

Editors' Note

I INTRODUCTION

In their Editors' Note in the 2020 volume of the Review, our predecessors Jodie Llewellyn and Louis Norton told of the then-novel disruptions COVID-19 had caused.¹ Sadly, that trend continues and does not appear to be letting up soon.

The Review has resolutely adjusted to this "new normal". Social events have been cancelled, the launch event for this volume was postponed four times, and editors and authors alike have dealt with fickle but frequent COVID-related restrictions. Alas, to the credit of all involved, we have still produced a journal of immense quality and interesting variety. We here introduce our special features, articles, commentaries and book review for the reader's consideration.

II SPECIAL FEATURES

We turn first to our special features. Drawing from the depth of the Review's alumni, we are honoured to include a contribution by Dame Sian Elias, who served as the 12th Chief Justice of New Zealand from 1999-2019. Dame Sian was herself Editor-in-Chief of the Review in 1970. Dame Sian's address is a tour de force, traversing her diverse interests from legal education to constitutional histories and reflecting on the law's evolution across her storied career within the law. Dame Sian leaves us with a wero to undertake deep research into Aotearoa, New Zealand's constitutional histories, so we can be prepared for the bicentenary of our nation in 2040. As Max Harris writes in his reflection, Dame Sian's address truly reflects her "belief in, and commitment to, the matter of New Zealand".

Another figure returning to the Review, Max Harris (2010), offers a thoughtful and considered reply to Dame Sian's address. Addressing Dame Sian's four key themes: legal history, legal education, New Zealand constitutionalism, and the relationship between life and the law, Harris offers his perspective on Elias's reflections. Harris's contribution is marked by his characteristic interweaving of socio-political histories into the law and, like Dame

1 Jodie Llewellyn and Louis Norton "Editors' Note" (2020) 26 Auckland U L Rev 7 at 7.

Sian's address, challenges us to critically examine the role law plays in our nation's history and the lives of our people today.

We conclude this year's special features with a speech from Sir David AR Williams QC (1967). Sir David spoke on international post-graduate legal education for New Zealand lawyers – drawing on his experience as one of the first such New Zealand lawyers to follow this path, studying his LLM at Harvard. Sir David notes the importance of taking up the opportunities you have whilst maintaining collegiality and friendliness with the law and your colleagues.

III ARTICLES

Turning to our articles. We open with this year's Ko Ngā Take Ture Māori article. Therein, author Mikayla Dempsey addresses the discrepancy between applying Treaty principles in natural justice reviews affecting large-scale decisions and those affecting individuals. She argues that the discrepancy is unfounded. Instead, both tikanga and Treaty principles *must* apply in judicial natural justice decisions. Only then can Government decision-makers fully consider the Māori voice consistently with Te Tiriti o Waitangi. In arguing as such, Dempsey proposed a novel but incredibly important approach to natural justice.

Thies Moran-Vaihū authors our inaugural Moana Pasifika Issues Paper. As a journal publishing undergraduate work, the Review provides vital opportunities to address wide-reaching legal issues, particularly those less familiar to traditional law journals. With that important aspect of the Review in mind, we have instituted this new feature to give space to Moana Pasifika legal scholarship. In this maiden Issues Paper, Moran-Vaihū analyses the tabooing over time of tātatau (traditional Tongan tattooing). She uses that analysis as a microcosm for the broader phenomenon of the erasure of traditional Tongan culture by the Wesleyan Methodist Church. Moran-Vaihū warns that although Tonga was never “formally” colonised, that is a misnomer. Acceptance of that fact can pave the way for Tongans to reclaim their traditional culture.

Closer to home, Rosa Gavey authors a piece of high practical significance. Gavey revisits the then-ground-breaking 1996 decision *Ruka v Department of Social Welfare*. In that decision, the Court of Appeal analysed when a de facto relationship could be considered a “relationship in the nature of marriage” for the purposes of a social security entitlement, concluding that one marred by violence (of all

kinds) was not so. Despite the seemingly positive shift *Ruka* produced, Gavey argues that in reality, the judgment has had little transformative effect in how the Ministry of Social Development determines benefits recipients' relationship statuses. The current approach, she says, is unjust and breaches human rights.

Madi Hughes' article, the winner of the MinterEllisonRuddWatts Legal Writing Prize for 2021, also addresses a topic of practical import. Hughes adjudges the Housing Accords and Special Housing Areas Act 2013 — which provides a fast-track alternative to usual resource consent processes — as falling short of natural justice requirements. Hughes goes further, explaining that this shortfall prejudices Māori stakeholders, as evidenced by the Ihumātao land dispute. While the Act has been repealed, Hughes' analysis provides vital lessons for any future fast-track housing legislation, lest it too fall short of preserving natural justice.

Louis Norton authors a lucid examination on the regulation of speech in a collective bargaining context. Starting from the decision of the Employment Court in *Kaikorai Service Centre Ltd v First Union Inc*, a decision which left unresolved the consequences of speech that breached the good faith duty, Norton dives into a detailed analysis of case law and legislation from Aotearoa and abroad. The object of this analysis is, as Norton says, “to introduce conceptual clarity to this lacuna in employment law jurisprudence.” Norton's analysis brings him to a principled conclusion; one must take a granulated approach, void of bright lines, to the regulation of free speech in an employment context.

Katie Pigou's article on the risks of digital contract-tracing is of modern relevance in two key ways. First, it concerns the ever-present COVID-19 pandemic. Secondly, it confronts the increasingly pertinent challenges to privacy and international law posed by cross-border data and surveillance concerns. While Pigou assesses New Zealand's contact-tracing system as “imperfect”, her analysis concludes with the optimistic point that contact-tracing can be done to protect health while also mitigating privacy issues.

Roxanne Pope offers a fresh topic to the Review: the regulation of space weapons. Pope asks whether the law is fit to grapple with the increasing militarisation of outer space. Pope narrows into the proliferation of dual-use satellites, that is, those with both a civilian and military function like the GPS system and tests of debris-causing weapons as an example of the complexity facing regulators in this space. Pope's article is unique in that it brings the global lens of international law and policy to the local level of Aotearoa, New Zealand. In doing so, Pope offers practical guidance for domestic

policymakers who are facing urgent regulatory pressures now that Aotearoa has become a space-faring nation.

Hart Reynolds takes aim at the prosecution of human rights violations by corporations. She identifies victims of corporate human rights abuse often fall into a lacuna of the law where they are unable to access a legal remedy to their harms. Examining a series of seminal international decisions, Reynolds explores how international jurisprudence is edging towards addressing this lacuna. However, for Reynolds, the incremental development of the law is insufficient; she makes the case states need to act. Reynolds analyses three courses of state action before concluding that applying mandatory human rights due diligence obligations on corporations is the best path forward.

Should the right to abandon be abandoned? In grappling with this infrequently addressed area of the law of personal property, author Mingze Sun seeks to answer that very question. Sun inspects a century-long but sparse jurisprudence to conclude that the accepted legal process underlying the law of abandonment — that abandoned property becomes *res nullius*, or “ownerless property” — is incorrect. Instead, he argues, abandoned property only becomes the property of another upon discovery; it can never actually be ownerless.

Finally, Nathan Whittle asks is there “justice for all?” Whittle examines how the costs of civil litigation have increased over time, excluding many potential litigants from accessing remedies and justice. Identifying the “market-driven approach to justice” that characterises the current civil justice system, Whittle reflects on areas for reform. The aim of these reforms is, for Whittle, to engender a cultural shift away from a market-based ideology of justice to one that simply recognises the right of justice for all.

IV COMMENTARIES

The Review again features our usual complement of legal commentaries: three case notes, one legislation note and a book review. In the first case note, James Adams analyses the Supreme Court argument in *Commissioner of Inland Revenue v Frucor Suntory New Zealand Ltd*, a complex and long-running fixture of New Zealand tax law. Having the benefit of attending the Supreme Court hearing, Adams’ summarises the judgements of the High Court and Court of Appeal before offering reflections on where the Supreme Court may land.

In our second case note, Hannah Yang examines the significant High Court decision in *Re Edwards (Te Whakatōhea No 2)*, which concerned a claim by the Whakatōhea hapū and other applicant groups to customary title under the Marine and Coastal Area (Takutai Moana) Act 2011. Yang notes the cases' promise in providing Māori claimants with an increased likelihood of being awarded grants of customary marine title. However, she cautions the reader to remember the history of Māori claims to the foreshore and seabed and argues there is room for the law to continue to develop.

Tommy Zhang presents our final case note on *Fitzgerald v R*. He argues the case and its appeals represent “the potential consequences of when the legislature overreaches and removes the discretion of judges in the sentencing process.”

The legislation note is presented by Rebecca D'Silva and concerns the Reserve Bank of New Zealand Bill 2020. A critical component of our public finance system, D'Silva demonstrates how the Bill seeks to improve the governance and accountability of the Reserve Bank. She identifies some deficiencies in the Bill and suggests, following Treasury advice, changes to the governance model within the Bill that correct these deficiencies.

Jane Wang closes the volume with her review of Professor Craig Elliffe's expertly timed book *Taxing the Digital Economy: Theory, Policy and Practice*. Wang artfully presents Professor Elliffe's book and reflects on how it has left her with a renewed sense of both frustration and optimism in the international tax system.

V REFLECTION

The Review is truly the product of its people. For this, we wish to express our sincere gratitude and appreciation to the staff and authors of the Review who worked tirelessly amongst the uncertain and challenging conditions brought on by a second year of the COVID-19 pandemic. As a relatively fresh group of editorial staff, we are impressed with how our editors rose to the challenge, developed their skills, and contributed to the final volume.

This year the Review made several strategic expansions. First, we formalised a partnership with leading student-run Reviews internationally. This group includes the Oxford University Undergraduate Law Journal, the Cambridge Law Review and the University of Bologna Law Review. Our partnership saw the four reviews participate in an international symposium in April. Therein

we shared processes and experiences and began to develop opportunities for Editor exchanges and further participation. We hope our alliance will in the future continue to offer Auckland Law students further opportunities to engage with legal writing and research abroad.

The Review was also privileged to publish a special issue in conjunction with the Arbitrators and Mediators Institute of New Zealand and Bankside Chambers in honour of our alumnus Sir David AR Williams QC. The special issue drew articles from experienced arbitrators who have worked with Sir David and provided space for students and recent graduates to contribute their scholarship alongside these esteemed practitioners. Our editors were also involved, undertaking remunerated editing and having the chance to work with top-tier legal writing and authors.

Finally, we have formalised our flourishing relationship with our industry partners. Firstly, we wish to thank Tom Cleary of Chapman Tripp and Adam Ross QC of Shortland Chambers for hosting a comprehensive and engaging training series for our editors. The Review is immensely grateful for Chapman Tripp's continuing support of undergraduate legal writing. Secondly, we wish to thank Aaron Lloyd and Jeremy Muir of MinterEllisonRuddWatts for judging and supporting the MinterEllisonRuddWatts Prize for Legal Writing for this year. MinterEllison's continued support of the Review's writing prize over the years has helped the Review to celebrate the very best undergraduate writing produced at Auckland Law School.

We also wish to thank our Faculty Advisors, Rob Batty, Associate Professor Chris Noonan and Jayden Houghton. Each of our advisors brought unique perspectives and helped shepherd us through the year. Professor Michael Littlewood graciously continued to share his deep knowledge of the Review and its people, providing invaluable counsel. The Dean, Professor Penelope Matthew, and the wider faculty have also continued to provide the Review with immense support and encouragement. We could not be more grateful to all of them.

Now exiting its 54th year, the Review continues to chart a path of unique scholarship and opportunity for those involved. We have been immeasurably grateful and humbled to be custodians of this storied institution for a moment in its long history. We hope you enjoy reading the fruits of our authors' and editors' labour that populate the following pages.

We wish our successors every success and expect the Journal will flourish under their kaitiakitanga.

Hei konā mai, ngā mihi

Hugo Wagner-Hiliau and Henry Frear

December 2021