

Editors' Note

It would be trite to say this year has been one of change; every year has been, and every year will be. But 2019 has seen changes that have had monumental implications for New Zealand society, as well as the legal community more locally.

The atrocities of 15 March will forever be imprinted on the conscious of our nation, and they rightly overhauled the conversations we, as a country, were having. So too has the situation at Ihumātao awakened in us a recognition that *we need to do better* — this time in relation to the way we treat tangata whenua. While incomparable, both events uncovered, and brought to the fore of social discourse, the racial biases that have laid dormant too long behind a façade of tolerance.

As our predecessors have noted before us, while this Note is not the place to engage in an analysis of the dominant forces at work in New Zealand society, those forces are not to be ignored. The Auckland University Law Review holds a special place in the legal community as a bastion of social justice and liberalism, and it is within these pages that critique of societal (as well as legal) institutions can and should happen. We are interested to see how the above events, and the voices they created, manifest in legal scholarship in the coming years.

There were two further changes of particular note this year that have closer implications for the Review. They have a standout feature in common: the coming into office of two important women in the legal community. The first was the coming into tenure of the Law School's new Dean, Professor Penelope Mathew, a renowned specialist in international refugee law who in many ways redeems her Australian background. The second notable change was the swearing in as Chief Justice of the Rt Hon Dame Helen Winkelmann, marking a turning point in New Zealand's jurisprudential landscape. We are proud, on that note, to be the only student-run review in the country of which it can be said that both of New Zealand's female Chief Justices are alumnae.

On the topic of the Review's alumni, we are honoured that the Hon Dame Susan Glazebrook joins us this year. It is curious that, although a graduate of Auckland Law School, she managed to evade involvement in the Review during her time here. Nevertheless, with her special feature article on the United Nations Declaration on the Rights of Indigenous Peoples and its interaction with New Zealand's domestic legal framework, we can finally claim Dame Susan among our ranks.

Interestingly, the range of topics in this year's Review reflect a traditional law school syllabus: criminal law, public law, torts, contract, land law and equity. Yet it would be wholly inaccurate, and a disservice to this year's authors, to say that the topics themselves are anything close to traditional. In fact, we would go so far as to say that the 2019 issue exhibits one of the most socially, technologically and legally topical curations the Review has featured.

Reflecting the Review's commitment to critiquing hegemonic legal structures, this year's Ko Ngā Take Ture Māori article by Claire Rossell examines the treatment of Te Ture Whenua Maori Act 1993 (TTWMA) in New Zealand's wider land law framework. Rossell argues that TTWMA and the Māori land rights it represents are continually subverted by the doctrine of immediate indefeasibility. As a solution to this problem, she proposes amendment to the Land Transfer Act 2017 (LTA) whereby the requirements under TTWMA would act as an exception to the LTA's indefeasibility provisions.

Madeleine Hay, the winner of this year's MinterEllisonRuddWatts Writing Prize, in an innovative appraisal of the tort of negligence, addresses the "justice gap" that prevents plaintiffs from bringing claims of direct liability against the Crown. Hay suggests reform will need to comprise more than mere legislative change given the conceptual issues at play. She advocates a robust doctrine of direct liability, in the development of which courts will need to take an active role.

Our third article, highly commended by the judges of the MinterEllisonRuddWatts Writing Prize, is an entertaining read on New Zealand's copyright framework as it applies to memes (which author Hannah Yang clarifies for the benefit of our older readers is pronounced "meem", as in "cream"). On the basis of Yang's assessment that a large proportion of memes would violate copyright, the article concludes that overhaul of the Copyright Act 1994 is necessary if the legislation is to remain relevant in the digital era.

Responding to a very topical issue in today's society, the anti-vaccination movement, Katherine Eichelbaum's article examines the legal standoff between population health and human rights. Eichelbaum draws on the analogy of mandatory fluoridation and undertakes a *Hansen* analysis to conclude that mandatory vaccination is a justified limit on human rights.

The theme of *law in the digital world* that Yang's article first expounds appears to be a recurring one in this year's issue, as evidenced by Fraser Gollogly's article on the Clean Slate scheme. Gollogly writes that the policy behind that scheme — the "right to be forgotten" — is rendered worthless by online search engines. He proposes that amendment to the scheme is necessary for its utility in the digital era.

Michael Greatrex's article is contract law in its unadulterated form. Greatrex discusses the problems that beset best endeavours clauses and, in particular, the traditional English hierarchy of formulations of those clauses. Having regard to the approaches taken in Australia, Singapore and the United States, Greatrex concludes that to give better effect to parties' intentions and to facilitate the drafting of better contracts, a single standard of effort should be applied to endeavours obligations and a stricter level of certainty required.

In Micah Hill-Smith's and Miranda Hing's articles, the seventh and eighth of this issue, the theme of *law in the digital world* rears its head yet again. Hill-Smith explores in the context of smartphones the "going dark"

phenomenon, and the issues it poses for law enforcement in effecting valid search warrants. His article takes, as he terms it, a United States-centric approach, and proposes a possible way forward in the form of a legal framework permitting compelled decryption.

Hing takes us to the not-too-distant future: a world in which driverless cars inhabit our roads. She writes that this unprecedented technology will raise novel legal questions as to who should be liable in accidents involving autonomous vehicles, and how personal data collected from such vehicles should be protected. Hing argues that the current liability frameworks under the tort of negligence and the Consumer Guarantees Act 1993 are inadequate to answer the first question, and that the second might be sufficiently addressed by tweaks to existing privacy laws.

In our final article, Anna Percy advocates that, following the example of other jurisdictions, New Zealand should exempt certain basic foods and menstrual products from Goods and Services Tax. She argues that such an exemption would reduce the disproportionate burden of tax on low-income households and women — groups already bearing significant social disadvantage.

Following the main articles is a selection of commentary consisting of case notes, legislation notes and a book review. Amy Dresser analyses *Attorney-General v Taylor*, a landmark Supreme Court decision affirming the power of higher courts to make declarations where enacted legislation is at odds with the New Zealand Bill of Rights Act 1990. Among the numerous fields of law represented in this year's issue, Sebastian Hartley's note is civil procedure's representative. He looks at *McGuire v Secretary for Justice*, a case hailing from the Supreme Court on the complex rules surrounding costs awards. The third case note, by Jae Jun Kim, is an appraisal of *Brown v New Zealand Basing Ltd*, a Supreme Court decision embodying a rather niche interaction between employment law and private international law.

Of the legislation notes this year, the first, co-authored by Emma Littlewood and Katherine Werry, relates to the Trusts Act 2019 — an Act that refurbishes New Zealand trust law and, as Littlewood and Werry discuss, makes it more accessible to trustees and beneficiaries. The second, by Jillin Yan, reviews the Taxation (Annual Rates for 2019–20, GST Offshore Supplier Registration, and Remedial Matters) Act 2019. However, it is the GST Offshore Supplier Registration aspect of the legislation (dubbed the “Amazon Tax” rules) that is Yan's concern. The issue closes with Janna Tay's review of *The Promise of Law: Essays marking the retirement of Dame Sian Elias as Chief Justice of New Zealand*, a Festschrift marking (as the title gives away) the Rt Hon Dame Sian Elias's retirement as New Zealand's foremost judge.

Having come to the end of the issue — in terms not only of the above summary but also of our tenure's close — we reflect on our successes. The first worth mentioning is the Honours symposium we hosted earlier in the year, which ran smoothly with an impressive attendance, no small thanks to our excellent presenters. We are proud to be an institution that not only

showcases but furthers, to the extent we can, academic excellence at the Law School.

The second success was this year's Symposium and Alumni Dinner. For the former, we had the very great privilege of hearing from Michael Timmins, the Director of Human Rights Proceedings, who spoke on career opportunities in international human rights law. Mr Timmins provided invaluable insight to a lecture theatre packed to capacity, and in doing so drew on enlightening anecdotes from his time at the United Nations and his career generally — a career, it is worth mentioning, that has seen achievements incommensurate to its as yet rather short length. The evening was excellently chaired by Dr Jane Norton (incidentally one of our faculty advisors), with whom Mr Timmins read law.

The Dinner that followed the Symposium was a resounding success. Departing from the orthodox Dinner address, we were treated to a hugely entertaining performance by Mika Austin of an excerpt from a play written and produced by fellow alumna Amy Mansfield. Ms Austin had previously performed the play, the script of which consisted entirely of verbatim quotes from University of Auckland lecturers, at the Auckland Fringe and Melbourne Fringe festivals, as well as at Auckland's Basement Theatre. We cautiously hope we have set precedent for future Dinners to showcase the creative and innovative work of the Review's alumni.

This Editors' Note would, of course, be incomplete without acknowledgements. We give thanks first to our incredible editorial team this year, who have worked diligently and cohesively — and particularly to our Managing Editors, to whom we delegated more than a fair proportion of our oversight duties. Secondly, we thank our faculty advisors, Professor Michael Littlewood and Dr Norton, the Review's worthy caretakers, who have been an invaluable fount of knowledge throughout our tenure. And finally, we thank Dean Mathew and the Faculty — the former for her keen embrace of the Review, and the latter for its unwavering support.

Our goal this year has been to create an issue of which everyone involved can be proud, and one that continues the Review's revered tradition as a steward of the Law School's best student scholarship. We consider our goal duly met.