

## *Editors' Note*

Having last year celebrated the 50th anniversary and reflected back on the first 50 years of the Auckland University Law Review, we set this year's theme as: *looking forward*. 2018 has been a year of calls for change. We saw, for example, the election of a new government with Prime Minister Rt Hon Jacinda Ardern, the world's youngest female head of government, at the helm starting late 2017.<sup>1</sup> There were similar calls for change in the legal community following public revelations of a culture of sexual harassment in the profession.<sup>2</sup>

The issue was addressed by Sacha Judd in her Alumni Dinner speech. Sacha recounted her own experiences in the legal profession and urged us to keep pushing for change. Currently, there are more female students in the Auckland Law School than male students; this is also reflected in the composition of the Review's editorial and business management team.<sup>3</sup> It is up to us to demand change. Saul Holt QC conveyed a similar message in his Symposium address. Saul considered the issue of climate change and whether the common law remains as capable of adaptation as its proponents suggest. He emphasised the importance of the pro bono ethos for public interest litigation and in bringing novel climate change actions. Like Sacha, he opined that it is up to us to drive change.

Coincidentally or not, this year there was a trend of submissions focusing on the law as it relates to social issues rather than black-letter law. Perhaps this is a product of the changing times. In this issue of the Review, we are proud to present nine articles and five commentaries. We begin with the Ko Ngā Take Ture Māori article and winner of the 2018 MinterEllisonRuddWatts Writing Prize: Alex Johnston mounts a case for a tikanga-based legal order governing freshwater bodies in New Zealand. He argues this constitutional renegotiation is necessary to recognise Māori rights and interests in freshwater, which equate to tino rangatiratanga over, and ownership of, those freshwater resources.

Matt Bartlett explores the (lack of) regulation of unmanned maritime drones against the backdrop of ongoing scientific advances and geopolitical instability. He concludes that the Law of the Sea framework is inadequate in regulating maritime drones and suggests the establishment of a new legal framework is necessary.

Simone Cooper considers issues arising from a different technological advancement: namely, the power of New Zealand intelligence and security agencies to intercept private communications. She examines the intricacies of

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1 See "It's Labour! Jacinda Ardern will be next PM after Winston Peters and NZ First swing left" The New Zealand Herald (online ed, Auckland, 19 October 2017).

2 See Sam Hurley "One in five NZ lawyers sexually harassed, Law Society survey finds" The New Zealand Herald (online ed, Auckland, 30 May 2018).

3 In 2016, 69 per cent of Part II students were female: Anna Hood and Julia Tolmie Auckland Law School Gender Report 2016 (Auckland Law School, 2016) at 9. Currently, 20 of our 31 team members are female.

the governing legislations and concludes that they present unjustifiable limits to the rights and freedoms protected in a free and democratic society.

In light of the current review of the Plant Variety Rights Act 1987, Paige Coulter proposes several important amendments to balance the interests of Māori, the agriculture sector and environmental groups. Notably, Coulter argues that, rather than binding the Government to the rigid framework of the prevailing international Convention, New Zealand should create its own plant variety rights scheme that best caters for its unique agricultural, environmental and cultural context.

Are the disciplines of law and history at cross-purposes? Kayla Grant examines how judicial forums dealing with complicated historical inquiries have attempted to reconcile the need to establish a definitive narrative and the academic scepticism about whether an objective truth can exist. Grant concludes that this theoretical tension can be managed in practice, as long as both history and the law are equipped with the knowledge and resources to engage with each other.

Christina Laing considers a different kind of history: the sexual history of a complainant in criminal sexual cases. In time with the Law Commission's review of the Evidence Act 2006, Laing proposes extending the prohibition of sexual experience and reputation evidence to all civil cases to fill the gap in New Zealand's current legislative approach

Under the Convention relating to the Status of Refugees, states can exclude asylum seekers if they are suspected — but not convicted — of a serious offence. Jade Magrath argues that such exclusions are not justifiable from a human rights perspective. Magrath invites the reader to challenge the assumptions underlying these practices that claim to be based on integrity, yet sends an individual back to a state where they face serious threats to life and liberty.

Finally, Ellen Stagwood presents the findings from her empirical study that indicate students from higher decile secondary schools are more likely to pursue, be admitted into and succeed in legal education than students from lower decile schools. Stagwood surmises that while the legal profession continues to diversify along gender and racial lines, little progress appears to have been made in relation to socio-economic background.

Our commentaries section begins with three case notes. First, Daniel Brinkman examines the Court of Appeal decision in *Ward Equipment Ltd v Preston* regarding the interpretation of implied terms in contracts. Then, Tiaan Nelson analyses *Southland Indoor Leisure Centre Charitable Trust v Invercargill City Council*, in which the Supreme Court set out a local council's liability in negligence when inspecting leaky buildings. Finally, James Toebes considers how the Court of Appeal decision in *Loosely v Powell* clarifies, rather than departs from, the principles applicable in determining testamentary capacity. The case notes are followed by a legislation note on the Land Transfer Act 2017. Jayden Houghton explains the reform process and canvasses some of the major changes, particularly those relating to indefeasibility of title. The commentaries conclude with Honor Kerry's

review of Alison Quentin-Baxter and Auckland Law School Professor Janet McLean's book *This Realm of New Zealand: The Sovereign, the Governor-General, the Crown*. Its insights are particularly relevant given the recent discussions around New Zealand becoming a republic.

We would not have been able to present these pieces without our dedicated team of editors. Our foremost thanks must go to them. We are proud that the Review continues to attract the Law School's highest achievers. This year, we built on last year's overhaul of the editorial team structure.<sup>4</sup> Our editors worked in five teams, with one team being mainly responsible for the commentaries. We introduced the role of Managing Editor for experienced editors to take the lead in resolving complex editorial issues raised by the Style and Sub-Editors. This compartmentalisation of roles resulted in greater collaboration and a marked improvement in editing efficiency and quality.

We thank our Business and Advertising Managers for their work in the operation of the Auckland University Law Review Trust and the various events across the year. In addition to the annual Symposium and Alumni Dinner, we also re-introduced the Honours Symposium for top Honours students from the previous year to deliver their Seminar presentations. The Review is proud to continue to nurture and promote excellent legal scholarship alongside the Honours programme.

This year, we farewellled John Ip as one of our Faculty Advisors and welcomed Dr Jane Norton to join Professor Michael Littlewood. We thank them for their invaluable wisdom and passion: we could not have asked for advisors more dedicated to the success of the Review than Michael and Jane.

We thank and farewell Dean Andrew Stockley as his term as Dean of the Auckland Law School comes to an end. Dean Stockley has been an ardent supporter of the Review throughout his tenure. Furthermore, we are grateful for the continued support of the Faculty of Law, particularly the Davis Law Librarians for their assistance with various aspects of the Review.

Finally, we thank our sponsors. At a time when law journals are increasingly moving to online publications, their financial support allows us to continue to enjoy the luxury of a hard copy journal. Particular thanks must go to MinterEllisonRuddWatts for their enduring support of the writing prize.

Echoing our predecessors: it has been a privilege and pleasure to be the Editors-in-Chief of the Auckland University Law Review for 2018. It is our hope that the articles published in this year's journal will contribute dearly to the study and practice of law, and to society at large. As evident from the pieces published, there is still much work to be done in the law in terms of equality and fairness. We hope the Review's articles continue to shed light on these issues, and that we would be the generation demanding and driving change — this is the torch we pass onto next year's editors.

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4 See Kayleigh Ansell and Jayden Houghton "Editors' Note" (2017) 23 Auckland U L Rev 8 at 11.