SPECIAL FEATURE

Auckland University Law Review Alumni Dinner Speech 2015

JUSTICE HELEN WINKELMANN*

It is 31 years since I was an editor of the Auckland University Law Review, a ridiculous period of time to have elapsed. I am proud to have been an editor of the Law Review, although I was actually a co-editor, alongside Leigh McGregor Goodwin. Leigh was an adult student, and had had a previous career as a journalist. In reality I suspect that Leigh was the more effective editor. My memory of myself as a law student is that I was rather clueless.

We were overseen in our endeavours by Professor Jim Evans. He was committed to the task, even attending meetings of the editorial board in my student flat over the holidays. At the time I took his solemn air of troubled confusion to be a personal judgment on me. Maybe it was, maybe it wasn't. Over the years I have come to realise that is Jim's perpetual air.

The 1984 Law Review is the product of those who were at Law School in the early 1980s. In those days Law School was at the top of the Library building, with some of the best views of Auckland. Life at Law School was not glamorous in the 1980s. There wasn't much focus on student comfort as there was no competition for students between faculties or universities. We had a student common room the size of a small bedroom and for coffee we had to resort to a contraption called a "Café Bar machine", which was nothing more than a dispenser of instant coffee and a tank of hot water. Toward the end of my time at Law School they took that out because of concerns about the state of the machine. When they took it away, they cleaned out of the hot water tank the bodies of many well-cooked cockroaches. Rather than hot water, it had been dispensing cockroach soup to us.

For entertainment we had Law School Steins. The most entertaining part of those was lecturers behaving disgracefully, in the days when they still did. We didn't have Facebook, Instagram or the Law Revue. We did, however, have a group of students who managed to get national coverage for the Law School. They did this by going along to "Big Time Wrestling", the New Zealand forerunner of WWF, which was shown live on television at about 9.30 at night. The students would get there early, claiming the front row. Then during the course of the wrestling match they would hold up signs emblazoned with the name they would then chant: "Coote", "Coote", "Coote" — a reference, of course, to none other than our conservative Dean,

* Judge of the New Zealand Court of Appeal.

Professor Coote, a man known for his slender and preppy style. This chanting was very much to the bemusement of the commentators, who said things like: "I don't know who this Coote guy is but he must be some kind of a wrestler".

We had our wild moments. We were after all the punk rock generation.

Things were not by any means wild in the profession we were studying, quite hard, to join. Although the profession was by then full of able lawyers who were progressive thinkers, the profession itself had changed little from that of the 19th century. There were women lawyers, but not many. There were two women Judges: Augusta Wallace and Sylvia Cartwright appointed to the District Court Bench in 1976 and 1981 respectively. But there were no women on the High Court or Court of Appeal. The profession was looking and behaving as it ever had.

Even as the profession clung to its 19th century model, changes were going on in our society and in the law, which would re-shape them: some changes for the better, some for the worse.

By the early 1980s the abolition of claims for personal injury was taking full effect. Lawyers of our generation were the first who would not have a steady diet of "crash, bash and ouch" litigation to hone our skills as courtroom lawyers.

The deregulation that swept New Zealand after 1984 and the boom and bust of the next five years would cause a transformation in the business model of the profession, creating intense focus on billable hours and profitability, and, of course, allowing advertising.

And although it was not reflected in the profession yet, women lawyers were coming out of Law School in great numbers. In my class we were a little short of half the numbers. By the beginning of the 1990s the number of women graduates would outnumber the men.

Outside the profession New Zealand was also a very conservative place. More conservative than the country on which we modelled ourselves at the time, the United Kingdom.

Views in relation to women were coming along but there were few female public figures outside the entertainment industry. Since 1976 we had had the Property (Relationships) Act, but that only applied to married women, and the equal sharing presumption only applied to the matrimonial home. There was no property-sharing regime offered by either statute or common law for de facto couples. Courts in New Zealand had to that point declined to lend a hand in this area, in some cases on the public policy ground that to do so might undermine the institution of marriage.[1]

Homosexuality was still criminalised. In the United Kingdom the Wolfenden Report had come out in 1957, recommending that homosexual behaviour between consenting adults no longer be criminal. That

1 Although in *Hayward v Giordani* [1983] NZLR 140 (CA), the Court of Appeal made clear that this position was likely to change.

recommendation had been acted upon in England in 1967. But it was not until 1986 that homosexuality was decriminalised in New Zealand.

So at the beginning of the 1980s New Zealand society could fairly be said to have significant social justice issues to face, and could otherwise be characterised as quite dull, from a young person's perspective at least.

Thankfully, through the first half of the 1980s Law School began to transform into an exciting place to be, as the new wave of lecturers started to come through: Mike Taggart, Jane Kelsey and David V Williams. These people had fiery ideas and beliefs, and an approach to the law that subjected it to policy analysis, moving lectures from the dusty recitation of precedent to something altogether more educational.

My first year, 1981, was the year of the Springbok Tour protests. I am sure I remember that David V Williams, that is the now Professor David V Williams, taught one Legal Systems class with his head bandaged because of the blows he had received from a Red Squad baton.[2] In this context, and as a protestor myself, it was uncomfortable but somehow exciting that a member of the Red Squad was also a student in the same Legal Systems class.

I remember that we loved the cases of Lord Denning. We understood him to be a Judge of purely liberal leanings. The thing about his judgments that engaged me, and I think others, was his novelist's ability to make plain the power the law had to right a wrong in the life of an ordinary person. Take farmer Herbert James Bundy of Yew Tree Farm for example.[3]

We were also taught in our classes to question the law as it was, and to see its power to get things wrong and to get things right, both in statute and in common law. These were the things that captured our hearts and minds, and made us want to be lawyers.

In 1984 the Law Review was controlled by an exclusively student editorial board. I understand that it still is, and I hope that it remains so. This is unique in New Zealand and it makes the Law Review a perfect vehicle for that particular voice of youth, the voice of the young lawyer.

Leafing back through the Law Reviews for students of my generation, you can see some of this belief in the power of the law of which I spoke.

In the 1982 edition there is a case note approving of High Court judgments in which Judges were prepared to make custody orders even though they would result in the child's exposure to a transsexual or homosexual adult (recalling as necessary context that homosexuality was illegal at the time).[4]

In the 1984 edition there is an article by Helen Dervan about the potential for the courts to come up with remedial responses to the inequities

2 The Red Squad was name of a police squad used to manage protestors in the 1981 Springbok Tour protests. They were typically equipped with riot shields, helmets and batons.

3 *Lloyds Bank Ltd v Bundy* [1975] QB 326 (CA).

4 KGG "Case note for *Y v Y*: June 1981 (Auckland M. 145/80) Barker J." (1982) 4 Auckland U L Rev 333.

often consequent upon the breakup of a de facto relationship.[5] The solution suggested there, of the use of the remedial constructive trust, was adopted several years later in the Court of Appeal decision of *Gillies v Keogh*.[6]

In the 1985 edition there is an article by the young John Tamihere, "Te Take Maori: A Maori Perspective of Legislation and its Interpretation with an Emphasis on Planning Law".[7]

But when I look at the content overall of those publications, I believe that we were too timid, perhaps trying to emulate what we thought lawyers should be like: conservative. I wish we had made more of our opportunities to criticise and challenge. As a group of students publishing our own Law Review, this was our chance to do just that.

In our editorial Leigh and I say nothing about the wave of change for which we should have been arguing. Looking back at myself as a 22 year old I wish I had been a bit wiser and a bit braver. I wish Leigh and I had, for example, said: we need more women to be appointed to the judiciary. I also wish we had asked why the courts were taking so long to respond to the need for the fair distribution of assets on the breakup of a de facto relationship. I wish we had spoken up on behalf of the rights of LGBTI people.

But this is all wishful thinking and, even without our voice, conservative New Zealand was about to change. The Springbok Tour, the land Hikoi, the Bastion Point occupation, some brave journalism and a general election were some of the things that broke the gridlock in our society. And by the early 1980s the politicians were already in Parliament, and the lawyers and judges already within the profession, who would begin and lead that change.

Although we didn't realise it as we went to class each day in 1984, we were at a watershed moment in New Zealand for our society and for our profession, with radical reforms in our economy, in the sexual politics of New Zealand, in relationship property and the development of Treaty of Waitangi jurisprudence to arrive within the next few years.

31 years on and the good news is that New Zealand society is not quite so dull and conservative as it once was. More good news in my view is that it appears from the content of more recent editions that we are breeding a braver bunch of student authors. I have read with interest an article in the 2014 edition by Thom Clark on sentencing indigenous offenders, suggesting a new approach using existing provisions of the Sentencing Act 2002.[8] And one by Finn Lowery arguing for what he describes as a more principled response by the courts to applications for stay of proceedings as a response to abuse of process claims.[9] This is to name just a few.

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5 Helen M Dervan "Quasi-Matrimonial Property Division and Judicial Alchemy" (1984) 5 Auckland U L Rev 1.

6 *Gillies v Keogh* [1989] 2 NZLR 327 (CA).

7 John Tamihere "Te Take Maori: A Maori Perspective of Legislation and its Interpretation with an Emphasis on Planning Law" (1985) 5 Auckland U L Rev 137.

8 Thomas Clark "Ko Ngā Take Ture Māori: Sentencing Indigenous Offenders" (2014) 20 Auckland U L Rev 245.

9 Finn Lowery "Abuse of Process: The Need for Structure" (2014) 20 Auckland U L Rev 223.

These are stimulating articles. They challenge lawyers to make different arguments, and the judges to decide cases differently. In a system based on precedent, which is by its very nature constantly harking back to what was done in the past, it is vital that lawyers and judges are exposed to thinking and writing that challenges and disrupts our settled views. Law students and young lawyers are well placed to fulfil this role. In some ways they are uniquely placed and it is in this area that I think the Law Review plays such a vital role.

Although the acute social justice issues I mentioned earlier have been addressed to some extent at least, there will always be areas in which the law needs to develop to respond to changes in society, or to better meet the needs of a just society. Over the last several years we have seen a development of the law in relation to the sentencing of young offenders, and the treatment of vulnerable witnesses and defendants in our courts. We are beginning to see the revival and growth of jurisprudence as to the place of Tikanga Māori in the law. I foresee developments will be necessary to address how we deal with juries and criminal proceedings in general in the age of the hyper exchange and flow of information.

Even so I suspect that right now, as we go about our daily work, we Judges are applying principles at which in 31 years time someone will look back and say: what were they thinking? Why did they even give that argument airtime? Why did they decide that case that way? If I am right, I have two thoughts. One, what are those bad principles? And two, I hope the Law Review points out the error of our ways before the next 31 years are up.