 103(2) of the Act, a person cannot be considered to be "unable" to engage in pre-injury employment on grounds other than physical or mental inability.

...

d) No: s 103(2) should not be interpreted so as to allow a claimant to establish an inability to engage in employment because of the consequences of a pregnancy, namely the birth of a child, independent from the physical effects of the pregnancy itself.

The majority considered question (c) did not need to be answered as no party

26 *J* (CA), above n 3.

27 At [46].

had argued "that the physical and mental effects of pregnancy necessarily stop at the moment of the birth of a child".[28]

President Kós dissented, concluding that Ms J was entitled to ERC under s 103 "for so long as the need to care for the child precluded her return to employment".[29] President Kós considered Ms J's incapacity to work was directly caused by the injury, stating "Ms J was both legally and morally obliged to care for her child. She could not just ignore it and go out to work."[30] Consistent with s 103(2), she was unable to return to her previous employment as a kitchen porter and housekeeper in a hotel because of her personal injury.[31] His Honour concluded that Ms J would be entitled to ERC while her child care obligations were unrelieved by family or paid provider assistance, or until the child started school, any of which would allow her to resume her former employment.[32]

The majority and Kós P agreed on the approach for interpreting the ACC legislation — "generous and unniggardly" as per existing case law[33] — and there was no difference of opinion in how previous New Zealand case law on wrongful births may apply. But the majority and the minority differed on the heart of Ms J's claim, which was the nature of the injury and what prevented her from returning to work.

The majority divorced the baby from the pregnancy and birth and considered that Ms J's incapacity to return to her previous employment resulted from needing to care for her baby, not the covered injury.[34] In addition, the majority considered the need to care for the baby to be a 'parental barrier' to employment (that is, a separate cause) and the statutory ERC provisions only covered where a claimant was unable to work due to mental and physical barriers arising from the injury.[35] In contrast, for Kós P the "presence of the baby is the incontestable and permanent consequence of the injury suffered by

28 At [46].

29 At [51].

30 At [64].

31 At [64]. See also *J* (CA), above n 19, at [7].

32 At [72].

33 At [14] per Cooper and Asher JJ and at [52] per Kós P (citations omitted)

34 See, for example, at [32].

35 At [26]–[28].

Ms J".[36] President Kós considered Ms J's incapacity to return to her employment to be a direct consequence of her injury.[37] He noted that the ability of some mothers who have suffered a wrongful birth to make childcare arrangements may relieve the incapacity preventing them working, but "the inability to make such arrangements does not cause the incapacity".[38]

I do not intend to discuss the merits of the Court's analysis from a statutory analysis or foreseeability point of view. I suggest that in the absence of express statutory language, Ms J's eligibility under s 103 is essentially determined by policy considerations about loss-apportionment, the "cost" of motherhood and parenting, and views on the physical and mental impact of mothering a baby. In particular there are two matters that are relevant from a gender perspective. These are:

i) the lack of detail or analysis of any post-birth physical and mental symptoms Ms J was facing. The judgments are silent on the substantial physical and mental changes that occur to a woman *after* the pregnancy and birth of a child. This analysis is highly relevant to when her injury ended; and

ii) the references in the two judgments to whom should bear the cost of raising the child, and, in the majority's judgment, the lack of remedy available to Ms J.

B When does the injury end?

The majority recorded ACC's position that Ms J's entitlements end when the physical consequences of childbirth to the mind and body are "fully healed".[39] The judges also adopted the statements of Blanchard and Tipping JJ in *Allenby* that the physical changes of pregnancy may involve discomfort, substantial pain and suffering.[40]

There was no examination of the physical and mental effects that may occur either to Ms J or to other claimants in her position several weeks after the birth. Such an analysis is necessary to determine whether these are effects of the pregnancy or the birth, or from having to care for a fully dependent newborn

36 At [65].

37 At [67].

38 At [67].

39 At [1].

40 At [17]–[18].

baby. The Court did acknowledge that a woman may not be able to work for a period because of the pregnancy and birth, but stated that once she recovered, as they found Ms J had, this incapacity was gone.[41] The District Court decision recorded that just over 10 weeks after giving birth Ms J was "discharged from medical services" and ACC had submitted that "there is no evidence that the appellant was incapacitated beyond [the date of the discharge] due to the physical effects of her pregnancy".[42] Nor does it appear that any evidence as to continuing injuries was before the Court of Appeal or High Court. The majority starkly framed the pregnancy and birth as completed events, stating "[t]he pregnancy is complete; Ms J has recovered".[43] While it is possible that at 10 weeks after birth Ms J had fully recovered and was in her pre-injury position, there was no indication that the view expressed was based on medical evidence.[44] Certainly it would be difficult for the Court to have made a finding of continuing incapacity on medical grounds in the absence of evidence to the contrary — a reminder for counsel in the preparation of the initial review and subsequent appeals. But, there was also no recognition in the judgments that at 10-week post-partum woman would likely still be suffering from various physical and mental ailments.

I argue that it would be a rare mother who, 10 weeks after giving birth, is "fully recovered" and has returned to her pre-injury state. There is no reference in the judgments to fatigue, extreme and constant sleep deprivation, massive hormonal changes (including higher relaxin levels, meaning a mother is prone to more sprains and strains), possible lactation, possible after-effects of the birth (such as healing scars from a caesarean, episiotomy or vaginal tears), or post-natal depression.[45] These symptoms are generally invisible in public discussions and cultural representations of new mothers. Should Ms J have had such symptoms, cataloguing these would have been necessary in order to

41 At [32].

42 *J* (CA), above n 3, at [2] and [7]. There appears to have been evidence before the District Court of Ms J's pre-pregnancy health, some of which is briefly recorded in noting "contextual matters".

43 *J* (CA), above n 3, at [32].

44 The meaning of the reference to Ms J having being discharged from "maternal care" at [2] of the District Court judgment is unclear. It seems most likely to be the standard discharge from her lead maternity carer (midwife or obstetrician) to return to receiving primary care from her general practitioner.

45 See, for an example of birth after-effects, Crishan Haran and others "Clinical guidelines for postpartum women and infants in primary care – a systematic review" *BMC Pregnancy and Childbirth* (online ed, 29 January 2014).

determine whether her ability to return to her pre-injury employment under s 103(2) was impaired. Those symptoms may not prevent her from working, but to suggest that a new mother is "completely recovered" is, it seems, unrealistic.

The majority's view of Ms J's "complete recovery" informed two key planks of their judgment. First, it allowed their Honours to portray Ms J's circumstances and continuing inability to work as inconsistent with the statutory provisions for ERC. For example, the Act requires ERC eligibility to be determined by medical and occupational assessments.[46] Because the majority considered Ms J to be completely recovered, they considered a medical assessment would be "inefficient and nonsensical" for her.[47] However, for the reasons above, I suggest that if a new mother had a medical assessment at 10 weeks post-birth, a doctor would likely note a number of "symptoms" that she did not suffer in her pre-injury, pre-pregnancy, state. A medical and occupational assessment would, therefore, be highly relevant to whether Ms J could return to work. Second, it allowed the majority to characterise any remaining effects on Ms J as separate to the physical and mental effects of the injury, that is, "parental barriers". Therefore, these remaining effects did not fall within the majority's interpretation of s 103 as concerning only physical and mental barriers to employment, even though this is not expressly stated in the Act.[48]

The gender make-up of those present in the courts cannot be ignored. All the Judges who heard the ERC claim, from District Court, High Court to Court of Appeal, were male.[49] All counsel appearing were male, with the exception of counsel for ACC in the District Court. Some of the male lawyers and judges involved were fathers. I am not suggesting that female judges who had given birth would have decided the case differently. However, it was unfortunate that all speakers and decision-makers in the High Court and Court of Appeal, discussing the impact of pregnancy and childbirth on a female claimant's ability to work post-pregnancy, were male. Perhaps this contributed to a missed opportunity for a more complete assessment of the effect of the injury (pregnancy and childbirth) to Ms J at the time her ERC ceased at 10 to 11 weeks post-birth.

46 Accident Compensation Act 2001, ss 55(1)(d) and 55(1)(e).

47 At [33].

48 At [28] and [36].

49 The panel of five judges of the Supreme Court who refused leave, based on a technical jurisdiction point, were split 3–2 male-female. See *J* (SC), above n 24.

In the 2007 High Court decision of *Accident Compensation Corp v D*,[50] Mallon J (herself a mother) discussed the physical effects of pregnancy, including by quoting an extract from the Australian Medical Association Journal on the features of pregnancy, when concluding that pregnancy was a personal injury.[51] The extract was referred to the Court by counsel, again illustrating the importance of the evidence counsel decide to adduce, both about the individual's injuries and also about what injuries may be expected generally. A similar consideration of Ms J's situation would have given the Court of Appeal an opportunity to truly consider whether Ms J was impaired by physical effects that could be characterised as a covered injury as opposed to "childcare responsibilities". This could have provided a path, within the approach to the legislation favoured by the majority, to award Ms J ERC for a longer period of time than just 10 weeks post-birth, even if ongoing child maintenance costs would still not have been covered.

C Where should the cost of the injury lie?

As a result of the negligent sterilisation, Ms J suffered costs that, but for the injury, she could have avoided. After all, Ms J had consciously decided she did not wish to have further children. As a result of the pregnancy, she will: bear the cost of raising the baby; lose income due to a period of being unable to work (during which she will also miss out on receiving retirement scheme contributions from her employer); and likely suffer the financial penalty identified as affecting mothers returning to the workforce after parental leave.[52] President Kós recorded that Ms J was without a partner or family member who could assist with childcare, lacked the financial resources to cease working for a period to care for the child, and was in low-paid employment that meant childcare rates were unaffordable.[53]

The majority considered Ms J's childcare costs as separate to the injury and essentially a matter of personal choice, stating "all mothers respond differently

50 *Accident Compensation Corp v D* [2007] NZAR 679 (HC) at [71]–[76].

51 This decision was overturned on appeal in *Accident Compensation Corp v D*, above n 10, but later endorsed by the Supreme Court in *Allenby*, above n 12.

52 Recent research indicates women who return to work after becoming a parent earn hourly wages that are 4.4 per cent lower on average than the wages they would have received if they had not had a child. There was no significant effect of becoming a father on hourly wages. See Isabelle Sin, Kabir Dasgupta and Gail Pacheco *Parenthood and Labour Market Outcomes* (Ministry for Women, May 2018) at 34.

53 At [66].

to the responsibilities of childcare" and noting some mothers may take maternity leave, while others return to work and engage third party childcare.[54] This statement ignores that whatever the choice taken, that is, stay-at-home parenting versus working and paying for childcare (or some combination of both), Ms J would bear these costs.

Although the majority held that Ms J's claim for ERC was not covered by the accident compensation legislation, they also strongly doubted she could successfully sue for common law damages for raising the child, should the statutory bar on claims for common law damages be surmountable.[55] The majority explained that this was the position in England, Canada and Ireland.[56] They acknowledged that in *Cattanach v Melchoir* the High Court of Australia allowed recovery of the costs of raising and maintaining a child following a "wrongful birth", but noted this result was reversed by legislation in Queensland, New South Wales and South Australia.[57]

The majority identified three main themes from the overseas case law to illustrate the difficulties they saw with any civil claim by Ms J, which were primarily policy matters.[58] First, the common law generally regards the birth of a healthy child as a blessing. Second, there are difficulties in quantifying the costs of raising a child. Third, the potential scope of liability for medical practitioners would be disproportionate to their duties and the extent of any negligence. The majority also noted that there would be difficult legal and practical considerations such as identifying who would suffer the loss (where the father or another relative provides care for the child), and depending on whether third party childcare is used.[59]

In his minority judgment, Kós P also examined the common law position, but in contrast to the majority, suggested that "on the present and progressive state of this country's law of torts" it was likely the Australian position of *Cattanach v Melchoir* would be followed and, in a claim similar to Ms J's, the

54 *J* (CA), above n 3, at [40].

55 Noted at [39], although the latter point was not argued.

56 At [39].

57 At [39].

58 At [40].

59 It is not the focus of this note to engage with these arguments. In other areas of law, such as contract, difficulties in quantifying damages will not prevent a deserving plaintiff from obtaining a remedy, and courts will assess damages as best as they can from the available evidence: Hugh Beale *Chitty on Contracts* (32nd ed, Sweet and Maxwell, 2017) at [26-015].

consequent costs of child-rearing sheeted to the negligent surgeon.[60]

The majority's position means that women who suffer a negligent sterilisation bear the cost of raising the child and of their lost wages, unable to recover these from either ACC or through the common law. Mothers are almost always the primary carers of infant children, so the majority's approach has a disproportionate effect on women.[61] What the majority describes as "parental barriers to employment"[62] (that is, having a newborn to care for) will almost always be barriers exclusively faced by women. A not insignificant number of female claimants will be without a legal avenue to remedy the economic consequences of a negligently performed operation.

Ms J, or others in her position, may be able to obtain some social security support to off-set their costs. President Kós noted that Ms J's social security entitlements were approximately 40 per cent of what she would receive from ERC.[63] Ms J was able to receive the domestic purposes benefit (DPB), which, as Kós P stated, is available for "ordinary conception" for which the state "assumes substantially less economic responsibility".[64] The DPB was only available if Ms J was not in a relationship. The DPB (now the Solo Parent Support (SPS) payment) is part of a social welfare safety net and, unlike ERC, is not a labour right that would have recognised Ms J's forced absence from the labour market or would have remedied monetary losses she suffered from the negligence. In addition, receipt of the DPB/SPS payment comes with additional restraints on a claimant's personal life, for example, due to the eligibility criteria, entitlement would cease if she entered into a domestic relationship with someone, even if this was only a few months after the birth.[65] If Ms J or another claimant was parenting with a partner they would not be able to claim the SPS and would simply have to bear the lost wages and additional costs caused by the wrongful birth.

60 At [69]–[70], citing *Cattanach v Melchoir* [2003] HCA 38, (2003) 215 CLR 1.

61 Sin, Dasgupta and Pacheco, above n 52, at 34.

62 *J* (CA), above n 3, at [28].

63 At [54].

64 At [2] per Cooper and Asher JJ and at [70] per Kós P.

65 See Social Security Act 1964, ss 20A and 63(b).

III CONCLUSION

The Act was not prescriptive in what the answer to Ms J's claim ought to be. Instead, judicial interpretation was required, and in this case, the majority's interpretation of the legislation came down to the judges' view of the nature of the injury against a complex policy background.

This debate plays out time and time again in wrongful birth cases — cases in which claimants seek economic remedies for insults not just to their bodies, but to their reproductive rights and their ability to control their own fertility and family size. Claimants must seek recognition of the economic value of these rights against a common law that historically undervalues domestic work, considers children a blessing, is ignorant of the physical and mental burden of birthing and parenting a small child, and expects maternal love to involve fiscal (and other) sacrifice.[66] In *XY v ACC* Jeffries J emphasised that:[67]

> This court does not find that our supreme legislative body intended to stigmatise possibly the highest expression of love between human beings, that of a mother for her child, as a continuing injury to her by making compensation payable during dependency.

As reflected in the *J* judgment, and in other wrongful birth cases, the burden of the law failing to provide a remedy falls primarily on women. What, if any, difference would it have made if the bench had included a female judge who had given birth? Diversity of thought amongst those hearing the case and counsel appearing assists those present in asking the right questions and challenging the socio-political underpinnings of previous decisions. You can both love a child and regret the opportunities lost due to their birth and parenting, and compensation awarded for a negligent sterilisation does not undermine the relationship between parent and child.

The common law in this space needs to continue evolving at the pace and degree of nuance that is easily found in other areas of the law, such as breach of contract or the quantification of commercial damages. It must surely be straightforward to recognise, in this day and age, that a child arising from a wrongful birth can be both a blessing and also cause economic loss to the

66 The latter two points are both prominent in *XY v Accident Compensation Corp*, above n 9, at 381.

67 *XY v Accident Compensation Corp*, above n 9, at 380.

mother that ought to be properly compensated by the person who caused it. Our society, through ACC, supports people who cannot work following an injury. As Kós P pointed out in his dissenting judgment, a wrongful birth is an unusual "injury', but it is nevertheless an injury — and an incapacity — that prevents the claimant from resuming employment.[68]

I do not consider that *J v ACC* will be the last word on the issue. There is judicial debate on the issue of compensation for loss following a wrongful birth, as illustrated by the split judgments in the Court of Appeal and the different conclusions in the lower courts. The issue may come before the courts again, or even better than the issue winding its way through the court system, Parliament might make better provision for lost wages following a wrongful birth.

68 At [64].

CASE NOTE

Commissioner of Police for the Metropolis v DSD

Sam McMullan*

I INTRODUCTION

In 2007, Dame Margaret Bazley released her report following a Commission of Inquiry into Police Conduct in New Zealand.[1] While largely positive towards the advances the Police had made through the 1990s and early-2000s in responding to sexual assault complaints, she found evidence of "disgraceful conduct by police officers" that included "a culture of scepticism in dealing with complaints of sexual assault".[2] That culture resulted in numerous instances of officers' "serious dereliction of duty", in which they had failed to investigate allegations of serious criminal offending over decades.[3] Recent reports suggest that the Police, as recently as 2013, failed to investigate a number of complaints of sexual offending due to "investigators' perceptions that a high percentage of sexual violation complaints are fabricated".[4]

This is unsurprising. Police "culture has traditionally been one dominated by men",[5] who are much less likely to experience sexual violence than women,[6] and who therefore have little direct experience of its prevalence. This culture underpins Police "scepticism" of sexual violence complaints. While the culture is increasingly supportive of women[7] and women make up over two-thirds of

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1 Margaret Bazley *Report of the Commission of Inquiry into Police Conduct* (March 2007) [Bazley Report].

2 At 1.

3 At 124.

4 New Zealand Police *K3 Report* (2013) at 4.

5 Bazley Report, above n 1, at [7.15].

6 Twenty four per cent of women in New Zealand have experienced sexual violence, compared with six per cent of men: see *2014 New Zealand Crime and Safety Survey* (Ministry of Justice, 2015) at 51.

7 Bazley report, above n 1, at [7.24]. See also New Zealand Police *A Decade of Change 2007-2017: Implementing the recommendations from the Commission of Inquiry into Police Conduct* (April 2017).

Police employees,[8] women make up less than 20 per cent of the Constabulary and its investigators, and less than 10 per cent of Police leadership.[9]

There are minimal legal avenues for redress for victims of sexual offending. While they are entitled to ACC compensation when that offending occurs in New Zealand,[10] accountability for state failures to investigate complaints effectively is difficult to obtain. It is generally accepted that Police owe limited duties at common law.[11] However, the United Kingdom Supreme Court's recent decision in *Commissioner of Police for the Metropolis v DSD* provides a potential pathway in cases of "egregious errors on the part of the police in the investigation of serious crime": recovery by way of damages under the New Zealand Bill of Rights Act 1990.[12] This case note examines the United Kingdom Supreme Court's reasoning, focussing on those aspects most relevant to its application in this country.

II BACKGROUND

The complainants (anonymised to DSD and NBV) were victims of John Worboys, a "clinical and conniving" man who raped or sexually assaulted over 100 women that he carried in his London black taxi cab between 2003 and 2008.[13] Worboys incapacitated his victims by plying them with drugs and alcohol before sexually assaulting them. He created the opportunity to do so by telling them a story that, he said, called for a celebration in the back seat of his taxi with a glass of champagne secretly laced with drugs.[14] His *modus operandi* was so specific and consistent that once "anyone put two or more

8 New Zealand Police *Briefing to Incoming Minister* (December 2017) at 7.

9 Of a rank sergeant or above: see New Zealand Police *Current statistics of women in NZ Police* (April 2016).

10 Accident Compensation Act 1993, s 21. Lump-sum payments can be made up to $100,000: Injury Prevention, Rehabilitation, and Compensation (Lump Sum and Independence Allowance) Regulations 2002.

11 See *Hill v Chief Constable of West Yorkshire* [1989] AC 53 (HL) at 63–64 per Lord Keith and 65 per Lord Templeman; *Mortensen v Laing* [1992] 2 NZLR 282 (CA); *King v Attorney-General* [2017] NZHC 1696, [2017] 3 NZLR 556; and Stephen Todd "Abuse of Legal Procedure" in Stephen Todd (ed) *The Law of Torts in New Zealand* (6th ed, Thompson Reuters, Wellington, 2016) at 1039–1040. Contrast this with the approach in Canada: *Hill v Hamilton-Wentworth Regional Police Services Board* 2007 SCC 41, [2007] 3 SCR 129. See also the United Kingdom Supreme Court's recent limited recognition of a duty in *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, [2018] 2 WLR 595.

12 *Commissioner of Police for the Metropolis v DSD* [2018] UKSC 11, [2018] 2 WLR 895 at [71] [*DSD* (SC)].

13 *DSD v Commissioner of Police for the Metropolis* [2014] EWHC 436 (QB) at [6] [*DSD* (HC)].

14 At [15].

of the reported incidents side by side, the inference that there was a single serial offender was irresistible".[15] Within eight days of officers analysing the coincidence of that offending, Worboys was arrested.

The two complainants were offered as test cases, representing the two temporal ends of Worboys' offending. DSD complained to Police in early-2003, the same morning she was assaulted. While the full magnitude of Police failures could not have been foreseen at the time, the response to DSD's complaint contextualises the extent of Police failures: had officers properly investigated her complaint, the victimisation of dozens of women could have been avoided. NBV was one of Worboys' last victims, and may have been spared from his offending had officers adequately investigated earlier complaints. Police failures were obvious and were largely admitted once they were identified through Police internal reviews.[16]

The circumstances relating to DSD's complaint can be stated briefly. After Worboys had drugged and assaulted her, he attempted to drop her at a house occupied by "Kevin". Kevin was woken by Worboys knocking at his door shouting that there was a girl in his taxi that lived at the address. Kevin did not know DSD, but given her intoxicated state he suggested that she be taken to the local Police station. Kevin accompanied Worboys to show him the way.[17] When they arrived, DSD was so inebriated that officers had to come out and help her from the taxi. The officers made no note of those who had accompanied DSD or the registration number of the vehicle she was in. The officers treated her as a drunk and called an ambulance to take her to hospital. Upon waking at hospital, DSD began to describe symptoms consistent with having been raped and called Police.[18]

Officers eventually interviewed the friends that DSD had been with earlier that night (although statements were never taken from them) and went to the place where she got into Worboys' cab in an unsuccessful attempt to obtain CCTV footage. However, they never spoke to Kevin, nor made any attempt to recover CCTV footage along the route they travelled. After five months, and

15 *DSD* (SC), above n 12, at [102]. The Police's own review concluded that it was unlikely that Worboys' crimes could have been identified earlier: Commissioner's Report *IPCC Independent Investigation into the Metropolitan Police Service's inquiry into allegations against John Worboys* at 5.

16 *DSD* (SC), above n 12, at [102].

17 *DSD* (HC), above n 13, at [21].

18 At [22].

several complaints by DSD that she was not being taken seriously by Police, the investigation was effectively closed. DSD would not be formally interviewed until 2008 when she contacted Police after learning of Worboys' arrest.

The offending against NBV took place in July 2007. NBV was out with her friends at a night club when she was picked up by Worboys. After drugging and assaulting NBV, Worboys dropped her at her university residence. While she complained to Police the next day, no search was conducted (despite Worboys' cab being identified) no detailed statement was taken from NBV and there were delays in obtaining the CCTV footage from the nightclub. Ultimately, the correct footage was never viewed. After three months, the investigation was closed.[19]

In 2013, DSD and NBV first sought declarations and damages from the Commissioner of Police in the High Court.[20] The applicants argued that under the Human Rights Act 1998 (UK), the Police owed a duty of care in relation to the investigation of crime, which had been breached in both their cases.

The High Court concluded that there is "a duty imposed upon the police to conduct investigations into particularly severe violent acts perpetrated by private parties in a timely and efficient manner".[21] The Court found numerous failures between the years 2003 (when the first complaint was made) and 2009 (when Worboys was tried),[22] categorised as both systemic and operational, in the investigations relating to both DSD's and NBV's complaints.[23] Systemic failures included: failures in the training and oversight of investigators; not using intelligence to identify linkages; and issues around the prioritisation of resources for the investigation of non-sexual complaints that were seen as being easier to clear (with accompanying pressure on officers to reject complaints of sexual assault).[24] The failures identified as operational included: failing to record the details of those who brought DSD to the Police station; not

19 At [40]–[58].

20 *DSD* (HC), above n 13.

21 At [14].

22 In March 2009, Worboys was convicted of 19 counts of rape, attempted sexual assault, four sexual assaults, and 12 offences of administering a substance with intent and rape.

23 *DSD* (HC), above n 13, at [12].

24 *DSD* (SC), above n 12, at [13].

interviewing Kevin (who it was accepted was "a vital witness");[25] not collecting key evidence including CCTV footage and failing to believe DSD or take her complaint seriously. Operational failings of that nature are not unknown to those regularly involved in the criminal justice system, and are among the failings identified by Dame Margaret Bazley in her 2007 report.[26]

The Supreme Court unanimously upheld the lower courts' findings of Police liability for failings in the investigations.[27] The judges agreed that art 3 of the European Convention on Human Rights (the Convention),[28] being the prohibition on inhuman treatment, includes an obligation on the state to carry out an effective investigation when it receives a credible allegation that serious harm has been caused to an individual.[29] The Court split on whether, to be actionable, defects in an investigation must be systemic, or whether (as the majority held) operational errors will suffice.[30]

III DISCUSSION

The judges' disagreement (Lord Kerr, Lord Neuberger and Lady Hale on the one hand, and Lord Hughes on the other) resulted from their respective analyses of both the juridical underpinning of the obligation and its policy. Given the confines of this case note and the reality that any recognition of this obligation in New Zealand (and the extent of that recognition) will be determined by policy, this note will focus on those arguments, after providing a brief outline of how the European courts came to recognise the obligation.

As noted by Lord Mance, while the obligation's underpinning is "shaky" and arguably dilutes the import of rights protected by art 3 of the Convention, the obligation on Police to investigate has now "so often been expressed" in clear terms that it "cannot be ignored".[31]

The obligation to investigate is, to use Lord Hughes' words, a "gloss"[32]

25 *DSD* (HC), above n 13, at [119].

26 Bazley Report, above n 1.

27 The decision was originally appealed to the Court of Appeal, in [2015] EWCA Civ 646, where the appeal was dismissed.

28 European Convention for the Protection of Human Rights and Fundamental Freedoms ETS 5 (signed 4 November 1950, entered into force 3 September 1953).

29 *DSD* (SC), above n 12, at [81], [99], [127] and [150].

30 At [84]–[85] and [99].

31 At [150].

32 At [104].

placed on arts 2 (the right to life) and 3 of the Convention by a line of European Court of Human Rights (ECtHR) cases beginning with *Assenov v Bulgaria,*[33] and *Osman v United Kingdom*.[34]

Assenov involved an allegation of violence inflicted on a suspect held in custody by police officers. The Court held that art 3 required, by implication, that the state investigate where an individual raises "an arguable claim that he has been seriously ill-treated by … agents of the State".[35] If the state is not obliged to identify and punish those responsible, then "the general legal prohibition of torture and inhuman and degrading treatment and punishment … would be ineffective in practice".[36]

By contrast, *Osman*, interpreting art 2, involved an allegation that officers had failed to act on information that a person "represented a serious threat to the physical safety of" an individual who was later killed by that person.[37] The Court held that the obligation on a state to safeguard lives within its jurisdiction implies a "positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another".[38]

Against that background, the ECtHR was faced with a claim in *MC v Bulgaria* that officers had failed to conduct a proper investigation into a complaint of rape by a 14-year-old. There was an associated claim that Bulgarian law failed to provide effective protection against rape and sexual abuse because only cases where the victim had actively resisted or violence was used by the offender were prosecuted.[39] The Court found that:[40]

> … states have a positive obligation inherent in Arts 3 and 8 of the Convention to enact criminal-law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution.

33 *Assenov v Bulgaria* (1998) 28 EHRR 652 (ECHR).

34 *Osman v United Kingdom* (2000) 29 EHRR 245 (ECHR).

35 *Assenov v Bulgaria*, above n 33, at [102].

36 At [102].

37 *Osman v United Kingdom*, above n 34, at 252.

38 At 305.

39 *MC v Bulgaria* (2005) 40 EHRR 20 (Section I, ECHR). Article 8 confers the right to respect for one's private and family life, home and correspondence.

40 At [153].

Returning to the United Kingdom Supreme Court's reasoning in *DSD*, Lord Hughes held that *MC v Bulgaria* required that a state have:[41]

> … a proper structure of legal and policing provision designed to punish [violence] when it occurs and [that it] has administered that structure in good faith and with proper regard for the gravity of the behaviour under consideration.

By contrast, both Lord Kerr and Lord Neuberger (with whom Lady Hale agreed) argued that by necessary implication, *MC v Bulgaria* required a state to conduct investigations effectively and not simply have the proper structures and systems in place. While those competing views also called in aid favourable interpretations of the line of cases and their progeny, discussed above, at the heart of the judges' disagreement were four policy arguments.

First, they considered the impact the recognition of the obligation would have on policing. As the ECtHR said in *Osman*, any obligations imposed on Police must be interpreted so as not to "impose an impossible or disproportionate burden on the authorities".[42] Lord Hughes considered that this factor weighed heavily in favour of limiting the obligation. Law enforcement and the investigation of alleged crime, Lord Hughes said, "involve a complex series of judgments and discretionary decisions".[43] Revisiting those judgments, and exposing the Police to litigation, would "inhibit the robust operation of police work, and divert resources from current inquiries".[44] He went on to say that the Court must bear in mind the "practical business of policing",[45] "the unpredictability of human conduct and the operational choices which must be made in terms of priorities and recourses".[46]

Additional obligations will always burden those on whom they are placed. The question is whether the benefits outweigh the costs. The standard the Police are expected to meet under this obligation is not high; breaches must be "egregious and significant", "conspicuous or substantial" or "obvious and

41 *DSD* (SC), above n 12, at [127].

42 *Osman v United Kingdom*, above n 34, at 305. See also *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [2015] AC 1732 at [121]–[122].

43 *DSD* (SC), above n 12, at [132].

44 At [132].

45 *DSD* (SC), above n 12, at [127].

46 At [112] citing *Osman v United Kingdom*, above n 34, at [116].

significant" to be actionable.[47] It ought not be unjustifiably onerous for Police to avoid making such significant errors.

Secondly, Lord Hughes was concerned about costs associated with responding to complaints; a broad obligation, he said, will lead to increased complaints and litigation.[48] However, accepting Lord Hughes' narrower obligation over the majority's is unlikely to make any material difference. While it is true that a narrower obligation will enable some claims to be filtered out at an early stage, all will require investigation, whatever their individual merit. Further, a narrow obligation will only enable claims to be filtered out if its parameters are clear and the point at which failures cease being systemic is far from clear — Lord Hughes characterised all of the failures in DSD's and NBV's cases as systemic.[49]

Relatedly, as Lord Neuberger was concerned to point out, the competing definitions raise broad forensic issues. Lord Neuberger said that the narrow definition may present a court with "difficult practical, categorisation, and apportionment issues".[50] However, this criticism ignores the issues inherent in the majority's definition. The application of both tests to the breaches at issue in DSD's complaint illustrates the point. A failure to record the registration number or name of someone who drops a drunk person at a Police station, in the context of what officers knew at the time in DSD's case could hardly be said to be an "egregious" or a systemic failure.[51] Further, difficulty in a court's forensic task is not generally a reason for broadening the scope of a duty. Definitions are not always easy to apply in practice, which is why courts are looked to as arbiters of those tests.

Third, the ultimate consequences of any breach (not apprehending an offender) must not weigh into the scope of the obligation. The obligation is "one of means, not result".[52] Focussing on operational failures risks creating an inquiry that looks to the ultimate consequences rather than individual egregious failures, which each reduced the opportunity for the apprehension of an offender. That risk can be adequately mitigated through care in its application.

47 *DSD* (SC), above n 12, at [29] and [72].

48 At [132].

49 At [140].

50 At [96].

51 At [51].

52 At [33].

Finally, as Lord Neuberger reasoned, there is nothing in ECtHR jurisprudence that leads one to believe that it may limit the extent of the obligation in the way Lord Hughes suggests.[53] The ECtHR's jurisprudence, "shaky" though its rationale may be, has been consistent; broadening obligations on states and not limiting them.[54] Through each of *Secic v Croatia*,[55] *Beganović v Croatia,*[56] *BV v Belgium*,[57] and *Vasilyev v Russia*[58] the ECtHR has repeatedly recognised the constituent parts of the majority's reasoning: that the obligation to investigate is not limited to ill treatment by state agents and that the operational failures are actionable. There is no reason to suppose that a court would not join the two when the opportunity arises.

IV APPLICATION TO NEW ZEALAND

When it comes time for New Zealand courts to consider whether to recognise the duty on Police and its extent, they will be reminded that systemic issues — similar to those in *DSD* — surrounding Police investigations of complaints of alleged sexual offending, have been identified before. These systemic issues are underpinned by a male-orientated and dominated Police culture.

While the New Zealand Police is a long way down the track to rectifying them,[59] more will need to be done than simply hiring more women. As recent experiences in the legal profession show, increasing the number of women within an organisation will not, of itself, resolve enduring cultural issues. Increased investigator training, resourcing, as well as individual attitudes, all need to change for systemic issues to abate. Until they do, the Police will remain at risk of breaching any broader duties owed.

In considering whether any particular Police conduct breaches the duty, care will need to be taken to keep in mind its origin as a "gloss" on the right of individuals to be free from "degrading, or disproportionately severe treatment".[60]

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53 *DSD* (SC), above n 12, at [93].

54 At [150].

55 *Šečić v Croatia* (2009) 49 EHRR 18 (Section I, ECHR).

56 *Beganović v Croatia* (46423/06) Section I, ECHR 25 June 2009.

57 *BV v Belgium* (61030/08) Section II, ECHR 2 May 2017: see the Supreme Court's partial translation of the case in *DSD Supreme Court decision,* above n 12, at [43], [87] and [151].

58 *Vasilyev v Russia* (32704/04) Section I, ECHR 17 December 2009.

59 See New Zealand Police *A Decade of Change 2007-2017: Implementing the recommendations from the Commission of Inquiry into Police Conduct* (April 2017) at 4.

60 New Zealand Bill of Rights Act 1990, s 9.

In New Zealand, this right is protected by s 9 of the New Zealand Bill of Rights Act 1990. Our Supreme Court has required a high "level of harshness" to found a breach of s 9.[61] To engage s 9, allegations of sexual offending would need to qualify as "cruel" or "degrading" treatment. Treatment will be cruel "if the suffering that results is severe or is deliberately inflicted" or degrading, and "if it gravely humiliates and debases the person subjected to it".[62] No court in this country has considered whether the state has a duty to prevent infliction of such conduct on citizens by non-state actors.[63]

There is, as Lord Hughes stated, "a clear distinction between protection from an immediately anticipated danger and inquiry into a past event".[64] However, the duty to investigate would "be of little value unless it was a duty to investigate effectively".[65] To fully consider whether an investigation was effective a court must be able to consider whether substantial errors were made that limited the means to apprehend an offender. Limiting the obligation to a review of Police systems, properly defined, is unlikely to enable a court to properly assess the effectiveness of an investigation. A court could dismiss a claim on the basis that while the investigation contained significant and substantial errors, it was not defective because officers were trained appropriately and the relevant procedures were satisfactory.[66]

Higher court consideration of the obligation may not be far away. The family of Steven Wallace have proceedings afoot in the New Plymouth High Court, which Brown J refused to strike out in 2016, alleging that Police had an obligation to properly investigate the killing of Mr Wallace by a Police officer.[67] While it remains to be seen whether the facts of that case will be ripe for development of the obligation (the incident was investigated by the Police and the Independent Police Complaints Authority, and was the subject of an

61 *Taunoa v Attorney-General* [2007] NZSC 70, [2008] NZLR 429 at [362] per McGrath J.

62 At [171] per Blanchard J.

63 See a discussion of the state's obligation to do so in Steph Lambert "Modern day slavery and human trafficking: Are the recent charges in Nelson just the tip of the iceberg?" *Law Talk* (26 September 2014); and Kris Gledhill and Peter Hosking "The Right to Life, Liberty and Security of the Person" in Margaret Bedggood, Kris Gledhill and Ian McIntosh (eds) *International Human Rights Law in Aotearoa New Zealand* (Thomson Reuters, Wellington, 2017) at [8.3.06].

64 *DSD* (SC), above n 12, at [138].

65 At [92] per Lord Neuberger.

66 At [95] per Lord Neuberger.

67 *Wallace v Commissioner of Police* [2016] NZHC 1338. The proceedings stalled pending the family's applications for legal aid: *Wallace v Legal Services Commissioner* [2017] NZCA 114.

unsuccessful private prosecution) there can be little doubt that the obligation to investigate will be adopted in some form in this country.[68] The obligation to investigate has been clearly and consistently adopted under the Convention and a "generous" interpretation of the New Zealand Bill of Rights Act must require nothing less.[69] Its recognition will be a welcome development where complaints of sexual offending have been met with inaction on the part of Police, and may provide victims with a legal path to overcome the inertia and resistance they have encountered thus far.

68 Gledhill and Hosking, above n 63, at [8.3.06].

69 *Mist v R* [2005] NZSC 77, [2006] 3 NZLR 145 at [45] per Elias CJ and Keith J. Their Honours held that courts must adopt a generous approach to the interpretation of the New Zealand Bill of Rights Act 1990.