

## *Editors' Note*

In 2017, the Auckland University Law Review celebrated its 50th anniversary. Over the past 50 years, the Review has served as a constant platform for the best research papers written by Auckland law students each year. It has also produced an illustrious alumni network featuring numerous members of the judiciary, political leaders, commercial trailblazers and notable academics. The alumni list reads very much like a *who's who* of the legal, political, commercial and academic spheres. And this is indicative of the talented, hard-working and meticulous students that the Review naturally attracts. We are extremely grateful to be a part of this ongoing legacy and we are confident that the Review will continue to add distinguished names to its alumni list in the coming decades.

It being the 50th anniversary, we received significant interest in our Symposium and attracted an exceptional number of alumni to our annual Alumni Dinner. The Symposium was titled *Looking Back, Looking Forward: Reflections on 50 Years in the Law* and was delivered by the Chief Justice of New Zealand, the Rt Hon Dame Sian Elias QC. We would like to thank Dame Sian, not only for her engaging presentation, which perfectly matched the theme we had envisaged for the evening, but also for accepting our invitation a mere two hours and 28 minutes after we sent it (not that we were counting). We were also fortunate to have Review alumna and University of Auckland Professor Julia Tolmie introduce Dame Sian and act as Chair for the Symposium.

The Symposium was followed by the annual Alumni Dinner at the Northern Club, where Court of Appeal Justice Mark Cooper QC featured as our dinner speaker. Having each spent three years on the Review, we can confidently say that the Alumni Dinner remains a true highlight for everybody involved with the Review. The opportunity for students (particularly junior students) to be seated between judges, Queen's Counsels, law firm partners, political leaders, academics and other established members of the legal profession is rare — and one that is repeatedly met with appreciation, excitement and, at times, star-struck nervousness from our editorial team.

As the Review is this year celebrating its 50th anniversary, we have worked tirelessly to produce an issue that is, hopefully, worthy of such a milestone. In this issue, we have published an unprecedented *four* special features. No one could argue, however, that we have forfeited *quality* for *quantity*.

Dame Sian's Symposium speech opens the issue. Given that Dame Sian has presided for so long in the uppermost echelon of the New Zealand legal system, we could not envision a more suitable way to begin this 50th Anniversary Issue. Dame Sian's Symposium speech is followed by

Justice Cooper's Alumni Dinner speech. In his speech, his Honour reflects on his own experience at the Faculty of Law and offers insightful comments on the future of law reviews (and the law generally).

We were fortunate to inherit our third special feature from our predecessors. In his 2016 Symposium speech, the Rt Hon Paul East QC draws on his own experience to reflect on *Life as the Attorney-General: Being in the Right Place at the Right Time*.

Finally, we were personally asked by the Faculty to write *A Brief History of the Review*. Inevitably, given the Review's 50 year legacy, this resulted in a not-quite-so-brief 40 page history, retelling the Review's evolution and detailing its institutions, its scholarship and its prestigious alumni network. Retrieving 50 years of Editors' Notes, alumni records and *anything else we could find* was no easy task — and one that we might not have survived were it not for the support of our dedicated research assistants. The exercise has been extremely rewarding, however, and we are pleased to have uncovered aspects of the Review's history that might otherwise have been forgotten. We hope that you find this piece as interesting to read as it was for us to write ... which is to say *very interesting!*

Aside from these special features, this year's Review contains nine articles and five commentaries. Special congratulations must go to Cherry Ngan — the recipient of the 2017 MinterEllisonRuddWatts Writing Prize. In her article, Ngan considers the adequacy of New Zealand's current midwife-led maternity framework. Ngan contends that the current system has created a choice façade in which midwives exist as the only readily available option for maternity care. This choice façade, Ngan asserts, contradicts the framework's original intention and is unfair to women who might expect the same standard of care from midwives as they would from registered general practitioners who practice obstetrics. Ngan concludes that either choice must be reintroduced into New Zealand's maternity system or the midwife standard of care should be raised.

In this year's Ko Ngā Take Ture Māori article, Aditya Vasudevan assesses the suggestions of the Matike Mai Aotearoa report into the constitutional recognition of indigenous rights. In supporting those recommendations, Vasudevan argues that historic sovereignty and the right to tino rangatiratanga provide strong moral grounds for constitutional reform. Vasudevan concludes that a form of legal pluralism should be carefully constructed with the aspiration of fairly balancing the inherent rights of Māori as indigenous people with the rights of non-Māori who now call New Zealand home.

Anna Chernyavskaya explores the appropriate scope of the penalty doctrine in light of recent developments in Australia and the United Kingdom. Chernyavskaya notes that the debate brings into conflict two highly respected legal principles: the need for certainty and the need for

substantive justice. Chernyavskaya concludes that the doctrine's application should be restricted to cases of true injustice to maximise the freedom of contract.

Jack Davies examines recent developments in the House of Lords regarding the available remedies for a misapplication of trust funds. Davies argues that the reasons for these departures from long-established equitable principles are unsatisfactory. Davies concludes that the correct legal result can still be reached in these cases without such departures from established legal principles and without disposing of substitutive performance claims from the law.

Riki Fujii-Rajani considers whether New Zealand should continue to allow financial institutions to terminate or restrict business relationships with money remitters. Fujii-Rajani argues that blanket de-risking policies would negatively impact on migrant families and developing countries that rely on these funds. They would also encourage the use of informal, unregulated channels of remittance with higher terrorist-financing risks. Fujii-Rajani concludes that the government should intervene by legislation in order to ensure that money remittances remain accessible.

Kya Raina Lal considers the legal impacts of climate change-induced sea level rise on Pacific statehood, sovereignty and claims to maritime territories. Lal argues that climate change deprives Pacific nations of their lands, while, at the same time, international law deprives them of their seas. Lal concludes that the current international law framework must change. While no single model seems to be satisfactory on its own, a combination of models could prove effective.

Rayhan Langdana considers the concept of ownership over the human body in light of the increasing prevalence of medical research using genetic material. Langdana argues that the lack of informed consent in medical research undermines free will. He also argues that the traditional view — that genetic material is incapable of attracting property rights — inhibits participants' *personhood*. Langdana concludes that the law should recognise information property rights over human genetic material, and that this would be consistent with existing theories of property rights and ownership.

Timothy Robinson discusses algorithmic law: law made by a predictive algorithm. While Robinson believes there is a place for algorithmic law — for reasons of efficiency — he cautions that it could easily undermine basic values, including freedom, liberty and human dignity.

Finally, James Rouse argues that we must settle on a sufficient definition of human rights so that one can easily determine whether a proposed right is a human right. Drawing on numerous jurists, Rouse proposes that human rights can be grounded in dignity, worth or sacredness.

However, this is only within certain parameters (which he sets out in detail). Interestingly, Rouse notes that it might only be possible to ground human rights *successfully* within a theistic framework.

Our commentaries section features two case notes on recent decisions of the Supreme Court. Miriam Bookman examines *Proprietors of Wakatū v Attorney-General*, in which the Supreme Court held the Crown may owe equitable duties to Māori over specific interests in land.<sup>1</sup> Timothy Plunkett then considers the deductibility of feasibility expenditure with reference to *Trustpower Ltd v Commissioner of Inland Revenue*.<sup>2</sup> The case notes are followed by notes on topical legislative developments. Samuel Johnston examines the significance of the multilateral tax treaty spearheaded by the Organisation for Economic Co-operation and Development.<sup>3</sup> And Dino Muratbegovic reviews the recent Judicature Modernisation legislation,<sup>4</sup> which has significantly amended the statutory foundation of New Zealand's court system. Finally, for our book review, Sam Bookman reviews Auckland Law School lecturer Dr Jane Norton's recent book on the *Freedom of Religious Organizations*.<sup>5</sup>

The Review is only possible with a bright and hardworking team of editors, business managers and advertising managers. First, we thank our editors. This year we adopted a new structure for our editorial team. In recent years, the Editors-in-Chief have adopted a structure with two tiers of editors: Sub-editors (responsible for finding sources and checking citations); and Senior Editors (responsible for style and argument). This year our Sub-editors were appointed as source finders *or* as citation checkers. This meant that the Sub-editors could develop a particular set of skills as specialists rather than generalists. We observed a noticeable improvement in the quality of Sub-editing as a result. We also established a second Senior Editor role. These new Senior Editors served as the conduits between the source finders, the citation checkers and the style editors. They also mentored and provided feedback to the Sub-editors — a fantastic opportunity for them to develop their leadership skills in a supportive team environment — and helped to troubleshoot the Sub-editors' difficult source finding and citation checking problems. We thank our editors for adopting their new roles with gusto and continuing to hold our authors to such high editorial standards.

We also thank our business managers and advertising manager for their work behind the scenes. From filing tax returns to helping to ensure our

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1 *Proprietors of Wakatū v Attorney-General* [2017] NZSC 17, [2017] 1 NZLR 423.

2 *Trustpower Ltd v Commissioner of Inland Revenue* [2016] NZSC 91, [2017] 1 NZLR 155.

3 Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting.

4 See, for example, the Senior Courts Act 2016, District Courts Act 2016, Electronic Courts and Tribunals Act 2016, Interest on Money Claims Act 2016 and Judicial Review Procedure Act 2016.

5 Jane Calderwood Norton *Freedom of Religious Organizations* (Oxford University Press, Oxford, 2016).

events were well-attended, these commerce-minded students played a crucial role in boosting the Review's profile and ensuring its financial survival.

We thank MinterEllisonRuddWatts and Wynn Williams for their contributions to the Review. We thank Dean Andrew Stockley for his unwavering support. We thank Adam Ross QC for continuing to provide riveting training sessions for our style editors. And we thank Centurion Print for ensuring that the publication was in safe hands at its final stages.

Finally, it is important when the editorship changes each year that the Review has *some* constant. We would like to thank our long-suffering Faculty Advisers, Professor Michael Littlewood and John Ip, who have *at least* one pair of safe hands between them. We always felt that your support was there if we needed it, although we challenged ourselves to rely on it as little as possible.

It has been a privilege to be the Editors-in-Chief of the Auckland University Law Review for its 50th Anniversary Issue. At times, we were conscious of the special attention this milestone might attract. But it never interfered with our desire to give a platform for law students writing, courageously, on issues — particularly theoretical issues and Pacific legal issues — not commonly featured in the Review.

Like many Editors-in-Chief before us, our editorial choices were far from safe. In March 2017, we reflected on articles we had edited for previous issues of the Review. (We have both been involved for some time.) We almost conked our heads upon realising that every issue we could remember had one or two *problem articles* — articles beset by problem after problem, from day one until the last. In recent years, the Review has had a sizeable surplus of quality submissions, so we could not understand why our predecessors would stick with these problem articles.

And then we did the same. But of course we did. Our predecessors know what we mean. And our successors will come to know too. Because why would you play it safe if you had just one year to say something worth saying? We were certainly not going to do something so patently sensible.

We wish the coming generations of Editors-in-Chief the very best. You will begin your year with excitement — selecting your editors and managers, shortlisting articles and shoulder-tapping note writers. Over time you will realise that, actually, being an Editor-in-Chief has little to do with editing and a lot to do with managing personalities. You will feel proud of your team for pulling through when times get tough. And you will think it was all worth it when you finally get to hold the physical copy in your hands.

But — most of all — you will feel *very* thankful that you are about to graduate and will *not* be returning next year. You will surely be on the alumni list though. You will receive your invite to the Symposium each year, of course. And we will still get to catch up at the annual Alumni Dinners. Won't we?



**Chief Justice The Rt Hon Dame Sian Elias QC with Editors-in-Chief Kayleigh Ansell and Jayden Houghton, the Editors, Business Managers, Advertising Manager, Faculty Advisers and other distinguished alumni**