Culturally and Linguistically Diverse Parties in the Courts: A Chinese Case Study

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Preface and acknowledgements

The courts are at the coalface of New Zealand's changing demographic makeup, especially in Auckland, so it is logical that issues and challenges should be encountered there with CALD ("culturally and linguistically diverse") parties.

It is important to identify these issues as the 2018 Census confirms that superdiversity is deepening in this country and with it, the challenges of providing equal access to justice will continue to grow. This research has raised more issues and challenges than I anticipated. This Report gives visibility to them so we are not surprised and can predict and prepare, taking these learnings into account.

A significant amount of work needs to be done to ensure New Zealand's increasing superdiversity does not undermine the ability of our court system to ensure equal access to justice for all, especially for those who are CALD. The combination of Ministry of Justice data and case and literature reviews together with interviews with judges, interpreters and lawyers deepened the insights into the true nature of the issues, the challenges that arise, and solutions to ensure communication in the courts does not break down.

We could not find any in depth report on CALD parties and the impact of culture, language and rule of law background on the courts, so the Superdiversity Institute had to write it.

I hope the Report will assist the New Zealand court system to become a world leader in successfully ensuring that CALD parties get equal access to justice.

This Report was only possible due to the helpful assistance I received from Lucinda King. I also appreciate the peer review support I received from Leo Donnelly of the relevant cases analysed in this Report, and his comments on the recommendations section.

I want to acknowledge retired Judge June Johnson's helpful comments on the recommendations in this Report in particular. Acknowledgements must also go to Tony Browne, former New Zealand Ambassador to PRC, Dr Henry Liu, Interpreter, Former President of the New Zealand Society of Translators and Interpreters and 13th President of the International Federation of Translators, and to Dr Andrew Zhu, Director at Trace Research for their helpful comments on a draft of the Report.

I am grateful for assistance from Rosie Judd. I am also grateful for assistance from junior lawyers who assisted with the case analysis including Rachel Wright. I also want to thank Marina Matthews (CEO of the Superdiversity Institute) for reviewing a draft of this Report.

As always, I am grateful to Dr John Sinclair, my husband, for encouraging me to undertake this project, despite it having to be written mainly at nights and during weekends. He told me the Report was important.

I acknowledge the financial support of the Ministry of Justice, without which this Report would not have been written. Anton Youngman in particular assisted us with data and liaison with the Ministry on the information needed to complete this Report, and discussed the recommendations with us that concerned the Ministry to ensure factual correctness.

I am also grateful for the grant from the New Zealand Law Foundation and for Lynda Hagen's support and assistance. The Borrin Foundation also provided a grant. The NZLS Executive Director Helen Morgan-Banda, Acting General Manager Law Reform and Sections Gabrielle O'Brien checked our recommendations to the NZLS to ensure they were factually accurate, and the Director of the Institute of Judicial Studies, Janine McIntosh, did a similar fact check on references to the Institute of Judicial Studies activities.

Everyone we interviewed wanted to support New Zealand's rule of law and to uphold equal access to justice. They contributed their time willingly to help us get visibility of issues and challenges so we could understand them and recommend changes, if needed.

Twelve senior court judges and two retired judges of Chinese ethnicity volunteered to be interviewed for our research on an anonymous basis. I would like to thank and acknowledge them for their time and for the valuable insights they shared.

I would also like to acknowledge the following practitioners, interpreters and academics who were interviewed for our research:

Clive Ansley – Canadian Lawyer and expert on the Chinese legal system

Gurbrinder Aulukh, Barrister and Solicitor – Auckland City Lawyers

Professor Sarah Biddulph, Director – Asian Law Centre, Melbourne University School of Law

Stella Chan, Partner – Forrest Harrison Lawyers

Albert Deng – Interpreter

Jay Choi, Prosecutor – New Zealand Police

Associate Professor Andrew Godwin – Associate Director of the Asian Law Centre at Melbourne University School of Law

Samantha Hiew, Solicitor – Crotfield Law

Frances Joychild QC – Barrister

Michael Kan, Partner – Michael Kan Law

Dr Zhixiong (Leo) Liao – Senior Lecturer & Director of International Relations (Law)

Dr Henry Liu – Interpreter, Former President of NZSTI and Interpreters and 13th President of the International Federation of Translators

Arthur Loo, Partner – Loo & Koo

Alice Nie, Director – Alice Lawyers Ltd

Ashley Oh, Prosecutor – New Zealand Police

Professor Charles Qin – Managing Director and Chief Interpreter, Chin Communications (Australia)

Royal Reed, Principal – Prestige Lawyers

Belinda Sellars QC – Barrister, Freyberg Chambers

Dr Olga Suvorova – Interpreter, NZSTI

Steve Symon, Partner – Meredith Connell

Fei Fei Teh, Director – Millennium Lawyers

Luisa Wong, Lawyer – Chen Palmer Partners

David Young – Barrister

Daniel Zhang, Lawyer – Amicus Law

I would also like to acknowledge those lawyers and interpreters who were interviewed on an anonymous basis for their time and contribution.

I take full responsibility for any errors or omissions in this Report. Please contact me on Mai.Chen@ChenPalmer.com if you find any, so I can correct them.

Mai Chen

Chair, Superdiversity Institute for Law, Policy and Business

November 2019

Forewords

Hon Chris Finlayson QC
Attorney-General of New Zealand from 2008 to 2017

In 2007, in my first term in Parliament, I met a young New Zealander of Chinese origin who offered to take me on a tour of Chinese Auckland. We met one Saturday morning and he and I visited many businesses in and around Queen Street and other parts of Central Auckland. It was a fascinating morning and I learned so much about an aspect of New Zealand with which I was unfamiliar even if the street names and some of the buildings were known by me. Twelve years on from my hikoi through Chinese Auckland, things have changed. The Asian population of our largest city continues to grow and make an ever greater contribution to our country and its economy.

We must adapt to changing times. New Zealand is an increasingly multicultural society. The recent Census may have been criticised for its obvious shortcomings but, in one respect at least, it was accurate in telling the story of the changes in the demographic make up of this land since 2013, the year of the previous Census.

So what does this all mean? As the author of this excellent study shows, business as usual in the law will not do. Major, indeed radical change is needed to ensure that all participants in the Justice system understand how the system operates and how each person has an important role to play. It isn't simply a system which operates for the benefit of judges and the legal profession. It is obviously also there for the individuals, many of whom may not understand fully what is happening and there may also be language barriers. Our system must adapt to meet these challenges. For example, the interpreter will need to play a vital role and we need to ensure there are adequate numbers of well trained interpreters who can assist where necessary.

As I read this excellent work, one question remained unanswered. What are the law schools doing to prepare the next generation of lawyers for practice in this new world? Every law school teaches a subject called Law in Society but is enough attention paid to the legal consequences of demographic change? When Evidence is taught, are students told about the challenges of representing non English speaking New Zealanders? Continuing legal education courses need to be offered to teach older practitioners about the consequences of diversity. That is the responsibility of the NZLS.

Congratulations to the author of this seminal study. This is not a work to be read and shelved but read and implemented throughout the justice system. There is no going back. Major demographic change will not be reversed so we must all adapt to the new world. Not some time in the future but now.

Hon Professor Margaret Wilson
Attorney-General of New Zealand from 1999 to 2005

I consider that this report makes a timely contribution to the issue of access to justice for all individuals. Overall this report is challenging, but it identifies real issues facing individuals in the Chinese community who engage with both the criminal and civil law. The value of this report is that it identifies structural issues that need to be addressed to ensure there is equitable access to justice for members of the Chinese community. For example, the role of interpreters and the need for cultural understanding by all members of the legal community, including judges, lawyers and court officials. The review of the cases identified there was an awareness of the relevance of cultural issues, particularly when sentencing, but it also revealed it is uneven and maybe inconsistent.

Increased resourcing will be required to implement some recommendations, such as those relating to interpreters and cultural awareness training. However, any such costs for the Ministry of Justice and the courts should be assessed against the costs of appeals and miscarriage of justice in some cases. It also seems to be sensible to provide greater understanding and awareness amongst the Chinese community of the requirements of the legal system, in particular the need for documentary evidence of commercial transactions.

I am aware there may be some sensitivity to the report and its recommendations but given the reality of the increasing diversity of New Zealand's community and the potential for misunderstandings to lead to a sense of alienation and mistrust, it is timely that there is recognition of the need to address the issues raised in this report.

INTRODUCTION

Applying a Superdiversity Framework to the courts

1 This Report researches whether there are any issues and challenges in administering justice in cases involving culturally and linguistically diverse (CALD) litigants and witnesses in New Zealand courts.[1] The ultimate goal of the research is to identify any issues and challenges and to determine if any changes are needed to ensure courts are better equipped to administer justice, including through improved interpreter services, data collection and analysis.

2 The focus is on CALD parties because Census and Migration statistics show that New Zealand is becoming increasingly superdiverse.[2] In the 2018 Census, 27.4 per cent of people are not born in New Zealand (up from 25.2 per cent in Census 2013); 15.1 per cent of New Zealand's population identified as Asian (up from 11.8 per cent) in Census 2013), 7.4 per cent identified as Pacific (a small increase from 7.4 per cent in Census 2013) and 70.2 per cent identified as New Zealand European (a decrease from 74 per cent in Census 2013).[3] Auckland, in particular, is now more superdiverse than cities such as London and New York.[4] The growing numbers of CALD people living in New Zealand have, anecdotally, posed challenges for the court system. It is important that we systematically research what those issues and challenges are to assist our courts to deliver one of the most fundamental principles of New Zealand's rule of law – that all parties are equal before the law and that equal access to justice should be available to everyone.[5]

3 Increasing superdiversity in New Zealand means that the court system has to be adequately equipped to ensure that those of culturally and linguistically diverse backgrounds are not denied equal access to justice because of cultural and linguistic differences. Our research has shown that clear and accurate communication is a potential barrier to achieving access to justice where parties are from different cultural and language backgrounds.

4 Previously, the court system has had to consider how to ensure equal access to justice for Māori and Pacific peoples, for example, through the introduction of Ngā Kōti Rangatahi (Rangatahi Courts) and Pasifika Courts in Youth Justice.[6] With Te Reo Māori being the second most spoken language in New Zealand and Samoan the third, this was important.[7]

5 This Report is a case study of Chinese parties as research shows that Chinese are one of the groups facing the greatest barriers when they appear before the New Zealand courts. Recent net migration statistics show that Chinese are the biggest migrant group arriving into New Zealand (after returning New Zealand citizens).[8] In the 2018 Census, the People's Republic of China (PRC)

Note to readers: the citations in this Report, where possible, follow the format set out in Coppard and others *New Zealand Law Style Guide* (3rd ed, Thompson Reuters, Wellington, 2018). However, for the reader's convenience, cross references for subsequent citations of cases are not used; instead, case references are given in full.

1 An example of a "Superdiverse Framework" can be found in the Superdiversity Stocktake at [244]–[255]. See also Pooja Sawrikar and Ilan Katz "How useful is the term 'Culturally and Linguistically Diverse' (CALD) in Australian research, practice, and policy discourse?" (paper presented to the 11th Australian Social Policy Conference, An Inclusive Society? Practicalities and Possibilities, University of New South Wales, July 2009).

2 The Superdiversity Stocktake defines superdiversity as being "the substantial increase in the diversity of ethnic, minority and immigrant groups in a city or country, 'especially arising from shifts in global mobility'". Superdiverse cities have been defined as those where migrants comprise more than 25 per cent of the resident population, or where more than 100 nationalities are represented: Mai Chen Superdiversity Stocktake (Superdiversity Centre, Auckland, 2015) at 52.

3 Statistics New Zealand "New Zealand's population reflects growing diversity" (23 September 2019) <stats.govt.nz>.

4 Lincoln Tan "Auckland more diverse than London and New York" *The New Zealand Herald* (online ed, Auckland, 17 January 2016). In this article Mr Tan quotes a 2015 World Migration Report from the International Organisation for Migration, which looked at how international migrants and migration were shaping cities.

5 Associate Professor Andrew Godwin (Associate Director of the Asian Law Centre, Melbourne University School of Law) has noted that:

> … we cannot compromise our system of equality before the law. However, we need to ensure that a lack of cultural awareness on the part of our judiciary does not compromise equality for those litigants who are not part of the dominant culture, as otherwise they may be at a disadvantage in the courtroom…

See Blake Connell "Workshop aims to bring Asian cultural awareness into the courtroom" (19 April 2019) The University of Melbourne <law.unimelb.edu.au>.

6 In the District Court, the introduction of Alcohol and Drug Treatment Courts has also helped to ensure equal access to justice for those convicted of certain drug and alcohol related offences.

7 Statistics New Zealand "2018 Census totals by topic - national highlights" (23 September 2019) <stats.govt.nz>.

8 For instance, in the year ended January 2019, 14,700 migrants arrived from PRC, with the next biggest group being India, with 12,600 migrants: Statistics New Zealand "Net migration remains around 50,000" (9 August 2019) <www.stats.govt.nz>.

was the third most common birthplace for those usually resident in New Zealand, after New Zealand and England.[9] This is also highlighted by recent statistics that show that in the 2018–2019 financial year, 47 per cent of international students in New Zealand were from PRC.[10]

6 The Report has focussed on Chinese parties mainly from East Asian cultures from PRC, Hong Kong, Macau, Taiwan, Malaysia, and Korea who speak Mandarin and Cantonese. These parties face language barriers, but also cultural barriers when they appear before the courts in New Zealand. In particular, migrants from PRC face cultural barriers due to the different rule of law system and legal culture in PRC when compared to New Zealand.[11] Chinese parties who come to New Zealand from Commonwealth countries that speak English as an official language and follow a similar (although not the same) rule of law system, like Singapore and India, tend to face fewer challenges.

7 Associate Professor Andrew Godwin, Associate Director of the Asian Law Centre at Melbourne University School of Law, has noted that an awareness of the legal and cultural background of Chinese litigants is important to determine the impact that this background has on their perspectives and perceptions concerning our legal system.[12] When thinking about Chinese 'culture' it is important to be aware that culture is not the same as nationality or language, and it moves and shifts depending on time and context.[13] Culture should be distinguished from other factors such as an individual's socio-economic background and education.[14] Godwin says that culture is relevant in the courtroom in assessing evidence and the credibility of witnesses, in determining legal relations and intention and substantive elements, and also to procedure/decision – where a court decides on points of procedure and the form an order will take.[15]

8 This research is therefore timely, and while this Report is a case study of the experience of Chinese, many of the findings and recommendations will be equally applicable to all CALD parties in New Zealand and will help better equip our courts to provide equal access to justice for everyone. In particular, the issues and challenges we have identified regarding interpreters and language would apply equally to a study that focussed on Samoan or Amharic or any other language used by a significant number of people in New Zealand.

9 The research has been conducted primarily through interviews with judges, practitioners and interpreters, along with an analysis of relevant cases. Generalisations are used in the Report to summarise the issues and challenges that have arisen from those interviews. This is only as a starting point for conceptualising the issues and challenges faced by the courts in ensuring equal access to justice for CALD parties.[16]

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9 2.9 per cent of the usually resident population were born in PRC, an increase of 0.7 per cent from the 2013 Census: Statistics New Zealand, above n 7.

10 John Gerritson "NZ Universities' dependence on Chinese students laid bare" *Radio New Zealand* (online ed, 26 August 2019).

11 It is also important to note that in Australia, there appear to be higher number of cases with cultural matters involving Chinese litigants than other ethnic groups. In 2017, Associate Professor Andrew Godwin collated statistics that from a survey of cases in the senior courts over the past 10 years and the frequency with which culture was raised in the cases. Cases involving Chinese parties were the highest, almost twice as many as the next biggest group, Indigenous Australians: Andrew Godwin "Chinese Perspectives on the Law" (presentation at Judges' Meeting – Federal Court of Australia, 25 August 2017).

12 Godwin, above n 11.

13 Godwin, above n 11.

14 Godwin, above n 11.

15 Godwin, above n 11.

16 In her cross-cultural research, Mannes (while acknowledging the many negative effects of and limitations of stereotyping) has described stereotypes as a way of understanding and organising our environment and as a "useful tool in understanding different cultures." Mannes states that:

> … for stereotyping to be effective, individuals must be aware they are describing a group rather than an individual, use descriptors rather than evaluations … accurately describe the norms and values of the person involved, and should be modified based on further observations and experiences with the person and situation.

See M Mannes "Communicating Across Cultures in a New Zealand Workplace: an investigation of attitudes, policies and practices at Excell, Auckland" (Masters of Management thesis, Massey University, Palmerston North, 2006) at 39.

METHODOLOGY

10 The research comprised three main components:

(a) Stakeholder perspectives;

(b) Case search and analysis; and

(c) Literature and data review.

Stakeholder perspectives

Judges

11 Interviews were conducted with 12 judges of the senior Courts (High Court, Court of Appeal and Supreme Court) to understand any issues and challenges they have experienced in ensuring the fair administration of justice given the increasing number of Chinese parties in the courts. Interviews were also conducted with two retired District Court judges of Chinese ethnicity as they are the only Chinese judges New Zealand has ever had.

12 All of the judges interviewed volunteered their time to participate in the research. The interviews were conducted on an anonymous basis, and this section therefore does not refer to any individual interviews with judges.

Lawyers

13 The Institute interviewed 20 New Zealand-based lawyers working with Chinese clients, to understand their unique experiences in courts. The interviews included two Crown Prosecutors, two Police Prosecutors, two Queen's Counsel, one criminal defence barrister, and 14 other lawyers ranging from those recently admitted to lawyers with 30 years' or more experience.

14 Of those interviewed, two lawyers were born in Korea, one was born in Malaysia, one was born in India and four were New Zealand Europeans. The remainder were born in PRC.

15 The lawyers selected for interviews were those most likely to give this study the broadest range of experience in terms of years of experience and experience advising Chinese clients, whether or not the lawyer was born in New Zealand. We also selected interviewees to ensure that we interviewed practitioners from a broad range of practice areas and those acting for the defence as well as the prosecution. The selection was undertaken from a pool comprising members of New Zealand Asian Leaders (NZAL) Lawyers[17] and those responding to an advertisement in *LawTalk* who volunteered to be interviewed.

16 Many of those interviewed raised themes that corroborated or confirmed issues raised by the interviews with judges and interpreters, and identified in the literature review.

Interpreters

17 The research on interpreters' perspectives comprised four main elements:

a) A review of the New Zealand framework for when a party is entitled to an interpreter, and a comparison with other similar jurisdictions;

b) A review of the New Zealand guidelines for court interpreters;

c) A review of available literature on interpreting; and

d) Interviews with six New Zealand interpreters, and one interpreter who is the most experienced Mandarin speaking interpreter in Australia who also provides interpretation services in Mandarin in New Zealand.

17 NZAL Lawyers is a branch of New Zealand Asian Leaders formed in 2019. See <www.nzasianleaders.com/program-initiatives/nzal-lawyers>.

18 We also analysed and incorporated research from other academics and experts in the Chinese rule of law which is included in this Report.

Academics and experts

19 The Institute interviewed four experts on Chinese culture, the Chinese rule of law and Chinese law. Their views and comments are reflected throughout the Report. The experts were:

a) Professor Sarah Biddulph, Assistant Deputy Vice Chancellor – International (China), Melbourne Law School, University of Melbourne;

b) Associate Professor Andrew Godwin, Director of Studies, Banking and Finance Law, Director of Transitional Law and Associate Director of the Asian Law Centre;

c) Dr Leo Liao, Senior Lecturer & Director of International Relations (Law), University of Waikato; and

d) Clive Ansley.[18]

Review of cases in New Zealand courts

20 The Institute has reviewed approximately 2,000 reported cases from New Zealand courts, mostly from the High Court, Court of Appeal and Supreme Court, where issues and challenges have arisen due to the parties or witnesses being Chinese. The specific methodology for this part of the research is found in the introduction to the *Case Review* section.[19]

Literature and data review

21 The literature review focused on legal scholarship from New Zealand and comparable superdiverse common law jurisdictions such as Australia, Canada, the United Kingdom and the United States of America. Supplementary material regarding Chinese legal and regulatory culture, from sociology, psychology or anthropology journals, was also analysed. This provided a global context for determining what is unique to New Zealand and what is universal.

22 There is little publicly available research about Chinese litigants and lawyers in New Zealand, although there has been some research from overseas, from jurisdictions such as Australia and Hong Kong. The literature review focused on more recent literature where possible. Literature was obtained from the following sources:

a) A list of articles obtained from the Ministry of Justice Library from searches on the topics of "access to justice for non-English speakers" and on interpreters worldwide;

b) Publicly available Bench Books from comparable jurisdictions;

c) Legal journals available through LexisNexis;

d) Reviewing the publication lists of academics and experts in Chinese legal culture; and

e) Google Scholar and a Google search for publicly available articles from academic journals and Law Reviews.

23 The Institute has also analysed data sourced from the Ministry of Justice as well as publicly available data, such as Census data, migration statistics and data from the New Zealand Law

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18 Clive Ansley is a Canadian Lawyer who holds undergraduate and graduate degrees in Chinese Studies, as well as an LLB and an LLM. He is a former Professor of Chinese History, Civilisation and Law, and has taught at two Chinese universities. Mr Ansley has practiced law in both Canada and China. In *Kim v Minister of Justice* [2019] NZCA 209, Mr Ansley was an expert witness for Mr Kim. The Court of Appeal accepted his expert testimony, as explained further below in our analysis of the case at under the heading *New Zealand Court of Appeal in Kim v Minister of Justice*, and at Appendix 3.

19 See the heading *Methodology* in the *Case Review* section.

Society to inform and support the findings of our literature and case analyses. The statistical data collected by the Institute focused on the following:

a) The ethnicity of litigants, witnesses and interpreters in courts;

b) Language data, regarding dialects spoken by litigants, witnesses and interpreters;

c) Corrections data, regarding numbers of Chinese in prison; and

d) Statistical trends and projections of this data.

24 The findings from the literature and data review are infused throughout this Report.

KEY FINDINGS

25 In this section, we set out the key findings from the literature review and data analysis, interviews and case review conducted for this Report.

Literature review and data analysis

26 Census and Migration data indicate that the numbers of Chinese, particularly from the PRC, are growing in New Zealand, with the trends in data corroborating what judges are anecdotally experiencing at the coal face. The percentage of New Zealanders who identified with at least one Asian ethnicity grew from 11.8 per cent in 2013 to 15.1 per cent in 2018. The percentage of the usually resident population born in PRC increased from 2.2 per cent to 2.9 per cent between 2013 and 2018, with PRC being the third most common place of birth after New Zealand and England.[20] Lastly, the number of those who identified as not speaking English, Māori or New Zealand Sign Language increased from 76,515 to 105,462 between 2013 and 2018.[21] Projections based on Census data indicate that by 2038, 22 per cent of New Zealand's population will identify as Asian. This research and Report is therefore timely in light of these demographic changes.

27 Research shows that immigrants who arrive in New Zealand as adults are much less likely to acquire full English language skills. Census data from 2006 onwards shows that the number of people in New Zealand not able to speak English is increasing, and that the number of Chinese not able to speak English is also increasing.[22]

28 Growing numbers of Chinese immigrants are living in "ethnoburbs" in Auckland, particularly in North Shore suburbs, Auckland Central and Manukau.[23] By 2038, Asian peoples are projected to comprise 35 per cent of Auckland's population.[24]

29 Chinese rule of law is very different to that in New Zealand. This will be explained in greater detail below, with particular reference to the Court of Appeal's findings in *Kim v Minister of Justice*.[25]

30 The Chinese concepts of *guanxi* and *mianzi* are highly important. They are entrenched cultural concepts that have the potential to impact on the behaviour of Chinese parties in a number of ways, and create barriers for their lawyers and the courts to ensure equal access to justice.

31 *Guanxi* refers to Chinese relationships and connections, and it can result in Chinese parties completing business transactions without written agreements. Another important manifestation of *guanxi* that was raised in interviews with practitioners was the expectation of favouritism.[26] Dr Andrew Zhu, Director of TraceResearch has also referred to *guanxi* as a medium for reciprocal exchanges to take place.[27]

32 *Mianzi* is the concept of "face" and "saving face" and can result in Chinese parties being less willing to settle a dispute than a New Zealand European litigant in similar circumstances. It can also impact adversely on Chinese criminal accused, as it can cause them to be less likely to plead guilty or show remorse because they wish to save face. Dr Andrew Zhu says that *mianzi* is also a credit system for one's trustworthiness and reliability, or a "social currency", and that losing a case

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20 Statistics New Zealand, above n 3.
21 Statistics New Zealand, above n 3 at table 15; and "2013 Census regional summary tables – parts 1 and 2" (3 December 2013) at table 24.
22 In the 2018 Census, 105,462 people indicated that they did not speak English, Māori or New Zealand sign-language. In the 2013 Census, 87,534 people (or 2.2 per cent of the general population) indicated they are not able to have a conversation about every day things in English (an increase of 5,595 people from the 2006 Census). 64 per cent of these people identified with at least one Asian ethnicity, and 59 per cent spoke a Chinese language instead of English. 65 per cent of these people lived in the Auckland region. A majority of non-English speakers are adults who were born overseas (86.1 per cent): Statistics New Zealand, above n 3, at table 15; and Statistics New Zealand "2013 Census QuickStats about culture and identity" (15 April 2014) <archive.stats.govt.nz>. Note that at the time of publication this breakdown of figures was not yet available for the 2018 Census.
23 Jingjing Xue, Wardlow Friesen and David O'Sullivan "Diversity in Chinese Auckland: Hypothesising Multiple Ethnoburbs" (2012) 18(5) Population, Space and Place 579.
24 Auckland City Council "Auckland's Asian Population" <www.aucklandcouncil.govt.nz>.
25 *Kim v Minister of Justice* [2019] NZCA 209.
26 Interview with Anonymous, Lawyer (Lucinda King, Auckland, 30 July 2019).
27 Email from Dr Andrew Zhu (Director, Trace Research Limited) to Mai Chen (Managing Partner, Chen Palmer) commenting on draft report, 14 October 2019.

would therefore cause loss of face, value and social credibility, and that winning a case would improve face and help an individual gain further social approval.[28]

33 Chinese parties are less likely to use written contracts or agreements in their business or familial transactions. If contracts are used, then they will often be brief and may not have had any legal input.[29] Thus, Chinese parties may not have turned their mind to complex and ambiguous matters, and worst case scenarios, before the deal is completed. This is a generalisation, and it depends on a number of factors, including whether the person has received a tertiary education in New Zealand or another Commonwealth country. Research on local Chinese business by Professor James Sun from the University of Auckland Business School and Dr Andrew Zhu, titled "New Zealand Chinese Life and Work Survey 2017-18" shows that those who have received a tertiary education in New Zealand or another Commonwealth country are more likely to behave in a similar way to other local business owners, than those who have not received a tertiary education in a commonwealth country.[30]

34 Differences between the Chinese and Western views of a "dispute" can be traced back to the differences in the derivation of the word in Chinese and English.[31] In English, "dispute" is derived from Latin *dis-* ("separate" or "apart") and *putāre* ("to consider").[32] The Chinese word that is most commonly used as the translation of "dispute" is *jiufen*, with the characters of this word referring to "tangled" or "twisted." Associate Professor Godwin has noted that "the underlying concept that these words suggest is a breakdown of social harmony" and that even private disputes mean a disruption of natural order and harmony.[33]

35 Some international jurisdictions have conducted research into CALD parties in the courts.[34] The Australian Judicial Council on Cultural Diversity has written on *Cultural Diversity within the Judicial Context: Existing Court Resources*.[35] This Report surveyed existing court resources available to all Australian federal and state courts and tribunals, and these findings are referred to throughout our *Recommendations* section. However, there have been no overarching studies on the experiences of Chinese parties in courts.

36 In Australia, the Judicial Council on Cultural Diversity is an advisory body that assists the Australian courts, judicial officers and administrators to positively respond to Australia's diverse needs, including issues that arise in Aboriginal and Torres Straight Islander communities. The Council is an initiative of former Chief Justice of Australia, Robert French, with membership primarily from the judiciary and select representation from legal and community bodies.[36]

37 England, Scotland, Australia and the United States of America have developed "Equal Treatment Benchbooks" to assist judges to address the issues which arise when presiding in cases involving CALD parties. The Institute of Judicial Studies (IJS) is currently developing a equity/diversity handbook for New Zealand judges, and intends to have this completed by August 2020.

38 Some thought has been given by courts and academics around the world to the need to apply a different reasonable standard for cases involving minorities. However, we have not been able to find any research on adapting or evolving the "reasonable person" test in superdiverse countries (like New Zealand), where indigenous peoples and ethnic minorities form a significant portion

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28 Email from Dr Andrew Zhu (Director, Trace Research Limited) to Mai Chen (Managing Partner, Chen Palmer) commenting on draft report, 14 October 2019.
29 Interview with Anonymous, Lawyer (Lucinda King, Auckland, 30 July 2019). A practitioner interviewed for our research commented that some Chinese are less likely to honour the terms of written contracts than their New Zealand European counterparts.
30 Email from Dr Andrew Zhu (Director, Trace Research Limited) to Mai Chen (Managing Partner, Chen Palmer) commenting on draft report, 14 October 2019. Publication of this research is forthcoming.
31 Andrew Godwin "Alternative dispute resolution: mediation or conciliation" (2011) 10 China Business Law Journal 73 at 75.
32 At 75.
33 At 75.
34 In particular there is an Australian report on CALD parties in the Family Court, referred to in the *Lawyers' Perspectives* section.
35 *Cultural Diversity within the Judicial Context* (Judicial Council on Cultural Diversity, 15 February 2016).
36 Judicial Council on Cultural Diversity "Learn About the Council" <jccd.org.au>.

of the population. There has understandably been more thinking done on how to accommodate indigenous people's rights and legal concepts.[37]

Stakeholder perspectives

Judges' perspectives

39 Interviews with judges, in Auckland in particular, highlighted that the growing Chinese population in New Zealand means judges are dealing with greater numbers of Chinese parties in the court system.

40 The main problem identified by judges as impacting on the ability of CALD parties to receive equal access to justice relates to communication. It is the lawyer's role to communicate their client's case to the judge or jury, and the aim of our research and this Report is to ensure that this communication is effective, efficient and does not break down. Lawyers need to be doing more and better for their CALD clients.

41 Chinese litigants and defendants are more likely to struggle with the English language, and are reliant on interpreters that can be of variable quality. This, alongside the use of translated contemporaneous documentary evidence, exacerbates communication problems between the parties and the judge/jury.

42 While there is no data currently being collected to confirm the exact numbers, Chinese litigants and defendants sometimes choose to represent themselves.

43 Some judges have observed challenges arising from self-representation by Chinese litigants. The challenges faced by Chinese litigants-in-person appear to be more acute than for New Zealand European litigants-in-person, due to the different rule of law culture they come from or their limited English proficiency.[38]

44 Chinese parties often deal with each other on the basis of trusting relationships, resulting in no or inadequate contemporaneous documentary evidence that could assist the courts in civil disputes. Often the documentation created has had little or no legal advice or input, and as a result, it may be difficult to interpret the meaning of those documents.[39] Where there is contemporaneous documentary evidence, it often has to be translated from Chinese (either traditional full form or simplified Chinese characters) into English, which may distort the meaning and clarity of the document, especially when concepts from one legal culture do not translate well into the other.

45 This increases the importance of the court's reliance on *viva voce* oral evidence, including in determining credibility. Some of the judges interviewed had presided over cases where an interpreter was not present, but where the parties "plainly" required one.

46 However, the use of interpreters may also result in the meaning and clarity of oral evidence being distorted.

47 A key finding from interviews with judges was the real need for an enhanced pre-trial process, described in detail below in the *Recommendations* section. The introduction of this administrative change would ameliorate many of the issues and challenges identified by judges, although greater proactivity by lawyers of CALD parties is also needed to ensure effective communication with judges/juries.

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37 See the discussion below under *Recommendation 7*.

38 See for example *Jia v Auckland Council* [2018] NZHC 1133, a case discussed in the *Case Review* section that demonstrates the challenges faced by Chinese litigants-in-person. An Australian review into *A Strategic Framework for Access to Justice in the Federal Civil Justice System* found that "people from CALD backgrounds face additional barriers when representing themselves in court due to linguistic and cultural barriers", and that a "greater focus in legal assistance services on advice, information and education will allow [self-represented litigants] to be better informed of court processes, and the steps they need to take in representing themselves": *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (Access to Justice Taskforce, September 2009) at 154.

39 See for example the cases under the heading *Lack of Contemporaneous Documentary Evidence* in the *Case Review* section.

48 Some judges interviewed raised concerns about the variable quality of interpretation provided by interpreters in New Zealand courtrooms. Some interpreters do not possess sufficient **English** language capability to interpret to the standard necessary. Further, use of interpreters means that a trial can take twice as long, and this factor is not being adequately taken into account when trials are scheduled. This results in cases being carried over, and counsel feeling pressured to truncate evidence. As a senior prosecutor interviewed for our research noted, jurors in such cases may express frustration by imposing harsher penalties. Some lawyers representing Chinese clients also expressed concern that their clients may be discriminated against by judges and juries due to their lack of English proficiency and the need for interpreters.

49 The adversarial system in New Zealand courts may exacerbate the challenges in ensuring equal access to justice for Chinese parties. Courts in PRC adopt an inquisitorial approach, and thus Chinese parties may expect the New Zealand court to function in a similar way. It is for the parties to adduce the relevant evidence in a case. However, judges retain a residual role, and may need to be more willing to admit evidence in cases with Chinese parties, due to the paucity of contemporaneous documentary evidence that is a common feature in disputes between Chinese parties (as well as the different types of documentary evidence that can arise when it is available, such as WeChat messages) and where viva voce evidence has been adduced through interpreters.

50 Judges have experienced challenges with Chinese witnesses who travel to New Zealand from PRC for the purpose of giving evidence, due to a lack of understanding by the witnesses as to the role and function of a witness in New Zealand.

51 Our case analysis suggests that information about a Chinese litigant or witness's background; for example, which country they were born in, and how long they have been in New Zealand (or other English speaking common law countries), may be very relevant to the matter the judge is presiding over, including to determine the English language capability of the parties.[40]

52 A key finding from interviews is that judges require cultural assistance, but that there are few mechanisms to enable them to access this. Prior to 2018, judges had been ordering publicly funded cultural reports under section 27 of the Sentencing Act 2002. However, we are informed by the Ministry of Justice that there is no provision under section 27 of the Act to allow a judge to order a written cultural report. Furthermore, there is no appropriation providing public money to pay for the reports. The Ministry consulted with the Chief High Court Judge and Chief District Court Judge, who issued similar guidance to all District and High Court judges.

53 Reports can still be commissioned by the defendant and heard by the court, but the commissioning of the report is at the defendant's own expense, unless they are eligible for legal aid funding for such a report. Section 27(5) of the Sentencing Act 2002 allows a court to suggest it would be of assistance for the court to hear persons called by the offender on cultural aspects. Section 26 also empowers a court to direct probation to prepare a report, which under section 26(a), can include cultural background. However, the interviews indicated that allowing judges to access cultural assistance through section 27 reports would assist sentencing decisions. In addition, judges thought it would assist if they could access cultural assistance in civil disputes when they consider it necessary for the proper administration of justice. Re-introduction of funding for section 27 reports will not be a "fix-all," however, it is a useful mechanism to allow judges more ready access to cultural assistance.

54 A number of suggestions for improvement were made by the Ministry of Justice's research report in 2000 related to the predecessor of section 27 of the Sentencing Act 2002, including further educational programmes in cultural competencies for professional groups including lawyers, judges and Community Probation staff, and increasing the numbers of judges and lawyers from

40 This was borne out of our interviews with judges, but is also evident from the cases, as a number of the judgments only refer to a party as "Chinese" without stating which country the defendant was born in, and how long they have resided in New Zealand.

different cultural backgrounds.[41] The different professional organisations and departments have worked together to improve both the cultural competencies within their professions and the cultural diversity of their workforces.

55 Judges interviewed were concerned that Chinese jurors are more likely to request to be excused from serving due to their English language capability or because they do not sufficiently understand the process and their role (although judges noted that Chinese jurors generally respond dutifully to their summons and show up to court).

56 Further, jurors are selected from the electoral roll, and as an ethnic group, Asians have a lower enrolment rate compared with those of non-Asian ethnicity, which means there are fewer Asians being called for jury service as well.[42] This may result in defendants not being tried by a jury of their peers.

57 Judges commented that they found it difficult to know how much English language capability a potential juror had when deciding whether to excuse a potential juror, but needed to err on the side of caution to prevent the need for a retrial if a juror really does not understand what is going on. On several occasions Chinese jurors who have been sworn in on Auckland High Court juries have had to be discharged because they spoke insufficient English to understand they should not have been sworn in. One such example is referred to at paragraph [400] of this Report.

58 The growing number of Chinese parties in courts is largely an Auckland phenomenon, which correlates with the larger Chinese population in Auckland as compared to the rest of the country. However, courts in other parts of the country also deal with CALD parties, for example the victims of the Christchurch Mosque Shooting in the High Court at Christchurch.

Study of Chinese Jurors in Hong Kong

59 Of relevance to findings about CALD jurors that have arisen from our research is a study completed in 2016 by Assistant Professor Dr Eva Ng from the University of Hong Kong into *English Trials Heard by Chinese Jurors in the Hong Kong Court Room*.[42] In Hong Kong, trials are conducted in English; however, 90 per cent of the Hong Kong community primarily speak Cantonese.[44]

60 Dr Ng notes:[45]

> Those serving in juries nowadays are mostly Cantonese-speaking with a bilingual knowledge of English. What faces these jurors then is not just the legal language, but the English language per se, which most of them speak only as a second or more frequently a foreign language. In other words, the comprehension problem for jurors in the Hong Kong courtroom is more than just the standard intra-lingual legal-lay communication problem, rather it is an inter-lingual communication gap between English speaking legal professionals and jurors who are both lay participants and non-native English speakers in the courtroom.

61 The Hong Kong system is based on a requirement that only those with at least an educational attainment of Form 7 or its equivalent are included in the jury pool, which equates to about 10 per cent of the population.[46] Dr Ng notes, however, that this standard may be too low, and that many potential jurors cite "poor English" to be excused from service.[47] Dr Ng writes that the court considers this to be a mere excuse, and that some judges try to talk prospective jurors into serving, by, for example, advising them (falsely) that the trial will be bilingual, based on a misunderstanding

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41 *Speaking about cultural background at sentencing: Section 16 of the Criminal Justice Act 1985* (Ministry of Justice, Research Paper, November 2000).
42 Malcolm McKinnon and Gary Hawke *Citizenship and government* (Our Futures: Te Pae Tawhiti – Citizenship and government sub report, February 2015) at 3. The 2014 post-election survey conducted by the Electoral Commission showed that only 84 per cent of those of Asian ethnicity were enrolled to vote compared with 97 per cent of those of non-Asian ethnicity.
43 Eva Ng "Do they understand? English trials heard by Chinese Jurors in the Hong Kong Courtroom" (2016) 3(2) Language and the Law 172.
44 At 174.
45 At 174–175.
46 At 176.
47 At 176.

of the obligatory presence of an interpreter in almost all trials conducted with English.[48] Dr Ng notes that while the majority of trials conducted in Hong Kong will have an interpreter present, the interpreter is there for the benefit of the defendant and witnesses, and the jury will not be able to hear the interpreting.[49]

62 The article cited a 1992 study into jurors' comprehension, which found that many of the jurors who had expressed problems related to their understanding of the proceedings ultimately convicted the accused.[50]

63 Another point from the study was that jurors may struggle when judges or lawyers talk quickly.[51] Dr Ng states that questions from jurors are not encouraged in open court, but also that jurors may "feel their face threatened for having to raise a comprehension problem in court."[52]

64 The report makes a number of recommendations. Firstly, it recommends making Hong Kong courtrooms fully bilingual, with team interpreting and the use of simultaneous interpretation equipment so that juries also get the benefit of interpreting.[53] Secondly, it recommends allowing the interpreter time for preparation, as providing jurors with access to interpretation services will not give them full access to understand the proceedings unless the interpretation is of sufficient quality.[54] Thirdly, counsel and judges should use more accessible language, and that they should articulate slowly and distinctly for the assistance of the interpreter and any listeners for whom English is not a first language.[55]

Lawyers' perspectives

65 A key finding is that the issues and challenges faced when representing Asian clients is more acute when acting for clients from PRC, because English is not commonly spoken (unlike countries such as Singapore and India), and because they do not come from a Commonwealth country. Even when advising Chinese clients from PRC in Mandarin or Cantonese, lawyers still struggle to explain key concepts to their clients, such as the independence of the New Zealand judiciary and the Torrens system of land transfer. In particular, unspoken norms and assumptions in how the courts operate may be hard for an immigrant to understand if they are not born in New Zealand, and particularly if they come from a country with a very different rule of law culture.

66 This key finding is however based on the assumption that the person from PRC understands the legal system from their country of birth. Many people, regardless of their place of birth or ethnicity, will have a limited understanding as to how their country's legal system works.

67 Another challenge faced by lawyers representing Chinese clients is the difficulty in understanding and then explaining in court why their Chinese client has acted in a way that may feel foreign to a New Zealand European judge or lawyer, but not to a person of Chinese ethnicity. For example, it is not unusual for Chinese to complete a major business transaction without a legally drafted contract, or without a contract at all, and without legal advice.

68 A key finding was that both Chinese and New Zealand European lawyers need upskilling to be able to better understand the motivations of their Chinese clients, and to be able to fairly represent their client in civil disputes (in particular, understanding that Chinese clients may be more resistant to mediation as a form of dispute resolution compared to other clients). New Zealand European lawyers need more "China capability" and some Chinese lawyers not born in New Zealand need a greater understanding of how the New Zealand rule of law differs from that in their country of birth.

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48 At 176.
49 At 187.
50 At 178.
51 At 183.
52 At 183–184.
53 At 187.
54 At 188.
55 At 188.

69 There are risks for lawyers representing Chinese clients if the lawyer does not speak Mandarin or Cantonese. Some of the cases analysed in this Report related to judicial proceedings brought by Chinese clients against their own legal counsel for not having properly explained what was going on in the proceedings, to the client's prejudice, or not having understood the client's instructions properly and making the wrong plea in criminal cases.

70 Some Chinese lawyers alleged discrimination (for example, unfair criticism, patronising behaviour, derogatory remarks about themselves and their clients, and stereotyping) from other New Zealand European practitioners and from judges, due to their ethnicity. Some Chinese lawyers said that Chinese clients sometimes preferred a New Zealand European lawyer to avoid any prejudice from the judge or jury.

71 Some Chinese lawyers who had arrived in New Zealand as adults noted that at times they found it difficult to be understood due to their accent, and that they experienced ongoing challenges with their written and spoken English capability.

72 There are emerging issues related to the growing number of small boutique Chinese law firms that are only servicing Chinese clients, and also the growing number of Chinese lawyers going into sole practice with limited experience in the law. This is partly driven by not being able to secure employment at law firms, and firms not being comfortable for Chinese lawyers to provide legal advice in Mandarin – which New Zealand European lawyers cannot supervise. There is a sense that young Chinese lawyers are being isolated by working in Chinese law practices with only Chinese clients and other Chinese lawyers.

73 Chinese lawyers also appear less likely to work in criminal law as they (or their families) prefer that they work in commercial law, which is perceived to be more lucrative and of higher status. Chinese lawyers also tend not to go to court because those who arrive in New Zealand after 16 years' of age are likely to have lower English language competency, affecting their ability to verbally argue cases in court. Criminal law will always require court advocacy, whereas other fields such as commercial law will involve more negotiation rather than advocacy in court.

74 Interviewees noted that Chinese accused of criminal offences may be more inclined to seek representation from a Chinese lawyer that they already know and who speaks Mandarin (for example, the lawyer used by their family for standard transactional matters), but who may not possess the requisite skills to defend them in a criminal trial in the High Court. Or, Chinese accused may seek representation from a New Zealand European lawyer (as they think the judge will not discriminate against them if they do so), but those lawyers may not be able to accurately take instructions from their client due to language issues and may also lack sufficient understanding of the impact of the client's culture which may have contributed to the offending and any subsequent actions or omissions of the client.

75 Regulatory agencies and Police are struggling to deal with the evidence of Chinese parties in criminal proceedings, as it will often be contained in large volumes of "chat" messages (in particular, WeChat (the message app of choice for many Chinese), WhatsApp or similar services) that require translating. Getting the meaning of short, colloquial messages correct is a particular challenge. The translation of these large volumes of messages and other evidence is expensive for a prosecuting agency, and this cost is a consideration that will be weighed when deciding whether to pursue a prosecution. However, this is not just an issue for Chinese parties. The courts are increasingly required to deal with large volumes of text message evidence, particularly in drug trials, regardless of the ethnicity of the defendant.

76 There are barriers that impede equal access to justice for Chinese accused, particularly when they may have misunderstandings about the law related to pleading and demonstrating remorse for sentencing purposes. A further key finding was a concern that Chinese accused are being interviewed by Police and other investigators without an interpreter present when they did in fact require one.

77 The interviews with lawyers revealed that there can be misunderstandings with Chinese clients about legal fees, due to the different way legal fees are charged in PRC (usually a success fee). Chinese clients may not understand the concept of charging by time spent, with one lawyer we interviewed commenting that their Chinese clients are more likely to call and chat on the phone, without understanding that this time would be billed.[56] Some lawyers had the impression that these differences and misunderstandings meant that Chinese clients were more likely to raise a complaint about fees than other clients.

78 In addition, it usually takes longer to advise CALD clients, due to English issues and lack of understanding of the law in New Zealand, and hence servicing CALD clients may be more costly.

79 Another key finding is that lawyers, particularly those who speak Mandarin or the language of their client, are concerned about the standard of interpreters in court. Lawyers who spoke the language being interpreted commented that they found it difficult or awkward raising their concerns with the judge when a statement was not being interpreted correctly, although one experienced practitioner said that they felt more comfortable today doing so than they did as a young lawyer. New Zealand European lawyers expressed concern about inaccurate interpreting where a lengthy exchange took place between interpreter and witness, but the resulting statement that followed was very short. This concern was also raised by judges.

80 Lastly, there is a concern that "part interpreting" (where the majority of the trial is conducted without an interpreter, but the interpreter's services are utilised only where it is considered necessary) is not working.[57] Chinese parties may not understand what is happening during the trial, but do not want to say they need an interpreter's services as they perceive it would slow down the trial and annoy the judge.

Interpreters

81 Data from the Ministry of Justice shows that there is a growing need for interpreters in New Zealand tribunals and courts. In 2015, 4,123 cases required an interpreter, and by 2018 that figure had grown to 9,826 (of which 2,806 required a Chinese interpreter). From the data available in the six months to June 2019, 5015 cases required an interpreter (of which 1515 required a Chinese interpreter). In each year since 2015, requests for Chinese interpreters have significantly outnumbered requests for other languages, such as Samoan.[58]

82 However, there is currently limited data on the use of interpreters in New Zealand courts. The Ministry of Justice advised on the current collection of data on interpreters that:[59]

> Unfortunately, interpreter services provided to the court do not have the language associated to them in our case management system. The language(s) a particular service provider is able to translate is linked to their profile, but not the actual service provided on a given case. An internal system change has been requested to allow for this, however it will take time to implement and build up a reliable dataset.

83 The research revealed that there is no uniform system for accreditation or certification of interpreters in New Zealand. Many interpreters commented that the changing demographics of New Zealand and the growing demand for interpreters meant that government investment in the interpreting occupation is necessary to inject quality and increase the numbers of people qualifying and working as interpreters. Otherwise, anecdotal evidence from interviews with interpreters suggest that New Zealand is losing interpreters to Australia, where interpreters are better paid,

56 Interview with Anonymous, Lawyer (Lucinda King, Auckland, 30 July 2019).
57 Interview with David Johnstone, Partner, Meredith Connell (Mai Chen, Auckland, 24 July 2019).
58 "Language interpreted per hearing, May 2015 – June 2019" (Statistics provided by Minister of Justice to Superdiversity Institute, 11 October 2019).
59 Email from Anton Youngman (Manager Analytics & Insights at the Ministry of Justice) to Mai Chen (Managing Partner, Chen Palmer) regarding Ethnicity information from the Ministry of Justice (4 February 2019).

and migrants who wish to work as translators in Australia who meet certain requirements can gain points toward particular visas.[60]

84 Interviews with judges, lawyers and interpreters demonstrated the importance of properly matching interpreters with witnesses. For example, while an interpreter from Singapore will speak Mandarin, they are unlikely to be able to pick up on the nuances and accent of a witness from rural PRC, and this will affect the quality of the interpretation. There is a need to implement a system to properly match interpreters in both the civil and criminal jurisdictions with witnesses to ensure quality interpretation to the standard required by the court.

85 Regarding the arrangement of interpreters, in the criminal jurisdiction, judges do not practically have a role in ensuring that an interpreter is adequately matched with the defendant. Appointing interpreters in the criminal jurisdiction is generally done by the Central Processing Unit at the Ministry of Justice. The Ministry of Justice has advised that there are no set terms and conditions the Ministry applies when seeking face to face interpreting services, and that the Central Processing Unit operates a master list of individual interpreters and interpreting agencies. The Ministry of Justice has advised that before interpreters are added to this master list they are required to undertake an assessment or interview as to their suitability for providing face to face interpreting services in courts and tribunals, and that this includes a criminal history check.[61] In most cases, the court simply adopts the decision of the Unit because there is no time to do anything else, and the costs are borne by the state.

86 In civil proceedings, the appointment of interpreters is left to the parties. The party calling a witness will generally be responsible for paying the interpreter. This can compromise the neutrality of interpreters. This approach is not uniformly applied and in some cases the court has arranged interpreters. It is unclear whether in such cases the parties have paid for the interpreters, however, if the court arranged interpreters are paid for by the parties this may still compromise the neutrality of the interpreter.

87 There is no mandatory formal qualification required to practise as an interpreter in New Zealand. In criminal cases, as interpreters are court-appointed, the quality tends to be of a better standard than in civil cases where interpreters are appointed by the parties. This arrangement by the parties themselves may result in parties choosing the cheapest interpreter available, who may not possess the requisite skills and experience to interpret well in court. Interpreters interviewed expressed the view that the quality of civil case interpreting was lower than that in criminal cases.

88 Interviews with interpreters and foreign studies considered as part of the literature and data review indicate that the role and status of a court interpreter is not sufficiently defined. Some witnesses feel that the interpreter should be an advocate for them, and some interpreters feel that lawyers expect them to be a cultural broker (to interpret not just language but the witnesses' culture).

89 Interpreters also feel their profession is not well regarded or remunerated well enough in New Zealand, and want the Ministry of Justice to do more to raise the status of the profession and encourage higher standards, including CPD requirements. The pay rates for interpreters in criminal cases (and interpreters for the Crown in civil cases) set by the Witness and Interpreters Fees Regulations 1974 have not been reviewed since 1996, which is symptomatic of the low status of the interpreting profession in New Zealand.

90 Another finding is that the skills, training and qualifications required to accurately translate written documents are different to those required to provide face to face oral translation, and interpreters and translators are not interchangeable.[62] This is not always well understood.

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60 National Accreditation Agency for Translators and Interpreters "Migration Assessments" (1 March 2018) <www.naati.com.au>.

61 Email from Anton Youngman (Manager Analytics & Insights at the Ministry of Justice) to Mai Chen (Managing Partner, Chen Palmer) commenting on draft report (10 October 2019).

62 Email from Dr Henry Liu (Interpreter, former National President of NZSTI and 13th President of the International Federation of Translators) to Mai Chen (Managing Partner, Chen Palmer) commenting on draft report, 15 October 2019.

91 The interpreters interviewed also said that they are not given adequate time to prepare for court interpreting positions. They are not paid for their preparation time and also experience difficulty getting access to court documents (both criminal and civil jurisdictions) for the purpose of preparation. There is a sense that courts view interpreting as a simple mechanical exercise, and do not understand the importance of adequate preparation to ensure accurate interpretation through an adequate understanding of the context.

92 Some interpreters felt that the court environment is not conducive to quality interpreting. There is currently no uniform place for interpreters to sit. Research by Professors Hale and Napier has found evidence that the way a hearing is conducted by the judge and/or judicial officers can have an effect on the performance of the court interpreter, in terms of providing quality interpretation.[63] For example, interpreters who participated in this research said that it was helpful if the judge gave them a proper introduction prior to the trial commencing, and reminded counsel and witnesses to speak in shorter sentences due to the presence of an interpreter.[64]

93 The interviews with interpreters (and the *Case Review*) found that Mandarin and Cantonese interpreters were often the subject of complaints made against them by unsuccessful litigants.

94 At present, the Ministry of Justice has an in-house complaints procedure for interpreters where parties consider there has been a breach of the Guidelines for interpreters or an interpreter's general duties. Under this procedure, a local manager at the Ministry of Justice considers the complaint, and prepares findings or recommendations. From these findings and recommendations, a decision is made by the Ministry as to whether it should reject the complaint, or accept the complaint and remove the interpreter or the agency from its list of interpreters. The Ministry can also issue a written warning that future complaints may result in the interpreter being removed from the list. But if an interpreter is not on the Ministry of Justice list – e.g. an interpreter that has been arranged by the parties in a civil dispute – there are no available sanctions for the Ministry to enforce the complaint.[65]

95 However, some interpreters felt that an independent complaint service provider would better manage and resolve complaints.

96 Lastly, the research demonstrated that there are a number of unique challenges faced by Chinese interpreters in achieving accurate interpretation of Chinese parties due to cultural factors. These include "saving face" behaviours by witnesses, indirectness, politeness and the use of "high context" by Chinese parties when explaining matters (meaning they provide additional background information that Westerners would not necessarily include).

Case Review

97 The Case Review confirmed a number of the key findings referred to above, and especially the "perfect storm" of no/little contemporaneous documentary evidence and parties who do not speak English, but who nevertheless decide to represent themselves. However, there were also some additional findings.

98 The relevant cases reveal patterns indicating that Chinese litigants do experience unique issues arising from their ethnicity, culture, or language which can make it more challenging for the court system to ensure they get equal access to justice when compared to New Zealand Europeans. These include Chinese cultural values that are potentially incompatible with common law adversarial court systems, due to the cultural perspectives about how one conducts oneself in disputes with others, for example, and the expectations shaped by the inquisitorial court system

63 Sandra Hale and Jemina Napier "We're Just Kind of there: Working Conditions and Perceptions of Appreciation and Status in Court Interpreting" (2016) 28(3) Target International Journal of Translation Studies 351 at 12.
64 At 12.
65 Ministry of Justice "Complain about an interpreter" (18 April 2017) <www.justice.govt.nz>.

that operates in PRC where the judge is an investigator gathering evidence and not an adjudicator making a determination on the evidence presented, as in the New Zealand Court system.

99 Of all the cases reviewed, we identified ten times as many cases of relevance from the High Court at Auckland than in the other High Court registries combined.

100 The case review indicated that the cultural background and language limitations of many Chinese parties who come before the New Zealand courts affects:

- The way they present evidence;
- The way they respond to questioning of their actions and motivations;
- The way they verbally or physically express themselves or visibly show (or fail to show) emotions such as remorse, empathy or contrition;
- Their sense of what is the right thing to do when they perceive that a particular outcome could reflect adversely on their personal honour or that of their family ("*mianzi*");
- Their confidence in representing themselves without the assistance of legal counsel and their sense that this is not a disadvantage;
- The ability of New Zealand European lawyers to understand their clients' instructions and motivations for their actions;
- Their expectation of how judges will determine the "truth" – an inquisitorial process where the truth is distilled from an active judge-led examination and evaluation of competing perspectives of what happened and why, or an adversarial process where the judge determines which of two competing versions of the truth he or she finds more credible;
- Their expectation that judges will take account of who they are, and their status and wealth in determining credibility and the "truth." To that extent, they assume that judges are not truly independent; and
- Their acceptance that they have been treated fairly and that the court did give them a fair opportunity to be heard.

Language

101 A major challenge of the New Zealand English-speaking court system for Chinese litigants is an English-speaking judge who cannot speak the Chinese language deciding a dispute between two Chinese-speaking parties who are not proficient in English. These issues are compounded when the parties speak different languages that require interpretation.[66]

102 The cases also demonstrate challenges where key documentary evidence requires translation from Chinese languages into English. There are currently no standard or guidelines as to who can supply translation for the courts. Translators and interpreters may therefore have variable training and qualifications. Furthermore, there is no standard process as to funding translation of non-English documentary evidence. One judge commented that in such cases the court should make allowances for the fact that "the full flavour of the Chinese version of the evidence may not have been captured in the English translation."[67]

103 There are also challenges that arise where a prosecutor seeks leave to apply to admit transcripts of telephone discussions that occurred in a Chinese language as evidence, as those assessing the evidence are unable to determine whether the terms have been translated correctly, whether statements have been attributed to the correct person and whether techniques have been used to

66 See *R v Lot* HC Auckland CRI-2008-004-18323, 17 September 2010 at [15] and [49].
67 *Ming Shan Holdings Ltd v Ma* HC Auckland CIV-2000-404-1597, 31 July 2008 at [33].

mask the true meaning of the discussion, for example, by the use of code words for drugs.[68] The court has also had to consider the admissibility of affidavits provided in English where the person swearing or affirming the affidavit did not speak or write English.[69]

104 Some cases show low English proficiency contributing to court action being taken against the Chinese party in criminal and civil proceedings.[70] Under the heading *Police Interviews* in the *Case Review* section[71] there cases where language issues have affected Chinese accused in their dealings with Police. In another case, language English capability was raised as a ground of appeal. A woman who had been convicted alongside her husband had her conviction quashed by the Court of Appeal, on the grounds that there was not sufficient evidence that she had "knowledge" of her husband's tax offending, with the Court of Appeal stating that the trial judge appeared to have overlooked Ms Liu's lack of English language capability.[72]

105 Some cases also demonstrate challenges where there is a language barrier between a litigant and their counsel, and in some cases this was raised as a ground of appeal.[73]

106 The case of *Abdula v R* is the leading case that establishes where an inadequate standard of interpretation will breach a defendant's rights under the New Zealand Bill of Rights Act 1990 in criminal proceedings.[74] The case review includes a number of cases where defendants of Asian ethnicity had unsuccessfully argued inadequate interpretation as a ground of appeal.[75] In one case, an interpreter was charged with contempt of court for discussing her view that the defendant was guilty with counsel and two jurors.[76]

107 Some cases demonstrate the challenges that arise from CALD litigants who have a low level of English language capacity representing themselves in court.[77]

Chinese culture, way of doing business and rule of law

108 There are cases with Chinese parties on both sides of the matter who give widely divergent testimonies of what happened, resulting in judges finding that neither is telling the truth, and having to piece together what did in fact happen without the assistance of much (if any) documentary evidence. These cases support the perception that lawyers and judges had, as corroborated by our literature review, that people of Chinese ethnicity are more likely to conduct business by a "handshake", on the basis of a trusting relationship than to complete transactions with written agreements.

109 In *Kim v Minister of Justice* the rule of law culture in the PRC was directly in issue, and the Court of Appeal made a number of findings about the PRC rule of law.[78]

110 Although it is not a defence in New Zealand that illegal conduct is acceptable in the defendant's culture, cultural considerations have sometimes been taken into account as mitigating factors in sentencing. There are cases where reports have been provided under section 27 of the Sentencing Act 2002 and civil parties have called expert evidence on culture to help the judge.

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68 See *R v Leigh* HC Auckland CRI 2006-019-008458, 27 August 2008.
69 See *Du Ling Trustee Limited as Trustee of the Du Ling Family Trust v C An and All in One Asset Management Limited* [2017] NZHC 1938. In this case, Ms Du resubmitted a translated affidavit that had been translated by a "freelance interpreter and translator" which was accepted by the court.
70 See those cases discussed under the heading *Low English language capability of parties resulting in cases against them* in the *Case Review* section.
71 See those cases discussed under the heading *Police Interviews* in the *Case Review* section.
72 *Wang v R* [2016] NZCA 56 at [67].
73 See for example *Department of Internal Affairs v Xiao* [2018] NZHC 2599, discussed below in the *Case Review* section under the heading *Credibility issues*.
74 *Abdula v R* [2011] NZSC 130, [2012] 1 NZLR 534.
75 Those cases are discussed under the heading *Interpreters*, in the *Case Review* section.
76 *R v L* [2019] NZHC 308.
77 See those cases discussed under the heading *Issues with self-represented litigants*, in the *Case Review* section.
78 *Kim v Minister of Justice* [2019] NZCA 209.

111 In *R v Xu*, Ms Xu, the wife of the "mastermind" of a large scale mortgage fraud scheme, successfully argued that cultural factors meant that her culpability was lower than her co-defendants and that she should therefore receive a lower sentence. Katz J gave "significant weight" to a section 27 cultural report provided by Ms Xu, that noted that Chinese cultural norms meant that Ms Xu was subservient to her husband, and that it would have been "extremely difficult" for Ms Xu not to follow her husband's instructions, even if she knew that his activities were illegal.[79]

112 "Face" (*mianzi*) was relevant in one case as it had resulted in the parties being unwilling to reach a settlement agreement, even though the quantum in dispute was low.[80] Lastly, in some cases *mianzi*, or other cultural factors mean that defendants were less willing to plead guilty or show remorse for their offending.[81]

113 In sentencing decisions, some High Court judges have taken account of the greater hardship for those not born in New Zealand of being in prison far away from family back home, even though the Court of Appeal in 2007 held that the fact an offender is a foreign national, who does not reside in New Zealand and is not a native speaker, will not normally justify a greater than normal discount.[82] This consideration is particularly taken into account in sentencing those with no support networks in New Zealand and low English language capability.

114 In sentencing foreign nationals, particularly for drug related offences, judges appear more likely than not to impose a minimum non-parole period, taking account of the fact that the accused will likely be deported to their home country at the end of their sentence. However, there are no statistics to support this perception. In the *Recommendations* section below, we recommend that the Ministry of Justice collect additional data on the imposition of minimum non-parole periods, to better allow it to assess the cultural factor in the decision to impose these. The majority of these drug-related cases relate to pseudoephedrine, which is legal and easily accessible in some Asian countries.

115 When assessing flight risk in bail applications involving immigrants, some judges take into account the extent of the applicant's connections with their originating country. The court has held that judges should be careful when considering bail applications for foreign nationals, and not label them "with the unfair and unreasoned 'perception' of being a flight risk," and that the particular facts of the risk of the defendant absconding should be considered.[83]

Steps taken by judges to ensure equal access to justice for CALD parties

116 The cases show that some judges make considerable efforts to ensure that Chinese parties receive equal access to justice, taking more active approaches to ensuring relevant evidence is admitted, and not just choosing to accept the easier-to-comprehend submissions presented by a New Zealand European Queen's Counsel against a self-represented Chinese party needing interpreter assistance.[84]

117 Some cases show judges taking extra steps to ensure that the defendant understood what was happening. For example in *R v Chen*, Williams J paused throughout the judgment to explain the meaning of legal terms to the defendant.[85] Woodhouse J took similar steps in *R v Xu Lei*, and made sure to explain the process of sentencing in a clear manner.[86]

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79 *R v Xu* [2018] NZHC 1971 at [44].
80 See for example *Zhou v Lou* [2018] NZHC 1887.
81 See for example *Xie v R* [2019] NZCA 218.
82 *R v Ogaz* CA180/06, 6 March 2007.
83 *R v Lee* HC Auckland CRI-2009-004-1792, 30 March 2010 at [1].
84 See for example *Mao v Green Land Investment Limited* [2018] NZHC 1348, discussed in the *Case Review* section under the heading *Lack of contemporaneous documentation.*
85 *R v Chen* HC Auckland CRI-2005-4-2191, 11 October 2005.
86 *R v Xu Lei* HC Auckland CRI-2009-004-13740, 7 December 2009.

118 In *Kim v Police*, Moore J, when deciding the self-represented defendant's appeal against the decision of the District Court, commented that the trial judge had "extended to [the defendant] a remarkable degree of tolerance and latitude" in order to ensure the defendant was able to fully explore the issues and present his defence as fast at he could.[87]

119 Former Attorney-General Professor Margaret Wilson has commented that the *Case Review* section of this Report identified that there was an awareness of the relevance of cultural issues, particularly when sentencing, but this awareness is uneven and maybe inconsistent. Interviews with judges and lawyers indicate that there are, however, additional steps being taken by counsel and judges to ensure equal access to justice for CALD parties that are not necessarily recorded in the judgments.[88]

87 *Kim v Police* [2015] NZHC 2543 at [23].
88 See, for example, Belinda Sellars QC's discussion of *R v Singh* [2019] NZHC 148, in the *Lawyers' Perspectives* section

RECOMMENDATIONS

The report makes 36 recommendations, set out in detail below.

Judges

Recommendation 1: Comprehensive pre-trial process

120 We recommend the introduction of an enhanced pre-trial and case management process in cases with CALD parties, where interpreters are required, with the same judge and registrar throughout, where possible.

121 Lawyers also need to ensure that they effectively utilise the case-management process to properly draw any issues and challenges that may arise from their client's cultural background to the court's attention as early as possible, such as the need for an interpreter.

122 While this would be an administrative change only, our understanding is that most cases in the High Court at Auckland are not case managed by the same judges at present.[89] Judges also go on leave or may get sick and be unable to sit. However, we recommend that this administrative change should be implemented to the greatest extent possible. Specifically, we recommend:

a) A process to determine as early in the process as possible, if parties to a proceeding require interpreters, to ensure that interpreters are appointed as early as possible. Lawyers need to advise as early as possible if their client needs an interpreter;[90]

b) The improvement of pre-trial processes for the appointment of interpreters, to allow judges to satisfy themselves that interpreters are a suitable 'match' for the witness and have the necessary English language capability to interpret in court before they approve the interpreter. Currently, judges tell us that the process gives them no time to be able to do so;

c) That a detailed pre-trial meeting take place with the parties, the judge presiding, and an interpreter present, to clearly establish the roles and responsibilities of the parties and the interpreter. This pre-trial meeting will provide CALD litigants with early additional assistance to understand the New Zealand court system and process in their own language, via the interpreter who will be present. This pre-trial meeting could cover off the role of giving evidence as a witness, the role of the judge and jury (if relevant) and other fundamental aspects of New Zealand law not present in PRC, such as perjury and contempt of court. A registrar should be assigned to the case and the same registrar should attend these meetings, as well as any other pre-trial meetings, and the hearing, if possible;

d) The presiding judge utilising this pre-trial meeting to ask questions about a Chinese party's background – such as which country they were born in, and how long they have lived in New Zealand, if this information has not already been adduced by counsel for the CALD party. This is because a person who has recently arrived from PRC will have a very different perspective and view of the rule of law and English proficiency than a person from a Singaporean family who arrived in New Zealand as a child. Having this information at the beginning of a trial would assist judges to better assess the cultural factors that may influence the behaviour and actions of the parties before them and their true English comprehension abilities, before judges are presented with substantive evidence in trial. It will also provide necessary information for judges to be able to approve interpreters as a suitable match for CALD parties;

89 Similar changes were introduced in a successful pilot by former District Court Chief Judge (and current Justice of the High Court) Jan-Marie Doogue of specialised sexual violence courts. This includes an intensive case management process by judges, and judges receiving case files significantly before they would in other cases. The changes in Auckland and Whangarei were made permanent in August of this year: Gill Bonnet "Sexual violence courts to be permanent after pilot's success" *Radio New Zealand* (online ed, 14 August 2019).

90 In the Federal Court of Australia, there is an operational protocol called the "Diversity Protocol" which offers a one page step by step process for CALD parties including checking if an interpreter is required and ensuring interpreters are booked for every event where an interpreter is required: Judicial Council on Cultural Diversity, above n 35, at 19.

e) The same judge being present in all pre-trial meetings, any interlocutory hearings and Case Review Conferences, will better enable the judge to gain a working knowledge of the case and the particular needs of the CALD parties to ensure there is adequate evidence to make findings and to decide the case;

f) Similarly, the same interpreter is present at all pre-trial meetings and Case Review Conferences so that they gain a working knowledge of the case and have time to read through the relevant documents before the substantive hearing.[91] It will also help the judge and parties build trust and confidence in the interpreter; and

g) Before the substantive trial is set down, the judge, interpreter and counsel for the parties discuss how much time may be required to hear the matter. A greater working knowledge of the case will allow for more accurate scheduling taking into account the time required for interpreting, and will result in fewer cases having to be part heard, or hearings running over time, due to insufficient time being scheduled.

123 Counsel retain the primary responsibly for questioning witnesses. Judges should only intervene to the extent necessary to have a clear understanding of the background and experience of a litigant and key witnesses to understand any issues or challenges that may arise as a result of this.

124 Placing emphasis and resource at the beginning stages of a trial will reduce inefficiencies (and thus create cost savings) as well as providing for better access to justice for the parties, as relevant issues and concerns could be worked through before the matter reaches a substantive hearing.

125 In the event that this enhanced pre-trial process is not implemented, we recommend that the trial judge should have a discussion with counsel, either before the trial begins or on the first day of the hearing, about the level of English language capability of the CALD party or parties and the main witnesses, the level of expertise and experience of the interpreters, and how any interpretation is to be carried out.

126 The case analysis also highlights techniques and mechanisms that judges (and practitioners) may wish to consider to help ensure equal access to justice for CALD parties. For instance, in the *Singh* case, Powell J, in conjunction with Belinda Sellars QC, put in place a number of mechanisms to assist the Fijian-Indian defendant in the proceedings. These included the use of a junior counsel who spoke Hindi to converse with the defendant, allowing the defendant to review a transcript of the Crown's opening and closing statements prior to the defence presenting their statements and allowing counsel the opportunity to converse with the defendant at the close of questioning a witness, to determine whether there were any additional matters that needed to be raised.[92]

Recommendation 2: Greater willingness to admit evidence

127 It is the judge's role to ensure that all relevant evidence is adduced in a trial. The unique set of circumstances – lack of contemporaneous documentary evidence, reliance on viva voce evidence, often through an interpreter, and approaches by parties to doing business which differ from New Zealand European approaches judges may be used to – mean that judges may need to be more willing to admit relevant evidence when it is presented in less traditional formats, and to decide the particular issues being raised by the parties. Judges may require training on how best to do this in presiding over cases with CALD litigants and also on less typical evidence that may be presented or be relevant.

91 The Ministry of Justice has advised that at present, in criminal cases, the CPU always aims to provide the same interpreter consistently across all hearings related to a specific case for the sake of continuity and case knowledge.

92 See the discussion of *R v Singh* [2019] NZHC 148, in the *Lawyers' Perspectives* section.

128 The need for a careful and considered approach has also been identified in Australia, by Johnson J:[93]

> The fact that key witnesses gave evidence through an interpreter limits the ability of a tribunal of fact to assess demeanour as an aid to fact finding. Further, great care must be exercised in making demeanour findings where witnesses are from a different cultural and ethnic background to that with which the Judge is familiar… It is necessary to weigh impression as to demeanour carefully against the probabilities and to examine whether the disputed evidence is consistent with the incontrovertible facts, facts that are not in dispute and any other relevant evidence in the case…

129 We understand that benchbook guidance is provided to New Zealand judges, cautioning them not to put too much weight on demeanour.[94]

Recommendation 3: Cultural guidance

130 At present, there are two main ways in which a court can access assistance in cultural capability. Firstly, through the use of independent experts under Schedule 4 of the High Court Rules; and secondly, by way of cultural guidance under section 27 of the Sentencing Act 2002.[95] Both of these are at the cost of the defendant. Use of an independent expert witness can cause complications when the parties question the impartiality of the expert. For instance, one judge recalled a case where the use of an expert witness was disputed by the plaintiff for conflict of interest as the witness was from the same town in PRC as the defendant.[96]

131 We recommend that systems be introduced to allow judges to access independent cultural guidance in both criminal and civil cases.

Criminal cases

132 Section 27 of the Sentencing Act 2002 provides:

> Offender may request court hear person on personal, family, whanau, community and cultural background of offender
>
> (1) If an offender appears before a court for sentencing, the offender may request the court to hear any person or persons called by the offender to speak on –
>
> a) the personal, family, whanau, community and cultural background of the offender:
>
> b) the way in which that background may have related to the commission of the offence…:
>
> (2) …The court must hear a person or persons called by the offender under this section on any of the matters specified in subsection (1) unless the court is satisfied there is some special reason that makes this unnecessary or inappropriate….
>
> (3) … If an offender does not make a request under this section, the court may suggest to the offender that it may be of assistance to the court to hear a person or persons called by the offender on any of the matters specified in subsection (1).
>
> (5) If an offender does not make a request under this section, the court may suggest to the offender that it may be of assistance to the court to hear a person or persons called by the offender on any of the matters specified in subsection (1).

93 *Jinhong Design and Constructions Pty Ltd v Xu* [2010] NSWSC 523 at [10], cited in Godwin, above n 11.

94 Our understanding is that there are currently four benchbooks for senior court judges in New Zealand: the *Senior Courts Benchbook, a Criminal Jury Trials Benchbook, a Sexual Violence Trials Benchbook* and a *Family Violence Benchbook*.

95 See for example *R v Xu* [2018] NZHC 1971 at [44]. At the sentencing hearing, Ms Xu, one of three defendants provided a cultural report from Dr Leo Liao, which set out the cultural factors that led to Ms Xu's offending, including that the wife's role is subservient to the husband. Justice Katz ultimately sentenced Ms Xu to a low sentence. Justice Katz said at [52] that she had given "significant weight" to the fact that Ms Xu was subservient to her husband and largely acting on his direction.

96 This was an anecdote raised during an interview with a judge and therefore we do not have a citation for the case.

133 Section 27 was added to the Sentencing Act when it was enacted in 2002. However, it was also found in a previous form in section 16 of the Criminal Justice Act 1995. Section 16 was originally intended to encourage the use of community-based sentences.[97] However, it was in fact used for a much broader range of purposes, including "a broad interpretation" of "cultural" factors, including religion, involvement in the community and family life.[98]

134 The Ministry of Justice conducted a wide-ranging study in 2000 regarding the use and impact of section 16. This study found that section 16 was underutilised at that time, with only 14 per cent of survey respondents perceiving that section 16 was being used as frequently as it could be.[99]

135 This study suggested enhanced cultural competencies for lawyers, judges and Community Probation service staff to improve the implementation of section 16. The report states:[100]

> Section 16 implies and encourages the participation of peoples of a range of different cultures in the sentencing process. It is important, therefore, that the professional groups that work within the system are adequately prepared to respond respectfully and sensitively. The survey findings strongly supported further educational programmes in this area for lawyers, judges and Community Probation Service staff. Increasing the number of judges and lawyers from different cultural backgrounds was also seen as a way of enhancing cultural competency within the system.

136 The study also suggested that resourcing for section 16 be increased and that "cultural responsiveness and flexibility in court processes be improved."[101] Lastly, the study recommended that the awareness of section 16 be raised by displaying information about it in court waiting areas and distributing a pamphlet about the section more widely.[102]

137 Despite its successor, section 27, referring to the court "hearing" a person, this section has largely been interpreted to refer to *written* reports, often prepared by cultural experts that cost anywhere from $800 to $3,000.[103] This cost can be a real barrier to defendants utilising section 27.

138 Lawyers and defendants need to understand that section 27 does not require an expensive report, and can simply be *viva voce* evidence of a relative or other person that can speak to cultural factors that may have been relevant to the offending. For example, an elder in the community that could talk to the concept of "face" and how it results in a defendant being less likely to show remorse even though they may feel it. One judge interviewed commented that section 27 needs to be "thought of in a much more flexible way."

139 Further, if judges believe that they require cultural assistance in sentencing decisions, then the Ministry of Justice needs to reconsider funding of the reports. Until 2018, judges had been ordering cultural reports under section 27. However, in June 2018, the Ministry of Justice informed judges that they did not have the power to order the cultural reports under the Sentencing Act 2002. This decision essentially halted public funding of section 27 reports.[104] The fact that judges were ordering these reports demonstrates that they found these reports relevant and helpful.

140 Section 27(5) of the Sentencing Act allows a court to suggest it would be of assistance for the court to hear persons called by the offender on cultural aspects, and section 26 empowers a court to direct probation to prepare a report, which, under section 26(a) can include cultural background. However, these are more circuitous routes to enable judges to access cultural assistance.

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97 Ministry of Justice, above n 41, at xii.
98 Ministry of Justice, above n 41.
99 At xi.
100 At xiii.
101 Ministry of Justice, above n 41.
102 Ministry of Justice, above n 41.
103 Anneke Smith "Funding cultural reports a matter of 'natural humanity' – lawyer" *Radio New Zealand* (online ed, 8 July 2019).
104 Anneke Smith "Judges ordered cultural reports 'in error'" *Radio New Zealand* (online ed, 6 May 2019). The Chief Judge of the High Court, Geoffrey Venning is quoted in this article as tell the Ministry of Justice that:

> … [his] understanding is that judges may have resorted to directing cultural reports under section 27 as some felt they were not receiving sufficient assistance about cultural information and related information from the standard pre-sentencing reports under section 26.

141 The Law Society reported in 2018 that despite positive feedback being received from judges where section 27 reports were used, the section is underutilised.[105] This positive feedback is also demonstrated by reference to section 27 reports in sentencing notes. In a recent decision sentencing a Samoan man for murder, Moore J, when discussing a delay in the sentencing hearing due to the preparation of a section 27 report, observed:[106]

> I had no option but to grant the application because it is essential for me to know everything I should know about the man I am sentencing today, particularly given the inevitability he will receive a very long term of imprisonment.
>
> The report was well worth waiting for. It has given me a much deeper insight into your background and some of the cultural factors behind the dreadful events which unfolded in 13 January this year.

142 This case demonstrates the value that judges place on the cultural guidance they have received through section 27. Another case is *R v Alexander*, where the Court, on hearing a cultural report regarding a Māori man convicted of murder, took into account the offender's culture in determining sentencing, and while not allowing a discrete discount for his deprivation, held that allowing the offender to have a connection with his iwi and children would be beneficial to him "and thus society". Justice Davidson stated:[107]

> the Cultural Report under s 27 of the Act is seldom obtained. In fact it is the first time I have come across it in over three years, and many judges have never come across it, and there is some, not debate, at least analysis of quite how it fits in, and I am going to say to you now that I found it very enlightening and helpful to me.

143 Further, information on the Courts of New Zealand website on how judges make sentencing decisions contains no reference to section 27.[108]

144 The judges that we interviewed expressed the view that there is a need to build cultural capability in the judiciary. Better utilising section 27, by encouraging its use, introducing public funding and allowing judges to order guidance under it, would build this cultural capability.

145 We recommend that section 27 of the Sentencing Act 2002 be amended to make it clear that judges are able to order cultural guidance through this section, and that such guidance will be publicly funded. Judges in Auckland, in particular, will need to avail themselves of this guidance. While this will not completely resolve the concerns voiced by judges as to their inability to access cultural advice, it will at least allow for judges to have access to cultural assistance in sentencing.

Civil cases

146 At present, the only way judges can access cultural guidance in civil cases is through expert evidence adduced under Schedule 4 of the High Court Rules. Given the high volumes of civil disputes involving Chinese and other Asian parties, consideration needs to be given to independent cultural advice to assist judges to understand the behaviour of Chinese and Asian parties and accused, operating in a very different cultural context.

147 Examples include the question of why Chinese parties have acted the way they acted (for example, lending a large amount of money to a relative with no documentary evidence establishing the purpose or term of the loan), understanding why some Chinese defendants may not show remorse for their offending and understanding why Chinese parties in civil disputes may be willing to pay more in legal fees than the amount in dispute.

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105 Tracy Cormack "Cultural background report process underutilised" *LawTalk* (online ed, 3 August 2018). Ms Cormack quoted from the decision *R v Alexander* [2018] NZHC 1584, where Davison J said that he had found the section 27 report "very enlightening and helpful," and that the present case was the first time he had come across a cultural report in three years on the bench.

106 *R v Ueta Vea* [2019] NZHC 1587 at [45]–[46].

107 *R v Alexander* [2018] NZHC 1584 at [7].

108 Courts of New Zealand "Sentencing Decisions" <www.courtsofnz.govt.nz>.

148 Some of the judges interviewed saw this as a key recommendation to ensure equal access to justice for Chinese parties in courts. We have recommended below that the Ministry of Justice implement a system of "duty interpreters", under the recommendations for interpreters. These duty interpreters will be employed by the Ministry of Justice. They will also be sufficiently experienced and qualified that in addition to providing interpretation assistance, they may also be able to provide cultural guidance to a judge. This cultural guidance would be publically funded, and any evidence provided by the duty interpreter would be treated the same as expert evidence under Schedule 4 of the High Court Rules.

149 Some of our interviewees suggested this as a way of enabling judges to receive cultural guidance. However, Dr Henry Liu has conducted research on interpreters in non-Germanic European countries such as France and Italy, where interpreters act as '[inter]cultural mediators'. He says "without strong institutional backing, there is more of a tendency to bend to societal and systematic expectations, become complicit to active intervention beyond that of misunderstanding arising from linguistic or culture-linguistic realities, and, thereby, compromising (sic) their impartiality."[109] He also refers to "a shared belief [among researchers] in the interpreter's commitment to neutrality as a surrogate marker of trust".[110] Therefore, we recommend that further research be conducted as to whether it is appropriate for a duty interpreter to also provide cultural guidance in New Zealand courts, since the two roles are different.

150 Alternatively, a system could be implemented creating the role of suitably qualified and experienced "cultural advisors" to advise judges if cultural advice is needed, as well as assist CALD defendants and witnesses who require assistance navigating the unfamiliar Court system.

151 Such a system could be to some extent analogous to the role of lay advocate in the Youth Court, with section 327(a) of the Oranga Tamariki Act 1989 providing that one of the two principal functions of a lay advocate are "to ensure that the court is made aware of all cultural matters that are relevant to the proceedings."[111] Judge Andrew Becroft has written that "the scope of this information can be as wide or as narrow as the particular circumstances of the young person require. For example, a young person from a migrant community will have different and specific cultural circumstances and needs that will be relevant to decision making."[112]

152 To adopt this recommendation:

a) There would need to be a power for judges to request cultural guidance added to the High Court Rules 2016. There is some precedent for such a power found in Rule 10.22 of the High Court Rules, which relates to Counsel Assisting. It states that "at the request of the court, the Solicitor-General must appoint counsel to appear and be heard as counsel assisting the court." The power for judges to request cultural assistance could be an equivalent provision to Rule 10.22; and

b) There would need to be an express provision that provides for funding of this cultural assistance. As demonstrated by the ordering by judges of section 27 guidance without provision for funding, the question of funding will need to be addressed at the outset. We recommend that state funding should be provided for cultural guidance where the judge considers it necessary to assist them to ensure equal access to justice; and

c) The question of whether cultural assistance is required should be included in the list of matters to be addressed in the Memorandum of Counsel in preparation for the Case Management

109 Dr Henry Liu "Help or hinder? The Impact of Technology on the Role of Interpreters" (2018) 5 FITISpos International Journal 13 at [2.2.2].
110 At [2.2.2] (citations omitted).
111 The second function in section 327(b) is to:
> … represent the interests of the child's or young person's whānau, hapū, and iwi (or their equivalents (if any) in the culture of the child or young person) to the extent that those interests are not otherwise represented in the proceedings.
112 Andrew Becroft "The Rise and Rise of Lay Advocates in Aotearoa New Zealand" (paper presented at National Youth Advocates/ Lay Advocates Conference, Auckland, 13–14 July 2015).

> Conference. This ensures that the parties, and Counsel actively consider whether cultural assistance is required and raises this with the judge at the earliest opportunity.

153 We recommend that further consideration is given as to how to ensure that judges have access to cultural guidance in civil disputes, whether it is through duty interpreters providing cultural assistance or through a system enabling judges to access independent cultural assistance.

Recommendation 4: Juries and judges directions in criminal cases

154 Judges interviewed for this research expressed concern about the English language capability of many summonsed Chinese and CALD jurors in New Zealand. While it appears that many of these jurors will seek to be excused from serving, some still find themselves on a jury. Dr Ng's research is therefore important, particularly her recommendation around counsel and judges using more accessible language, and enunciating clearly and slowly when they speak. It also reinforces the need for judges to be sure that jurors can adequately comprehend English and what is going on to be able to contribute to the jury role. The priority, given the current limitations of interpreting in New Zealand courts, is to ensure witnesses get quality interpreting.

155 In a recent report by the Law Commission on a review of the Evidence Act 2006, the Law Commission made recommendations regarding sample judicial directions and the use of benchbooks to address myths and conceptions that jurors may hold in sexual and family violence cases. We recommend that any development of such directions or benchbook material by the IJS also include directions to juries on the topic of unconscious or conscious bias, particularly in criminal law cases where such biases, based on cultural norms and held by jurors, might inappropriately affect their reasoning. This is particularly important in drug and fraud cases, where interviews with prosecutors have revealed that there may be a negative public perception towards Chinese defendants.[113] Judges' directions will help to ensure that these perceptions do not unfairly impinge on a juror's impartial assessment of the facts and evidence before them.[114]

Recommendation 5: Cultural training

156 IJS already runs cross-cultural seminars including on cross-cultural bias and self-represented litigants and these should continue to develop the cultural capability of the judiciary, and focus on those ethnicities, cultures and religions that are growing the most in New Zealand.[115] Such cultural training will help the judiciary to develop a "mental red-flag cultural alert system, which gives [them] a sense of when a cultural dimension may be present so that they may actively consider what, if anything, is to be done about it."[116]

157 Justice Kyrou of the Court of Appeal of Victoria has also noted that:[117]

> Judges need to be culturally aware in order to avoid the performance of any of their functions being inappropriately influenced – whether consciously or unconsciously – by assumptions that are based on cultural stereotypes. Every litigant is entitled to have his or her case decided on the evidence that has been adduced and tested in open court in the course of a trial rather than on any extraneous considerations.

158 Cultural training will help to assist judges to understand the reasons why some Chinese parties may be reluctant to settle disputes. They should continue to encourage out of court settlement where that is warranted.[118]

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113 Interview with Steve Symon, Partner, Meredith Connell (Mai Chen, Auckland, 16 July 2019).

114 Law Commission *The Second Review of the Evidence Act 2006* (NZLC R142, 2019) at 201. Note that this Report expressly said that the Evidence Act does not need to be reformed to provide for specific judicial directions on cross-cultural identification and/or demeanour assessments, on the basis that the appellate courts have already set out guidance on when such directions are appropriate and what they should contain, and "Case law emphasises that the need for a direction must be assessed on a case by case basis. A legislative provision would limit judicial discretion in a way we do not think would be desirable": at 42.

115 Similar programmes are also in place in Australia. In New South Wales, there is an annual programme on "Cultural Barriers in the Court Room Interpreters" that is delivered annually at the National Judicial Orientation Programme for judges: Judicial Council on Cultural Diversity, above n 35, at 40.

116 Emilios Kyrou "Judging in a multicultural society" (2015) 24 JJA 223, cited in Godwin, above n 11.

117 Emilios Kyrou "Attributes of a good judge" (paper delivered at the 14th Greek/Australian Legal and Medical Conference, 4 June 2013) at 4.

118 We have also recommended this for lawyers advising Chinese clients, below at paragraph [253].

159 We adopt the recommendation by one of the judges interviewed that all new judges to the High Court bench should serve on the bench in Auckland to gain experience through the higher volume of cases in the High Court at Auckland with parties of different ethnicities. This will help to grow cultural capability more quickly for judges who operate out of other High Court registries that see fewer cases with CALD parties than seen in Auckland. This is important because superdiversity impacts upon other parts of New Zealand.[119]

Recommendation 6: Bench book guide for judges

160 IJS is currently developing an Equity/Diversity Handbook for judges. Its purpose is to guide judges in addressing the issues which arise when presiding over cases involving CALD parties. We are pleased to hear that this is underway; however, we note that benchbooks can only go so far, and that it is important that there is active and ongoing discussion to build cultural capability through the other recommendations made in this report.[120]

161 Equal Treatment Benchbooks exist in other jurisdictions, such as the United Kingdom and Australia, which will provide useful guidance to the IJS in the development of an Equity/Diversity Handbook for the New Zealand judiciary. We set out a brief overview of the guidance contained in these benchbooks below.

England

162 The London Judicial College *Equal Treatment Benchbook* provides guidance to judges in the English courts and tribunals. The Benchbook sets out three principles for the judiciary: good communication, demonstrating fairness, and diversity. Importantly, the Benchbook also sets out guidance for the judiciary on "communicating interculturally" to ensure that there are no misunderstandings between judges and CALD litigants and witnesses. This includes guidance on communication where interpreters are involved.

163 The Benchbook notes:[121]

> Speaking English clearly to a person who is using it as a second or third language requires care to use 'plain English', and to clarify legal jargon, but this may not be sufficient to meet their communication needs in court. They may bring culturally different social assumptions, behaviours and expectations, as well as a 'speech style' (i.e. accent and manner of talking in English) influenced by a 'mother-tongue' or a dialect whose grammatical structures and intonation patterns are very different from English. As adult learners of English they may be well versed in vocabulary, but not fully aware of how the way words are spoken and used alters meanings in English. Such linguistic differences create difficulties in both the presentation and the evaluation of verbal evidence.

164 To address these concerns, the Benchbook sets out a list of things that should be avoided when speaking to a CALD person (such as idioms, hypothetical questions and humour), and recommends that judges frequently summarise what has been said, and check a CALD person's understanding by asking them to feedback to the judge their understanding of important points.[122]

165 The Benchbook also references a 2017 independent review of Black, Asian and Minority Ethnic (BAME) individuals in the English criminal justice system by Rt Hon David Lammy MP.[123] This review made several important findings, including that a lack of trust in the justice system by BAME offenders increased their chances of reoffending and their likelihood to plead not guilty. The review found that a lack of judicial diversity, a failure by BAME offenders to understand what

119 Wardlow Friesen *Beyond the metropoles: the Asian presence in small city New Zealand* (report to the Asia New Zealand Foundation, October 2015).
120 Robert French "Equal Justice and Cultural Diversity – the General Meets the Particular" (2015) 24 Journal of Judicial Administration 199, cited in Godwin, above n 11.
121 *Equal Treatment Benchbook* (Judicial College, London, 2018) at 8-22.
122 At 8-15–8-17.
123 David Lammy *The Lammy Review* (Government of the United Kingdom, 8 September 2017).

was happening in court and the basis for sentencing decisions caused this lack of trust. The benchbook therefore places emphasis on judges ensuring that all those in court understand what is going on and ensuring they believe they are being treated fairly.[124]

166 The *Lammy Review* also commissioned a report into the experience of BAME women, which found that BAME women were doubly disadvantaged when it came to their experiences in the court system. The report found that BAME women felt the legal process was confusing and jargon loaded, and they did not have their stories and circumstances properly considered at trial. Furthermore, they raised concerns about the gender, ethnic and age composition of juries, in particular relaying the view that older men who were not of their ethnic background would have less understanding about their backgrounds, lives, and the pressures on them, and would therefore be unconsciously biased against them.[125]

Scotland

167 The Judicial Institute for Scotland *Equal Treatment Benchbook* sets out general points for Scottish judges when dealing with CALD parties, including guarding against unconscious prejudice and avoiding stereotypes and assumptions, while also taking into account a person's cultural differences.[126] The Benchbook also contains the following guidance on dealing with language difficulties:[127]

> Situations may arise where the judge has to take a proactive role, and make some effort to clarify and resolve the extent of any language difficulty faced by a witness. It is part of the judge's function to assess an individual's fluency and comprehension. If a judge hearing a case considers that an interpreter is required, an adjournment should be granted for that purpose. Such an adjournment will not necessarily result in the loss of the hearing or trial date and it may be possible to make arrangements at fairly short notice, unless the language is an unusual one or the court is in a remote location.

Australia

168 Both the Supreme Court of Queensland and the Judicial Commission of New South Wales have published Benchbooks on equal treatment for CALD parties. The Supreme Court of Queensland *Equal Treatment Benchbook* importantly notes that in addition to the language miscommunications identified by the English and Scottish Benchbooks, miscommunications can also arise with non verbal communication in the courtroom. The Benchbook states (emphasis added):[128]

> …due to the multicultural nature of contemporary Australian society it would not be possible for judges to be fully aware of the nuances of every culture which she or he might conceivably encounter in the courtroom. Judges must therefore be prepared to consider the influence of cultures with which they have had no direct experience. **Further, judges must be alert to ethnocentrism – using one's own cultural assumptions to interpret other people's behaviour – and the potential for culturally-based misunderstanding**. Areas of potential misunderstanding may include politeness, body language, power dynamics, metalinguistic factors such as pitch, volume and silence, and the difference between individualistic and collectivistic cultures. Clarification may be sought by asking questions, or it may be necessary to receive expert evidence from a linguist or an anthropologist in this regard. It may be appropriate to give some direction to jurors as to how to view oral evidence where cultural influences have some relevant impact.

169 The Judicial Commission of New South Wales *Equality before the Law Benchbook* sets out some of the common cultural differences of CALD users of the New South Wales courts, including that CALD people may, when giving evidence, use a more roundabout style, talk more slowly, use less powerful sounding speech, talk quietly and submissively, prefer to agree with what is being put to them rather than openly disagree, and use fewer hand gestures and body movements than people

124 Judicial College, London, above n 121, at 8-23–8-24.
125 At 8-24.
126 *Equal Treatment Benchbook* (Judicial Institute for Scotland, Edinburgh, 2018) at 4.11–4.12.
127 At 7.2.
128 *Equal Treatment Benchbook* (2nd ed, Supreme Court Library Queensland, Brisbane, 2016) at 55 (emphasis added).

from English speaking backgrounds. The Benchbook states that judges should observe a CALD person's style of giving evidence, and take steps to determine if their style has been influenced by cultural factors (such as asking the person's legal representative or the person themselves), and if the judges determine that these behaviours are cultural in origin, then to ensure that cross examination does not pay unfair attention to these behaviours and, if appropriate, to make directions to the jury to take into account cultural factors in their assessment. The Benchbook also notes that judges may need to go to greater than usual lengths to explain what is happening to CALD parties.[129]

United States of America

170 In the United States, there is a Benchbook for Federal District Court Judges.[130] This Benchbook does not set out any guidance for dealing with CALD litigants, but notes:

> Taking pleas from defendants who do not speak English raises problems beyond the obvious language barrier. Judges should be mindful not only of the need to avoid using legalisms and other terms that interpreters may have difficulty translating, but also of the need to explain such concepts as the right not to testify and the right to question witnesses, which may not be familiar to persons from different cultures. See 28 U.S.C. § 1827 regarding use of certified interpreters.[131]

171 We recommend that the IJS prioritises development of the Equity/Diversity Handbook for the New Zealand CALD context, taking account of the above examples from overseas jurisdictions.

Recommendation 7: Legal implications of increased superdiversity – demographic transformation of the reasonable person on the Lambton Quay bus

172 The current legal system provides for a number of "tests" based on the behaviour of a hypothetical "ordinary reasonable person." However, in light of the section on demographic data and projections below (under *Chinese People in New Zealand and its Courts*), it is reasonable to question who the ordinary reasonable person is and will be in New Zealand in even 10, 15 or 20 years' time.

173 Adopting a superdiversity lens may also affect assessments of what is offensive or defamatory, or whether a person has taken reasonable steps or care to do something, or prevent something from happening. For example, the tort of invasion of privacy as described in *Hosking v Runting*:[132]

> We are not convinced a person of ordinary sensibilities would find the publication of these photographs highly offensive or objectionable bearing in mind that young children are involved…The real issue is whether publicising the content of the photographs … would be offensive to the ordinary person.

174 The reasonable person test is classically framed by the New Zealand Court of Appeal in *Brooker v Police* as:[133]

> The concept of the reasonable man (or woman) has longstanding currency in other areas of the law, and I am reluctant to believe that the Clapham omnibus does not run to Molesworth Street. While not entirely eliminating the judge's subjective perception, it charges the judge with the task of assessing the behaviour in issue against the contemporary attitudes, practices and values of the community. The judge must seek to ascertain the reaction of the reasonable person. That is as it should be... Using similar language, courts in Australia have defined the reasonable man as one who is mature enough to tolerate expression of views violently at odds with his own, and who is reasonably understanding and contemporary in his reactions.

175 What if the bus now runs to ethnoburbs in Auckland? Or we find that people on a bus running down Queen Street (in Auckland, where most New Zealanders live) behave or react differently

129 *Equality before the Law Bench Book* (12th ed, Judicial Commission of New South Wales, Sydney, 2018) at 3323–3326.
130 The Federal District Courts in the United States hear cases that deal with the constitutionality of a law, the laws and treaties of the United States, cases involving ambassadors, disputes between two or more states, admiralty law, bankruptcy and habeas corpus issues.
131 *Benchbook for US District Court Judges* (6th ed, Federal Judicial Center, Washington DC, 2013) at 63.
132 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [65].
133 *Brooker v Police* [2007] 3 NZLR 91 (CA) at [201].

from those on a bus running down Molesworth Street (in Wellington, where fewer New Zealanders live)? Does New Zealand's demographic transformation raise issues about who is the reasonable and ordinary person in society? What are their attributes concerning care, skill and judgement?

176 Another example of a statutory "reasonable person" test is the Broadcasting Standards Authority Act 1989, which provides at section 4(1)(a):

> Every broadcaster is responsible for maintaining in its programmes and their presentation, standards that are consistent with–
>
> (i) the observance of good taste and decency; and
>
> (ii) the maintenance of law and order; and
>
> (iii) the privacy of the individual; and
>
> (iv) the principle that when controversial issues of public importance are discussed, reasonable efforts are made, or reasonable opportunities are given, to present significant points of view either in the same programme or in other programmes within the period of current interest; and
>
> (v) any approved code of broadcasting practice applying to the programmes.

177 In response to a complaint that a person's privacy had been breached by a broadcaster for cultural reasons, the Broadcasting Standards Authority (BSA) said "our general approach is that we must look to the New Zealand community as a whole and apply a New Zealand lens when determining whether broadcasting standards have been breached".[134]

178 The BSA has taken steps to assess what the New Zealand community as a whole believes is "good taste and decency" by surveying attitudes towards good taste and decency in broadcasting in 2001 among Māori and Pacific peoples. In their survey, the BSA found that although Māori attitudes reflected those of the general public, Pacific people were significantly less accepting of offensive language, sex and nudity in broadcasting.[135]

179 The BSA also undertakes regular surveys and reviews into specific areas to go toward "good taste and decency." For instance, in 2018, it conducted research into language that may offend in broadcasting.[136] Part of the research considered offensiveness from a cultural/gender/sexual orientation perspective. The report states:[137]

> New Zealand is rich with a diverse range of cultures, communities and languages. As a result, it is not only words traditionally thought of as swear words in English that may offend. Words or expressions in English or other languages may be considered offensive depending on the cultural perspective of the audience.

180 The report found that those of Pasifika and Asian ethnicity are the least accepting of the use of potentially offensive language in broadcasting.[138] The BSA now regularly surveys Asian, Indian and Pasifika populations, as well as Māori, which is a reflection of New Zealand's changed demography.

181 Decisions of the BSA can be appealed to the High Court.[139]

American, Canadian and Australian approaches to the reasonable person test

182 In America, Canada and Australia, courts and academics have taken steps to determine how to assess the "ordinary reasonable person" in an increasingly superdiverse world. However, the focus

134 JNJ Management and Radio New Zealand Ltd – 2017-095 (18 April 2018).
135 *Attitudes Towards Good Taste and Decency in Broadcasting Among Pacific Peoples* (Broadcasting Standards Authority, 2001).
136 *Language that may Offend in Broadcasting* (Broadcasting Standards Authority, 2018).
137 At 10.
138 At 15.
139 Broadcasting Act 1989, ss 18 and 19.

of the research and the cases appears to be on the importance of adopting different "reasonable person tests" in different circumstances. The case of *McBride v Motor Vehicle Division of Utah State Tax Commission* concerned the use of the term "redskin" on personalised plates.[140] The Tax Commission had originally granted the application for use of the term, but some Native American petitioners challenged the plates.

183 The legislative scheme was similar to that for the BSA, providing that the Motor Vehicle Division "may refuse to issue any combination of letters, numbers or both that may carry connotations offensive to good taste and decency."[141] The Supreme Court of Utah held that the Tax Commission apply a "reasonable person" standard in determining whether "any connotation" of that term could be considered offensive.[142]

184 The dissenting judgment, however, held that, rather than using the objective reasonable person standard, the majority should have focused its analysis on the submissions received from the Native American submitters – i.e. applied the standard of a reasonable Native American person.[143]

185 Writing on this judgment in 1999, an American lawyer said:[144]

> For years the objective, reasonable person standard has done nothing more than perpetuate the viewpoints and biases of white male judges applying that standard.

186 This issue appears to have been considered in some other American cases and academic publications. In 2001, Mia Carpiniello from Georgetown University Law Centre wrote an article proposing a "new standard for evaluating reasonable suspicion in "flight plus evasion" police stops justified by the United States Supreme Court in *Terry v Ohio*: a reasonable Black person standard that would explicitly take account of the perspective of a reasonable Black person."[145] Earlier, in 1992, an article considered how courts in the United States were replacing the "reasonable person" standard with a "reasonable woman test" in sexual harassment cases.[146]

187 In Canada, Professor Mayo Moran of the University of Toronto has written a comparative perspective on the reasonable person.[147] Professor Moran notes:[148]

> More recently, critical race theorists, queer theorists, and others concerned with the impact of the criminal process on those who are marginalised or disadvantaged, have also focused attention on the effect of legal standards including the reasonable person.

188 Also in Canada, in 2016, a group of female academics re-wrote six Supreme Court of Canada decisions to reflect a more feminist perspective. The movement has inspired similar projects in Australia, the United Kingdom and Ireland, as well as in New Zealand, with a book published in 2017, co-edited by a number of prominent female legal academics re-writing a number of famous New Zealand judgments such as *Lankow v Rose* [1995] 1 NZLR 277.[149] A commentator in the Irish project, Senator Ivana Bacik, states that the project was necessary as it "questions what we take as a neutral reading of law and rules and argues there are alternative, equally valid readings that take into account gender bias in the making and application of law."[150] In assessing

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140 *McBride v Motor Vehicle Division of Utah State Tax Commission* 977 P 2d, 473 (Utah 1999).
141 Utah Code Ann §§ 41-1a-411(2) (1993); and Utah Admin Code R873-22M-34 §§ 41-1a-411(2) (1995).
142 Cited in Andre Douglas Pond Cummings "'Lions and Tigers and Bears, Oh My'. Or 'Redskins and Braves and Indians, Oh why'?: Ruminations on McBride v. Utah State Tax Commission, Political Correctness and the Reasonable Person" (1999) 36 California Western Law Review 1.
143 At 13.
144 At 16.
145 Mia Carpiniello "Striking a Sincere Balance: A reasonable Black Person Standard for 'Location Plus Evasion' Terry stops" (2001) 6(2) Michigan Journal of Race & Law 355.
146 Saba Ashraf "The Reasonableness of the 'Reasonable Woman' Standard: An Evaluation of Its Use in Hostile Environment Sexual Harassment Claims under Title VII of the Civil Rights Act" (1992) 21(2) Hofstra Law Review 483.
147 Mayo Moran "The Reasonable Person: A Conceptual Biography in Comparative Perspective" (2010) 14(4) Lewis and Clark Law Review 1233.
148 At 1250.
149 Dominic McGrath "The Feminists Rewriting Legal History, One Case at a Time" *University Times* (online ed, Ireland, 22 October 2016); and Elisabeth McDonald and others (eds) *Feminist Judgments of Aotearoa New Zealand, Te Rino: A Two-Stranded Rope* (Hart Publishing, Oxford, 2017).
150 McGrath, above n 149.

different "reasonable person" standards and how the standard can be adapted or evolved, courts throughout the world are also considering alternative readings of the law.

189 In Australia, the courts have considered who the ordinary person is in the context of the defence of provocation.[151] In the case of *Masciantonio v the Queen*, the High Court of Australia considered the appeal of an Italian man who had been convicted of the murder of his son-in-law.[152] In the dissenting judgment, McHugh J states:[153]

> The ordinary person standard would not become meaningless, however, if it incorporated the general characteristics of an ordinary person of the same age, race, culture and background as the accused on the self-control issue. Without incorporating those characteristics, the law of provocation is likely to result in discrimination and injustice. In a multicultural society such as Australia, the notion of an ordinary person is pure fiction. Worse still, its invocation in cases heard by juries of predominantly Anglo-Saxon-Celtic origin almost certainly results in the accused being judged by the standard of self-control attributed to a middle class of Australian Anglo-Saxon-Celtic heritage, that being the stereotype of the ordinary person with which the jurors are most familiar.

190 The Judge goes on to state "real equality before the law cannot exist when ethnic or cultural minorities are convicted or acquitted of murder according to a standard that reflects the values of the dominant class but does not reflect the values of those minorities."[154]

191 That case, and other examples cited are from the 1990s, and with superdiversity deepening since then, in countries such as New Zealand, the United States, Canada and Australia, where there will increasingly be no majority ethnic group, the issue about reflecting on the standard of the ordinary reasonable person will remain.

192 As Professor Moran notes, however, that is a difficult task:[155]

> The concern is that reasonableness, regardless of what kind of person it is attached to, is so inextricably tied to what is commonly done that it can never be rehabilitated. And, if there is no way to disentangle the reasonable and the normal, then only dispensing with reasonableness will make it possible to develop a standard appropriately attentive to equality and distinct from the problematic reliance on "ordinariness."

193 We recommend that judges reflect on the impact of culture and New Zealand's growing superdiversity when applying legal tests which require them to consider the behaviour of a hypothetical "reasonable person" in the circumstances of the parties. In an increasingly superdiverse country, it is important to consider the possibility that a reasonable person from an immigrant culture (who now constitute a significant proportion of New Zealand's population) might behave quite differently to a European or Māori New Zealander in the same circumstances.

Interpreters

Recommendation 8: Professionalisation

194 We recommend that court interpreting be recognised as a profession and that this sits within a system of regulation, accreditation and professional pay rates. This is vital to ensure that there are adequate numbers of qualified and experienced court interpreters practising in New Zealand. Similarly, translation of documents into English, which requires different skills to interpreting, needs to be regarded as a profession, with a proper recognition of the unique skills required to perform this task.

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151 Note that in 2005, the defence of provocation was repealed for offences that occurred after that date: see Crimes Act 1958, ss 3B and 603.
152 *Masciantonio v the Queen* [1995] HCA 67.
153 Per McHugh J.
154 Ibid.
155 Moran, above n 147.

Recommendation 9: System-wide and connected approach to providing interpreter services to courts

195 We recommend taking a system-wide and connected approach to providing interpreter services to CALD litigants across courts and the Ministry of Justice, utilising either the Trans-Tasman or New Zealand Certification system, described below, to create a list of suitably certified and qualified court interpreters the Ministry can draw on. To remove any disconnect between the organisers of interpreting services and the courtroom itself, we recommend moving the responsibility for arranging interpreters from the Ministry Central Processing Unit to the court registry. This is consistent with the Australian Recommended National Standards for Working with Interpreters, which provides that specific members of the registry should be designated as having responsibility for coordinating interpreting arrangements.[156]

196 We recommend that counsel get more proficient at estimating hearing time in cases requiring interpreters, to ensure that there is sufficient time allowed to hear a case with an interpreter. This is to ensure that cases do not have to be held over, and to ensure that lawyers and prosecutors do not feel under pressure to reduce the amount of evidence they are presenting in court to save time, and to prevent juries taking out their frustrations on the accused where cases run over time.

197 We recommend that the current system whereby the parties arrange and pay for interpreters in civil cases be changed so that interpreters are arranged through the court in every case. Paying for interpreters for civil as well as criminal cases is justified by the need to support the judge to administer justice for all and to ensure that there is not a greater cost imposed on CALD to access justice.[157] We also recommend that the Ministry of Justice consider funding of translations required when affidavits are filed in a foreign language. If this recommendation is not implemented, we recommend that the Ministry of Justice consider a model similar to that used in the Federal Courts in Australia, whereby those who are entitled to a reduction in court fees or are represented by a pro bono scheme are able to receive publicly funded interpreting services, with the Registrar making the decision as to entitlement.[158]

Recommendation 10: Officers of the Court

198 We recommend that interpreters be appointed as officers of the court. Interpreters are required to assist the judge, and this essential change makes it clear that interpreters are responsible to the court and to prevent the perception arising that they are responsible to the parties. This is especially important if parties in civil disputes needing interpreters are required to continue to appoint and fund their own interpreters. Making interpreters officers of the court will also allow judges to direct interpreters to provide extra assistance to those witnesses and parties they consider need more help understanding the process.

199 As noted by an American Spanish interpretation academic at Virginia Commonwealth University:[159]

> People think the interpreter is just there for the person who doesn't speak English. Maybe it's the defendant, maybe it's the witness. But people forget the interpreter is there for the benefit of everyone. So the lawyers can do their job. So judges and juries can make good decisions.

200 Further, because a person may speak a second language, it does not mean that they have a sufficiently wide vocabulary or grasp of the technical legal language to interpret in court. This is

156 *Recommended National Standards for Working with Interpreters in Courts and Tribunals* (Judicial Council on Cultural Diversity, 2017) at [8.2].
157 In *Worldwide Holidays Ltd v Wang* [2019] NZHC 2218 at [67], one of the defendants was unable to afford an interpreter and therefore did not have one available to her at the hearing.
158 Federal Circuit Court of Australia "Interpreter Policy" (10 August 2018) <www.federalcircuitcourt.gov.au> at [7].
159 "How bad translation by court interpreters can turn misunderstanding into injustice" *PBS News Hour* (online ed, 17 August 2016).

particularly acute where an individual has knowledge of the language from speaking it at home, but not from a formal education in the language.[160]

201 In order to achieve this, New Zealand can either adopt a Trans-Tasman certification or qualification system for interpreters, or New Zealand could develop its own system. We recommend that the Ministry of Justice consider, explore and implement one of these options.

Recommendation 11, Option 1: Trans-Tasman certification system

202 In Australia, the National Accreditation Authority for Translators and Interpreters (NAATI) is used. NAATI is a national system of certification of all interpreters in Australia. Interpreters have to meet certain requirements before being certified, with different levels of certification required to perform different interpreting roles. For example, there is a "Certified Specialist Interpreter – Legal" certification level. NAATI Certification is currently recognised in New Zealand, and the NAATI assessment can be undertaken in New Zealand, and could therefore be applied in New Zealand for all court interpreters if the Ministry of Justice adopted this option. Certification gives the courts "a known quantity" so that the court is aware of the level of skill and experience of an interpreter.[161]

203 The Ministry of Business, Innovation and Employment, coupled with the Department of Internal Affairs have been working on a "Language Assistance Services Project" since 2015. The latest phase of this project from 2020-2021, includes phased implementation of NAATI accreditation for public sector language practitioners, with the introduction of "new professional standards and certification requirements for interpreters and translators operating in the public sector to lift the quality and consistency of services".[162] The project aims to have full implementation of NAATI by 2023 for public sector language practitioners.[163] Therefore, the NAATI framework will already be in place and the courts could adopt the framework alongside the public sector over the coming years. We have been advised that the Ministry of Justice are monitoring the work of the Ministry of Business, Innovation and Employment, and that it is "keen to be involved to ensure face to face interpreters are available for providing their services in the unique courts and tribunals environment".[164]

204 NAATI has the ability to consider complaints about accredited interpreters.[165] This would allow the certifying agency to have oversight over complaints about its interpreters and ensure training and improvement measures are put in place where necessary. We have recommended below that if this model is adopted, the accreditation agency in New Zealand should similarly have the ability to consider complaints about accredited interpreters.

Recommendation 11, Option 2: New Zealand certification system

205 If the Ministry of Justice chose to implement a New Zealand Certification or qualification system, we recommend a requirement that only qualified or accredited interpreters under this national qualification be used where an interpreter is required to be provided by the court for a litigant or witness in both civil and criminal trials. We also recommend the development of an ongoing quality assurance system for interpreters holding this qualification, for instance, by way of a peer review or observation in court. If this model is adopted we similarly recommend that it include an independent complaint handling body.

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160 An American interpreting teacher has said that
> … skipping unfamiliar words or words without a direct English translation might work for low-stakes situations, but it doesn't work in the courtroom. Not understanding nuances, especially legal nuances, can cause trouble in court.

See *PBS News Hour*, above n 159.

161 *PBS News Hour*, above n 159.

162 Immigration New Zealand "Language Assistance Services Programme – what you need to know" (August 2019) <www.immigration.govt.nz>.

163 Immigration New Zealand "Language Assistance Services Project Implementation Diagram" <www.immigration.govt.nz>.

164 Email from Anton Youngman (Manager Analytics & Insights at the Ministry of Justice) to Mai Chen (Managing Partner, Chen Palmer) commenting on draft report (10 October 2019).

165 National Accreditation Agency for Translators and Interpreters "NAATI Complaints Policy" (May 2019) <www.naati.com.au>.

Recommendation 12: Use of qualified interpreters

206 In New Zealand, there are currently a limited number of training providers that offer interpreting qualifications. The Auckland University of Technology offers an Interpreting Major for the Bachelor of Arts Degree, as well as Graduate Diplomas in Arts in Translation and Interpreting. The University of Auckland offer postgraduate qualifications and a Postgraduate Diploma in Translation Studies. Lastly, Victoria University of Wellington offer a MA Literacy Translation Studies and a Master of Intercultural Communication and Applied Translation.

207 However, anecdotal evidence from our interviews shows that there are relatively few qualified interpreters practising in New Zealand. We recommend that Immigration New Zealand add interpreting to its Long Term Skills Shortage List, or otherwise consider how to attract qualified and experienced interpreters to migrate to New Zealand.

208 In *Abdula v R*, the Supreme Court upheld the approach taken by the Supreme Court of Canada in *Tran's case*, referring to that Court's finding that there are no universally accepted standards for assessing competency of an interpreter, and that where there was a legitimate reason to doubt the competency of a particular interpreter, there should be an inquiry into the interpreter's qualification. The Supreme Court said "*the Tran* approach is desirable as part of the means by which the court discharges its duty to ensure at all times that the interpretation being provided is in compliance with the accused's rights".[166] We understand that the use of qualified interpreters will not be possible in every case, such as for the rarer languages where there are fewer (or no) qualified interpreters available. We recommend that the accreditation system utilised be flexible and adaptable, as in Australia, and allow for a lower standard of accreditation for such rarer languages, if necessary.[167]

Recommendation 13: Duty interpreters

209 We recommend that the Ministry of Justice consider implementing a system of duty interpreters, who will be certified as court interpreters by the certifying agency that the Ministry of Justice adopts. A group of well-qualified full-time interpreters could be employed by the Ministry of Justice to provide interpreting services as and when they are required. This will enable them to become experts in court interpreting. Duty interpreters will be supplemented by other accredited interpreters where necessary, for example in order to ensure an adequate "match" with the person requiring an interpreter or for rarer languages where there is no duty interpreter available.

210 This would help to ensure that the court has ready access to qualified and experienced interpreters, who will be available to translate oral evidence for judges and hearings. These duty interpreters will also be able to provide ad hoc translation services of documents for judges where a formal translation is not available (although we acknowledge that the skills required to translate documents are different to those required to orally interpret). It will also enable these interpreters to become experts in court interpreting. When the services of the duty interpreter are not required by the court, the duty interpreters would be able to prepare for upcoming trials.[168]

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166 *Abdula v R* [2011] NZSC 534, [2012] 1 NZLR 534 at [50], referring to *R v Tran* [1994] 2 SCR 951, (1994) 117 DLR (4th) 7.

167 This is found in Judicial Council on Cultural Diversity, above n 156. These recommend that where "NAATI professional interpreters are reasonably available, they should be employed". The Standards divide all languages into Australia into four tiers, based on NAATI data on the number of accredited practitioners for each language. Tier A languages include Mandarin and Cantonese, and the Standards state that Courts should always employ interpreters with the appropriate NAATI accreditation for such languages (although the standards do grant the Court the ability to allow qualified, non accredited interpreters to interpret if the interpreter can demonstrate they have the requisite qualifications). For languages in the lower tiers, i.e. those with fewer interpreters' available, different standards apply, and these standards are clearly defined. This is a pragmatic solution where interpreters are needed in rarer languages, such as Burmese, and some Aboriginal and Torres Strait Islander Languages.

168 This recommendation is similar to the Diversity Services Unit in New South Wales, as well as the Cultural Diversity Committee in Tasmania, which provide advice to the Department of Justice on improving access to justice for disabled and CALD parties: Judicial Council on Cultural Diversity, above n 35, at 34 and 67.

Recommendation 14: Pay rates for interpreters under certification system

211 We recommend that the adopted National (or Trans-Tasman) accreditation system set minimum pay rates for civil interpreters, to help attract and retain well-qualified interpreters, and to ensure that interpreting is considered a viable and attractive profession.

212 The Witnesses and Interpreters Fees Regulations 1974 needs to provide for the payment of all interpreters needed by parties in criminal and civil cases, to ensure that judges can adduce evidence adequate to make findings and decide a case, and to ensure that all parties can get equal access to justice without some having to pay more to get it.

213 At present, the 1974 Regulations apply to interpreters for the Crown in any judicial proceedings, whether civil or criminal, and Schedule A, clause 2 of the Regulations allows for a payment of $25 per hour, and a maximum payment per day of $175. These rates have not been updated since 1996 and their low level could appear to reflect the low status of interpreters, although Dr Henry Liu has said that some courts do augment the payment for interpreters above the rates in the 1974 Regulations.[169]

214 We recommend that further investigation be undertaken to ensure that the payment rates of interpreters is tied to other players in the court system where comparable expertise is required, or where the importance of the role is comparable. For example, payment rates for interpreters could be tied to legal aid rates, and those rates could be reviewed on a regular basis. As is the case for legal aid, there should be differing rates that can be applied depending on complexity.

Recommendation 15: Training for interpreters

215 A common theme among the literature and interviews was the need for interpreters to be inducted and trained in courtroom process in order to be more effective. We recommend that this training should be provided as part of the new national qualification or accreditation we have proposed.

216 As the Australian *Recommended National Standards for Working with Interpreters in Courts and Tribunals* notes:[170]

> Where the court is responsible for the engagement of interpreter, either directly or through an interpreting service, interpreters should be provided with induction and continuing training, either by the court or interpreting service, to ensure that interpreters understand their role as officers of the court.

217 We recommend that interpreters should receive training on cultural nuances and issues as part of the new national qualification or accreditation we have proposed.

218 We further recommend that frontline court staff, administrators, judicial officers and judges should receive training on the role of an interpreter and how to conduct cases involving interpreters, the interpreter's duty to clarify issues during interpretation, requirements for establishing an interpreter's credentials, and available technologies to assist CALD litigants.[171]

Recommendation 16: Development of an interpreting protocol

219 We recommend that the current Ministry of Justice Guidelines on interpreting be reworked into a formal interpreting protocol across the Ministry of Justice and courts, utilising the new certification system adopted from the above options. We were informed by one interpreter interviewee that the Ministry of Justice had developed an interpreting and translating charter in conjunction with the New Zealand Society of Translators and Interpreters (NZSTI), but that the Ministry was no longer actively pursuing its obligations under the charter.[172]

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169 Email from Dr Henry Liu (Interpreter, former National President of NZSTI and 13th President of the International Federation of Translators) to Mai Chen (Managing Partner, Chen Palmer) commenting on draft report, 15 October 2019.
170 Judicial Council on Cultural Diversity, above n 156, at 52.
171 *Strategic Plan for Language Access in the California Courts* (Judicial Council of California, 2015).
172 Interview with Henry Liu, Interpreter, NZSTI (Mai Chen, Auckland, 17 June 2019) transcript provided by Superdiversity Institute.

220 Under the charter, the Ministry of Justice would have delegated the assessment of interpreters' competency before appointment and the provision of training and professional development of interpreters to the NZSTI, and delegated dealing with complaints against interpreters to a joint NZSTI/Ministry of Justice committee, with the Ministry of Justice providing induction training to interpreters and resources to the NZSTI and the committee. The Charter also provided guidelines for interpreters and a complaints resolution process.

221 We consider that the formal interpreting protocol would fill many of the same functions as the NZSTI charter proposed to fill, in setting out guidelines for interpreters and providing a mechanism to resolve complaints. It would be implemented and monitored by the Ministry of Justice in consultation with the new accreditation system body established.

222 We recommend that the new interpreting protocol should contain more in-depth guidance on the interpreter's role in the courtroom, particularly in terms of addressing CALD litigants' specific cultural communication needs. While the current Ministry of Justice Guidelines on interpreting specify that an interpreter must "inform the court or tribunal if a statement or question cannot be accurately interpreted because of cultural or linguistic differences between the 2 languages",[173] we recommend that this requirement should be extended to cover all aspects of cultural communications, both verbal and non verbal.[174]

223 We recommend the protocol would also set out continuing professional development requirements for interpreters, to ensure high levels of continuing competence.

Recommendation 17: Complaint mechanism

224 The current procedure for complaints about interpreters is to the Ministry of Justice, with the judge presiding over a trial also having the ability to consider complaints during the course of a proceeding. The standard of interpretation is also able to be raised as a ground of appeal in criminal cases.

225 We recommend that an independent complaints handling body be set up to consider complaints made about the standards of interpreting in court. In Australia, NAATI have the ability to consider complaints about accredited interpreters,[175] and in New Zealand a similar system could be put in place whereby the accrediting agency that is adopted is able to consider complaints about the quality and service provided by interpreters. Steps should be taken to ensure that the complaint body that is established is adequately resourced, and that the panel that hear complaints include representatives from the judiciary, the Ministry of Justice, and the interpreting profession. It will also require clear terms of reference as well as the funding and resources necessary to properly investigate complaints, such as through calling witnesses and seeking advice from external independent experts, if needed. The complaint body will also need the authority to enforce its decisions.

226 This will allow complaints from judges themselves to be considered (the Ministry of Justice has advised that complaints to the Ministry's internal complaint body are often from judges themselves).[176] It will also ensure that the accrediting agency retains oversight over all complaints about court interpreters and can better assess where additional training or development is needed across the profession. The complaint body is independent and will have the technical knowledge required to fairly assess complaints about the standard of interpretation.

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173 Ministry of Justice "Guidelines for interpreters" (20 September 2016) <www.justice.govt.nz>.

174 In the Northern Territory courts, there is an Interpreters Protocol in place that provides "guidance to the Court, interpreters and legal practitioners regarding the engagement of interpreters, the professional duties of interpreters, and the role of interpreters in Court." It has been adopted in other jurisdictions in Australia: Judicial Council on Cultural Diversity, above n 35, at 50.

175 National Accreditation Agency for Translators and Interpreters, above n 165.

176 Email from Anton Youngman (Manager Analytics & Insights at the Ministry of Justice) to Mai Chen (Managing Partner, Chen Palmer) commenting on draft report (10 October 2019).

227 If an independent complaint body were implemented, this would not detract from or supersede the ability of the presiding judge to receive a complaint or concern about an interpreter during the course of a proceeding and handling it accordingly. Adoption of an independent complaint handling body would also not remove the ability for the quality of interpretation to be taken as a ground of appeal in criminal cases.

Recommendation 18: Where interpreters stand/sit in court

228 We recommend that a decision is made as to where interpreters should sit or stand in court and that there is clear guidance given to judges and all parties as to where that should be. There is not always sufficient room in the witness box for the interpreter to sit next to the witness, unlike in Australia, and there is currently no uniform place for interpreters to sit. In the long term, we recommend that a designated place for interpreters to sit be considered when future courtrooms are designed. For instance, in Japan, interpreters have a designated place to sit next to the stenographer. We also recommend that the interpreter be provided with a desk and stationery during a trial, and that they be given access to a rest and break room during court adjournments, separate from the witnesses. This allows them to remain independent and also not to come under undue pressure from witnesses or parties.

Recommendation 19: Collection of better data about interpreters

229 We recommend that better data is collected by the Ministry of Justice on the use of interpreters in courts. The purpose of this data gathering is to enable the Ministry and the courts to have a better gauge on the language needs of its users, and to more accurately predict which languages require support in the future, in order to be prepared and to build capacity. This data would then feed into interpreter recruitment and appointment.

230 We also recommend that this data would feed into court staff recruitment policies at the Ministry of Justice, identifying gaps where bilingual court staff is needed. The projections of this data on the changing demographics of court users will also inform the court of future CALD needs.[177]

231 We recommend collecting data on the numbers of interpreters in New Zealand, what languages they can interpret and translate, and their qualifications, so that the Ministry of Justice can ascertain whether there are sufficient numbers available to service the current and growing needs for their services in the courts.

232 We recommend not only collecting data on current users of court interpreting services, but also collecting data on possible future users and emerging languages, to enable the interpreting services to evolve with the demographics of its users.[178] We recommend that data on emerging languages would be collected from sources outside the courts themselves, such as the New Zealand Census, school systems, health departments, social services and local community based agencies.

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177 This is in accordance with the recommendation of the *Strategic Plan for Language Access in the California Courts* that: Any efforts to improve the provision of language access services must include a more comprehensive mechanism for collecting data on LEP (Limited English Proficiency) communities and their potential need for Court services. Traditional sources of demographic data underestimate the existing numbers of LEP residents in the state, in particular with regard to linguistically isolated communities, migrant workers, and speaker of indigenous languages. Similarly, these data sources do not adequately track emerging languages: Judicial Council of California, above n 171.

178 The Australian Judicial Council on Cultural Diversity suggests the following method of developing better data on emerging languages:

> … registry staff could undertake snapshot surveys, one day a fortnight, inquiring of persons using registry services on that day what language they speak at home and whether they feel that they have trouble understanding what lawyers and service providers say to them… Courts should include data elements in case management systems to indicate whether litigants or witnesses need interpreters and clearly mark case files when a person needs an interpreter

See Judicial Council on Cultural Diversity, above n 156.

Ministry of Justice

Recommendation 20: Translated guidelines and information

233 Translated material available on the Ministry of Justice website in Mandarin includes guidance on the duty lawyer service, legal aid, and guides for victims of crime, family violence translations in simplified and traditional Chinese and information about duty lawyers. The Ministry of Justice also has a list of translations into Chinese terms related to family violence available on its website. These guidance documents are all in PDF format and were found by using "Mandarin" or "Chinese" as search terms. They therefore may be difficult for non-English speakers to locate.

234 We recommend that the Ministry of Justice develop simple guidelines in Chinese, available in both traditional full form and simplified Chinese characters for Chinese parties in courts and that this guidance material is made available in courts throughout the country and accessible on the Ministry of Justice website. In particular, we recommend that guidance material is developed for self-represented litigants and for defendants, about the court process, their role in it and about sentencing. In the long term, we recommend that both traditional full form and simplified Chinese characters are options users can select to read all of the information available on the Ministry of Justice website.

235 We could find no guidance on the Courts of New Zealand website in Chinese. We note that this website is part of Courts, not part of the Ministry. We similarly recommend that the judiciary consider making information from the Courts of New Zealand website available in both traditional full form and simplified Chinese characters. The Judicial Office Communications Unit of the Judicial Office for Senior Counts has recently released a short video, titled 'Our Courts', that is available in English, Te Reo and Mandarin, and provides easily understood information about the courts as a separate and independent branch of government. It is hoped the video will will make the courts more accessable to, and better understood by the increasingly diverse communities they serve.

Recommendation 21: Litigants-in-person

236 Given the observations from the judges interviewed regarding the challenges faced by CALD self-represented litigants, we recommend that guidance be developed on Chinese or CALD parties being able to meet a certain IELTS (International English Language Testing Scheme) level before they consider representing themselves, and that this be provided to any litigant who has indicated that they wish to self-represent.[179] This would not be mandatory, but would offer guidance for CALD parties about what is likely to be in their best interests. Coupled with guidance developed by the Ministry of Justice in Mandarin and other languages, this would assist in ensuring that CALD self-represented litigants are aware of the issues and challenges of self-representation in the High Court as a non-native speaker of English.

237 In *Fahey v R*, the Court of Appeal made a clear finding that courts have an implied power to appoint standby counsel to assist self-represented defendants.[180] The power is discretionary, and *Fahey*, adopting the earlier Court of Appeal decision of *R v Hill*, establishes that courts have the ability to appoint standby counsel whenever a judge "considers that counsel will assist significantly."[181]

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179 IELTS is jointly owned by Cambridge English Language Assessment (a department of Cambridge University), the British Council (part of the UK Government) and IELTS Australia Pty Ltd. IELTS Australia Pty Ltd is a wholly-owned subsidiary of IDP Education Limited. Cambridge has primary responsibility for preparing the test and ensuring the validity and reliability of the test. IELTS Australia and the British Council deliver the IELTS Test to test takers and also participate in the preparation processes. The IELTS test is developed by some of the world's leading experts in language assessment. It is the world's most popular English language proficiency test for higher education and global migration, with over 3 million tests taken in the last year. It assesses all of a candidate's English skills – reading, writing, listening and speaking– and is designed to reflect how he or she will use English for study, at work, and in everyday life. IELTS is the most widely accepted English language test that uses a one-on-one speaking test to assess a candidate's English communication skills. IELTS has an excellent international reputation, and is accepted by over 10,000 organisations worldwide, including schools, universities, employers, immigration authorities and professional bodies.

180 *Fahey v R* [2017] NZCA 596 at [105]. *Fahey* provides for a detailed discussion about the difference between amicus curiae (who assist the court) and standby counsel (who assist self-represented defendants).

181 At [53]; and *R v Hill* [2004] 2 NZLR 145 (CA) at [57].

Therefore, the case establishes that judges should consider whether the use of standby counsel would assist the court significantly where defendants are self-represented. We recommend that the judiciary give more active consideration to the use of standby counsel to assist CALD self-represented defendants in criminal cases.

238 Guidance for defendants about sentencing translated into traditional full form and simplified Chinese characters is also crucial as our research has shown that defendants from PRC can misunderstand the law and cultural norms that prevent them from pleading guilty (where this may be an appropriate choice) and which prevent them from showing remorse. This can contribute to them receiving higher sentences than might otherwise have been the case.

Recommendation 22: CALD witnesses

239 We recommend that the Ministry of Justice develop a briefing on the New Zealand legal system, and the role of witnesses giving evidence, to be available in both traditional full form and simplified Chinese characters to help CALD witnesses, including those traveling to New Zealand from PRC to give evidence in court.

Recommendation 23: CALD jurors

240 We recommend that the Ministry of Justice develop guidelines for all jurors and potential jurors that would be suitable for CALD jurors, to ensure that everyone adequately understands their role and function (including why jury service is important), and the importance of having a requisite level of English language capability.

241 The Contempt of Court Act 2019 has recently passed, with one of its purposes to "enable courts to make certain orders and impose certain sanctions" so that "jury verdicts are based only on facts admitted or proved by properly adduced evidence after free, frank, and confidential jury discussions, and the finality of verdicts is protected".[182] Section 13 applies to jurors who "intentionally investigate" or research information relevant to the trial, where they knew or reasonably ought to have known that the information is or may be relevant to the trial.[183] If the judge finds the juror guilty beyond reasonable doubt under this section they must not convict the person, but may impose a fine not exceeding $5,000. It is therefore important that all jurors are made aware of these restrictions, particularly CALD jurors who are more likely to utilise the internet or seek assistance from friends and family to help them understand the trial they are serving on, due to their different cultural background and lower English language capability.

242 This highlights the need for ensuring there is accessible information available for all jurors (including CALD jurors) about the role of serving on a jury and the rules they have to follow while doing so.

Recommendation 24: Collection of better data about jurors and litigants

243 We recommend that the Ministry of Justice collect data on the reasons for juror excusals, in particular excusals related to English language capability. Data should also be collected on the ethnicity of those serving on juries. This will allow the Ministry of Justice to better assess the numbers of CALD serving on juries, and to identify whether further work is required to ensure accused are judged by a true jury of their peers.

244 We recommend that the Ministry of Justice collect ethnicity data for all parties in the courts. We further recommend that the Ministry of Justice collect ethnicity data on the ethnicities of litigants-

182 Contempt of Court Act 2019, s 3(2)(b).

183 Section 13(6) establishes that information relevant to the trial means: information about the defendant, any person involved in the events which are the subject of the trial, any person involved in the trial, including a witness, the events that are the subject of the trial, the law relating to the trial and the law of evidence. It also makes it clear that investigate or research includes to "search any information source, including the Internet" and asking another person to do so.

in-person.[184] We also recommend that the Ministry of Justice collect data on minimum non-parole periods and the ethnicities of defendants sentenced, in order to better track themes and trends as to the cultural factors that may influence the decision of whether to impose a minimum non-parole period.

Recommendation 25: Translated signage in courts

245 We recommend that the Ministry of Justice consider providing signage and material in courts in more languages, based on statistics around the most commonly spoken languages in a particular region. We understand that this recommendation will have to be considered by the Ministry of Justice in conjunction with the judiciary.

Recommendation 26: Growing cultural capability

246 We recommend that the Ministry of Justice ensure that the staff employed in courts reflect the ethnicities of the general population to grow trust and confidence in the court system and also to grow the cultural capability of the organisation. It also grows the capability of Ministry staff to understand and deal with issues CALD parties raise for the court system.[185] We also recommend cultural capability training for staff members employed in courts.[186]

Recommendation 27: Adoption of relevant recommendations from Australia

247 We recommend that the Ministry of Justice consider implementing, in conjunction with other relevant public agencies such as the Ministry of Business, Innovation and Employment and the Office of Ethnic Communities, recommendations and improvements that were identified from justice system reviews in Australia, including:[187]

a) The development of legal literacy strategies to provide targeted community education programmes to newly arrived communities. In Australia, these have been implemented in the family law jurisdiction, and have included consultations with local communities to identify legal information needs and misconceptions of the law, collaboration with community members at all stages, partnerships between migrant services and other local community organisations and a two-way learning exchange for service providers and migrant communities. While this recommendation was particular to the Family Court in Australia, these measures would be beneficial in New Zealand in the higher courts, particularly in light of the increased volume of Chinese parties in the High Court at Auckland in particular. However, legal literacy is a problem for all New Zealanders to a greater or lesser extent, and the development of legal literacy strategies across all demographic groups would be beneficial;[188]

b) The establishment of information and referral "kiosks" in particular courts to link CALD litigants with support services. Again, this recommendation was specific to the family law jurisdiction, however, it could be equally beneficial to introduce such "kiosks" in the Auckland courts to assist CALD parties to find publically available support services and face-to-face assistance, such as Community Law and the Citizen's Advice Bureau;[189]

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184 In Australia, data is collected on the culture of litigants as well as the areas of law that matters come before the courts. This data collection will allow the Ministry of Justice to identify themes and trends on the regions and types of law that have the highest volume of Chinese and CALD litigants: Godwin, above n 11.

185 This was one recommendation made in Access to Justice Taskforce, above n 38, at 154. It was also referred to in Judicial Council on Cultural Diversity, above n 35. In the Australian Capital Territory courts, there is a Work Experience and Support Programme, which offers CALD individuals the opportunity to train and gain work experience in the Public service (at 29). In the United Kingdom, the Supreme Court has an Equality and Diversity Strategy, to grow the diversity of staff and to ensure that the ethnicity of its staff reflect the diversity of the British population. One of the aims of this strategy is to ensure equal access to justice for diverse clients of the court: UK Supreme Court "Equality and Diversity Strategy" <www.supremecourt.uk>.

186 In the Federal Court of Australia, such training is provided through a cultural competency e-learning module, which could be adopted by the Ministry of Justice in New Zealand. Cultural Awareness Training is also provided by the Tasmanian Department of Justice, when funds allow, along with a TAFE qualification in Cultural Competence for staff: Judicial Council on Cultural Diversity, above n 35, at 22 and 65.

187 Access to Justice Taskforce, above n 38; and *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds* (Family Law Council, 2012).

188 Family Law Council, above n 187, at 49.

189 At 95.

c) Consultation with front-line staff, such as court staff and client service staff, to obtain their suggestions for actions that will assist CALD clients. In Australia, this consultation has resulted in translation of particular guidelines, including the affidavit guide, into relevant languages;[190]

d) Introducing a policy similar to the "Community Language Allowance Policy" in the Federal Courts in Australia, whereby staff who speak another language and have regular client contact are encouraged to develop and use their language skills with clients; [191] and

e) Developing "ethnic naming practices" guidance, which will provide information on the order in which a name appears, how children are named, if and how a woman's name changes after marriage, divorce or death of a partner, and the pronunciation of names, for different commonly used languages.[192]

New Zealand Law Society/Lawyers

248 The Superdiversity Institute discussed the recommendations below with Helen Morgan-Banda, Executive Director; Glenda Macdonald, General Manager Representative and Auckland Branch Manager; and Gabrielle O'Brien, Acting General Manager, Law Reform and Sections from the New Zealand Law Society (the Law Society). They said that these recommendations were timely as they fit in well with a number of initiatives the Law Society is currently working on, including a mentoring pilot in Auckland and Canterbury-Westland.

Recommendation 28: Cross-cultural communication training for lawyers

249 We recommend that the Law Society run Continuing Professional Development (CPD) Seminars on cross-cultural communication, similar to seminars run by the IJS, to build cultural capability throughout the profession. Growing cultural capability and Asia capability is essential if lawyers are to properly understand their clients' behaviours and their instructions. In particular, it is important that lawyers receive training on the Chinese rule of law, business culture and the concepts of *guanxi* and *mianzi*, so that they can adequately take account of these cultural differences in advising their clients. If lawyers properly understand their clients' cultural background, assumptions and understandings of law, they will be better placed to understand their client's instructions and advise their client about the differences between their birth country and New Zealand's legal system. Cultural training will help lawyers to encourage their clients to settle disputes where this is in their best interests, as they will better understand the reasons why Chinese parties are reluctant to settle disputes. NZAL Lawyers and the Auckland branch of the Law Society held such a CPD session in September 2019 on "Chinese rule of law and how it differs to that found in New Zealand."

250 Associate Professor Godwin has written on techniques and strategies to assist lawyers when they engage in cross-cultural communications. These include increasing cultural awareness, being aware of your own culture and legal system so you can better understand how that influences the way you think and communicate, looking at the underlying meaning behind a word, communicating clearly and in plain English, communicating effectively through interpreters and preparation. These are all useful suggestions that could be incorporated into CPD sessions run by the Law Society.[193] Godwin says that "in a cross-border, cross-cultural context, lawyers add value not only by being culturally aware themselves, but also by helping clients to communicate in a more culturally appropriate manner, and by acting as a bridge for cultural understanding."[194]

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190 Judicial Council on Cultural Diversity, above n 35, at 14.
191 At 20.
192 At 21.
193 Andrew Godwin "Cross-Cultural Communications" (2014) 11 China Business Law Journal 89 at 92.
194 At 92. See also *R v Singh* [2019] NZHC 148, discussed below, in the *Lawyers' Perspectives* section.

Recommendation 29: Mediation and alternative dispute resolution

251 We recommend that all bodies which currently accredit mediators (AMINZ, Resolution Institute (former LEADR) and the Law Society) develop training and guidance for lawyers working with Chinese clients to enable lawyers to properly advise their client on how mediation and other alternative dispute resolution processes work in New Zealand, the differences between mediation in New Zealand and PRC, and the advantages of mediating a case rather than pursuing it through court. This will help to ensure that cases that are capable of being resolved through mediation or alternative dispute resolution are resolved without the parties pursuing their claim in court unnecessarily. We recommend that all bodies which currently accredit mediators develop cultural training for mediators, so that they can understand the differences in views and approaches to mediation for CALD people, and ensure that they can effectively mediate disputes involving CALD parties.

252 We also recommend that guidance is developed on mediation, and that this written guidance be made available in both traditional full form and simplified Chinese characters, so that CALD clients can educate themselves on the New Zealand approach to mediation and the non-litigation options available to them to resolve their disputes.[195] We also recommend that the Law Society, in conjunction with the Ministry of Justice and other bodies involved in the provision of mediation services consider a model to ensure that those participating in mediation are provided with an interpreter if one is required. We recommend that consideration be given to the provision of public funding for interpreters at mediation for those litigants who would otherwise be unable to afford one (as we have discussed above, this could be tied to whether they would be eligible for other funding, such as a reduction in court fees). At present, as far as we are aware, the only public funding provided for interpretation services at mediation is through publicly provided mediation services such as those provided by Employment Services at the Ministry of Business, Innovation and Employment, the Tenancy Tribunal, and the Family Dispute Resolution Service.

Recommendation 30: Collection of better data about practitioners

253 We recommend that, in addition to ethnicity data, the Law Society request data from lawyers on where they were born and how long they have lived in New Zealand. We recommend that the Law Society regularly analyse data on the areas of practice for lawyers of different ethnicities, as current data shows that lawyers of Chinese ethnicity in New Zealand are less likely to work in litigation and criminal law.[196] Regular data collection would help to identify any gaps and allow the profession to take steps to remove these gaps.

Recommendation 31: Application of a superdiveristy lens to Law Society resources for members of the public

254 We recommend that the Law Society apply a superdiversity lens to its resources for members of the public looking for legal representation, including:

a) Having versions of the pages where members of the public can find information about finding a lawyer available in both traditional full form and simplified Chinese characters;

b) Reviewing the accessibility of its website for the growing number of New Zealanders for whom English is a second language, to ensure it is easy for visitors to navigate and find information;

c) Better utilising the data that lawyers provide on languages they speak to allow Chinese parties to find Mandarin- and Cantonese-speaking lawyers close to where they live;[197]

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195 Such guidelines have been developed in the Northern Territory in Australia: Judicial Council on Cultural Diversity, above n 35, at 51.

196 Law Society figures show that the four areas of practice in which the highest proportion of Chinese lawyers do "some" work are Company (67.8 per cent), Property (60.5 per cent), Trusts (47.8 per cent), and Family (36.2 per cent): Geoff Adlam "Lawyer ethnicity differs from New Zealand population" *LawTalk* (3 August 2018).

197 The Law Society registry currently requests lawyers self-select languages that they are fluent in. In the Snapshot of the Legal Profession from 2018–2019, 208 lawyers self-reported that they spoke fluent Mandarin, which was the highest number followed by French.

d) Providing the means for members of the public to complain and engage with the Law Society in their own language, for example, through the provision of telephone interpreting services; and

e) Developing written guidelines available in both traditional full form and simplified Chinese characters, for Chinese clients about legal fees in New Zealand, to help lawyers reduce the risk of misunderstandings about fees, which would hopefully lessen the number of complaints received by the Law Society.

255 We recommend that the Law Society review and analyse complaints from or concerning CALD litigants/clients. If the Law Society could discern some recurring issues or themes from the complaints, these could be used both to educate lawyers on how to better serve CALD clients, and to provide CALD clients with information about the legal system in New Zealand which might avoid complaints being made based on misunderstandings about New Zealand's legal system and the role of lawyers under it.

Recommendation 32: Mentoring

256 A handful of the Asian lawyers (born in PRC and in Malaysia) interviewed spoke to the need for better support and mentoring for young Chinese lawyers.[198] This is particularly important in light of the emerging issue of small boutique Asian law firms with only Asian lawyers and Asian clients. It is important that young lawyers get a variety of work, and do not find themselves isolated and pigeonholed early in their career. This will enable them to be more effective and to better represent their clients, including Chinese and CALD parties.

257 The Law Society has recently launched a nine month mentoring pilot programme that will initially be tested and developed across two centres, comprising Canterbury-Westland and Auckland branches. The programme consists of mentors and mentees choosing their own delivery format – either through software matching via *Mentorloop* or by manual mentoring matching. The Law Society has advised that the mentoring programme is an opportunity to create more diverse and inclusive relationships. When registering for the programme mentees and mentors are asked to list objectives, skills and goals for the mentoring relationship. Cultural competence can be offered as a 'skill set' or listed as an objective or goal for the mentoring relationship. Lawyers from all areas of legal practice in the two centres have been invited to participate as a mentee or mentor in the pilot regardless of their stage of career, ethnicity, mode of practice, gender, or place of work. The nine month pilot programme will inform what will work best for a national programme, including how to ensure it is a culturally competent mentoring programme. The Law Society has advised that further enhancements may be made once the pilot is completed and reviewed.

258 We recommend that the Law Society utilise this pilot to develop mentoring programmes for the following:

a) Guidance for young Chinese lawyers on avoiding discrimination and stereotyping, both in court and when dealing with other lawyers, guidance on navigating through the challenges faced when representing Chinese clients as well as help with networking with the wider legal community, to ensure that young Chinese lawyers are not isolated;

b) To encourage Chinese lawyers to work or stay working in litigation, so that we can ensure that there are more Chinese judges in New Zealand in the future. More needs to be done to encourage Chinese lawyers to litigate, if their written and spoken English proficiency equips them to do so;

198 Interview with Anonymous, Lawyer (Mai Chen, Auckland, 17 June 2019); Interview with Anonymous, Lawyer (Lucinda King, Auckland, 8 July June 2019); and Interview with Samantha Hiew, Crotfield Law (Mai Chen, Auckland, 19 June 2019).

c) To ensure that Chinese lawyers work or stay working in the criminal law field, as anecdotal evidence from prosecutors suggest that they are more likely to leave to practise in more lucrative fields, such as commercial law. This also has flow on effects to appointing Chinese judges to the New Zealand judiciary who have criminal law expertise.[199] This is particularly necessary for Chinese lawyers not born in New Zealand, as the culture of New Zealand courts is a very foreign when compared to Chinese culture and Chinese courts; and

d) For lawyers working with criminal accused, both Chinese and New Zealand European. In an interview, Crown Prosecutor Steve Symon noted that New Zealand European lawyers representing Chinese accused may not adequately understand the instructions from their client, due to a language barrier, or understand why they have behaved as they have, due to a cultural barrier. Symon also noted that Chinese accused may be more likely to instruct a Chinese lawyer who is not familiar with criminal work, due to a pre-existing connection and their ability to speak Mandarin or Cantonese – e.g. the lawyer may be the family lawyer for property matters. It is important that both sets of lawyers receive mentoring and support to ensure that they are adequately equipped to provide fair representation for their client.

259 The need for mentoring and training for Chinese lawyers was also identified in a recent High Court case, where Whata J heard an appeal against the decision of the National Standards Committee. Justice Whata notes:[200]

> Relevantly, also, there is an evident cultural dimension to Mr Young's conduct with which I think many lawyers in New Zealand will be unfamiliar. It appears to me Mr Young brought to the underlying litigation his life experience in commercial dealings in China, which influenced his dealings not only with Mrs Z but with Mr D. While this provides no justification for his conduct in the litigation or subsequently, it helps inform our response to it and where we might target further practical training and education about, among other things, the norms that must be adhered to as practitioners of the law in New Zealand.

260 We also recommend that the Law Society and the profession work together to establish a group of practitioners who are skilled and experienced in advising Chinese clients, so that they can provide advice and assistance to lawyers who are lacking that experience, including through the mentoring pilot.

261 We recommend that the larger firms in New Zealand do more to recruit and retain Chinese lawyers, and also take steps to ensure that they are not pigeonholed into servicing only Chinese clients. This breadth of general experience is also necessary to allow Chinese lawyers to develop the skills required to later be appointed to the bench as judges, if that is a goal of theirs.

262 In addition to the above, we recommend that the Criminal Bar Association do more to encourage Chinese lawyers to either join or continue to practice in the criminal law field, and that the New Zealand Bar Association do more to encourage Chinese lawyers to litigate if they have sufficient English language skills.

Investigators and interviews

Recommendation 33: Interviews with CALD

263 While we note that the Police, in their Investigative Interviewing Suspect Guide, have some guidelines in relation to interviewing suspects from different linguistic or cultural backgrounds or with different religious beliefs,[201] we recommend that further guidance be developed that assists the Police and other investigators in how to interview CALD parties fairly.

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199 Interview with Steve Symon, Partner, Meredith Connell (Mai Chen, Auckland, 16 July 2019).
200 *Young v National Standards Committee* [2019] NZHC 2268 at [99]. This case is analysed in greater detail at [708]–[713] of this report.
201 See New Zealand Police "Police Investigative Interviewing Suspect Guide" at 32 (Obtained under Official Information Act 1982 Request), available at <fyi.org.nz>.

264 This further guidance should include reference to the fact that Chinese accused in particular may be more likely to state that their level of English language competency is high. This may be due to the cultural concept of face and deference and respect for authority. Chinese accused may also be more likely to agree to be interviewed even when it would be self-incriminating (as they may not understand what self-incrimination means). Investigating agencies should therefore ensure that there is access to quality interpreters when required.

265 We are pleased to note that the Police have developed a Multilingual Rights Caution document, and recommend that printed copies be available at every Police station. We recommend also that CALD interviewees be advised that they can request the assistance of an interpreter.

Recommendation 34: List of lawyers who speak different languages available at police stations

266 We recommend that the list developed by the Law Society of lawyers who speak different languages be available at Police stations for criminal accused to quickly access legal advice in their own language if required. We note that the Police Detention Legal Assistance service does already state where rostered lawyers speak a second language.

Cross-agency recommendations

Recommendation 35: Judiciary to reflect New Zealand's superdiversity

267 We recommend that the New Zealand Law Society, the Ministry of Justice and the Criminal Bar Association consider and implement steps to ensure that there are sufficient numbers of Chinese and Asian lawyers in the pipeline to become judges. As noted in the *Judicial Appointments Protocol* for senior court judges, "it is very important that the judiciary comprise those with experience of the community of which the court is part and who clearly demonstrate their social awareness."[202] These groups all have a shared interest in ensuring that the New Zealand judiciary is representative of our increasingly superdiverse population.

268 We recommend that the Attorney-General's Judicial Appointments Unit amend the *Judicial Appointments Protocol*, to include NZ Asian Lawyers in the list of parties who may be contacted at the nomination stage, alongside the existing reference to the Māori Law Society and women lawyers' associations. We also recommend that nominations be sought from the Minister for Ethnic Communities alongside the Minister for Women and the Minister of Māori Development.[203]

269 A more superdiverse judiciary will assist with the cultural capability of the judiciary overall. Justice Kyrou has written on the benefit his superdiverse background has afforded him as a judge in Australia:[204]

> My experience as a victim of racism in my youth has helped me to gain a deep appreciation of the importance of cultural awareness and tolerance. I seek to uphold these values in my work as a judge.
>
> At times, my Greek background has assisted me to understand the evidence given by some witnesses with European backgrounds. For example, in a case involving a claim for damages for personal injuries, the plaintiff gave evidence that, as a result of the defendant's wrongful act, he locked himself in his house for three years. Counsel for the defendant then cross-examined the plaintiff at length to establish that he was lying because he was seen in the local bank and supermarket on numerous occasions. Counsel appeared to be unaware that, in some cultures, exaggeration is considered a legitimate form of emphasis rather than as a dishonest lie. Counsel's cross-examination to establish that the plaintiff's evidence was literally untrue missed the plaintiff's point, namely, that he became withdrawn and did not socialise.

202 *Judicial Appointments Protocol* (Ministry of Justice, 2019) at 4.
203 At 6.
204 Kyrou, above n 117, at 4.

Law schools and continuing legal education

Recommendation 36: Education at Law Schools and Professionals courses

270 We recommend that the New Zealand Law Society, in conjunction with the Council of Legal Education and the College of Law work to provide additional practical training for those completing legal professionals courses. Such practical guidance in the day to day tasks lawyers are required to do would assist all law graduates and students and especially those who are CALD to develop the necessary knowledge and skills required to practice law in New Zealand.

271 We also recommend that the New Zealand Council of Legal Education consider the inclusion of some of the key issues and challenges faced by lawyers in advising CALD clients when prescribing courses of study required to be undertaken by candidates for admission as barristers and solicitors for example in the university core law paper, Legal Ethics. This will help to ensure that all law students are aware of these issues, and are better prepared to effectively advise all of their clients, including their growing numbers of CALD clients.

272 It is also important for legal academics teaching at law schools to consider the impact of superdiversity on the content of courses they teach. For example, in evidence law courses, students should be taught about the extra issues and challenges that CALD witnesses and documents not written in English pose for counsel and for the courts. In order to effectively understand these key issues one of the universities in New Zealand (or more than one) should consider the establishment of an "Asian Law Centre" (such as the Asian Law Centre at the University of Melbourne). This could be a source of advice and scholarly comment, a place that coordinates briefings, advisory opinions and be available to be called on by judges to give advice or to provide expert witnesses.

CHINESE PEOPLE IN NEW ZEALAND AND ITS COURTS

Demographics

273 As the number of Chinese in New Zealand increases, so do the number of Chinese parties in the New Zealand courts.

274 Chinese are not a homogenous cultural group.[205] The specific culture of a Chinese person depends on where they were born. Chinese can come from a variety of places due to the Chinese diaspora – PRC, Hong Kong, Taiwan, Singapore, Malaysia, US, India, Canada, Australia. Where these people were born affects their culture, languages and view of the rule of law. It also becomes important to get interpreters who come from similar places so they understand the different dialects, accents, and cultural nuances.

275 The Chinese community is made up of many sub-groups, divided by language and dialect coming from very different countries with distinct legal and political systems. In the 2018 Census, 231,387 people identified as Chinese, 4,866 people identified as Malaysian Chinese and 6,570 identified as Taiwanese.[206] Of the population usually resident in New Zealand, 132,906 identified as being born in PRC, 10,992 in Hong Kong, 10,440 in Taiwan and 6,741 in Singapore.[207] PRC was the third most common place of birth after New Zealand and England.[208]

276 Also note that the meaning of the phrase "recent migrants" can be variable – seven New Zealand public sector bodies used nine different definitions of "recent migrants" ranging from two to less than 10 years of residence across 16 different research reports.[209] Dr Andrew Zhu referred us to his research WTV- Trace Research Chinese Poll 2017, which found that seven years living in New Zealand was the differential point for Chinese from PRC to "significantly readjust their democratic thoughts", as Dr Zhu put it.[210]

277 Statistics New Zealand 2013 and 2018 Census data shows that the CALD population of New Zealand is significant and growing – including the significant number of residents who say they cannot even speak conversational English.

278 The 2018 Census data demonstrates that the number of New Zealanders who identify as being of Asian ethnicity has grown significantly in the five years since 2013. In 2013, 11.8 per cent of the usually resident population identified as of at least one Asian ethnicity, and in 2018 that had increased to 15.1 per cent.[2011] One in five of those who identified as of Asian ethnicity were born in New Zealand, so they should not have any English capability issues. This increase was the largest for any ethnic group, and the percentage of New Zealanders who identified with an Asian ethnicity grew more than those who identified as Māori. Demographic projections based on the 2013 data of who will be the majority and minority populations in 2038 forecasted that 51 per cent of the population will identify as either Asian (22 per cent), Māori (18 per cent) or Pacific peoples (11 per cent).[2012]

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205 Amartya Sen cautions against the view that people have, or belong to, a single unchangeable culture or cultural identity, or that cultural groups are homogenous and monolithic, such that it is impossible to have membership in multiple groups or identities: "The insistence on a choiceless singularity of human identity not only diminishes us all, it also makes the world much more flammable"; "Civilizational or religious partitioning of the world population yields a "solitarist" approach to human identity, which sees human beings as members of exactly one group (in this case defined by civilisation or religion, in contrast with earlier reliance on nationalities and classes)"; "A solitarist approach can be a good way of misunderstanding nearly everyone in the world": Amartya Sen *Identity and Violence: The illusion of Destiny* (Allen Lane, London, 2006) at xii–16

206 Statistics New Zealand, above n 7, at table 3.

207 The numbers of those that identified as born in Taiwan and those who identified as being of Taiwanese ethnicity differ, as a person's place of birth may differ from how that person identifies their ethnic or national group.

208 2.9 per cent of the usually resident population were born in PRC, an increase of 0.7 per cent from the 2013 Census: Statistics New Zealand, above n 7.

209 *Health and safety regulators in a superdiverse context: Review of challenges and lessons from the United Kingdom, Canada, and Australia* (Superdiversity Institute for Law, Policy and Business, December 2018) at [112].

210 Email from Dr Andrew Zhu (Director, Trace Research Limited) to Mai Chen (Managing Partner, Chen Palmer) commenting on draft report, 14 October 2019.

211 Statistics New Zealand, above n 3.

212 Statistics New Zealand "Ethnic diversity projected to rise" (18 May 2017) <archive.stats.govt.nz>.

English speaking ability

279 In the 2018 Census, 105,462 people indicated that they did not speak English, Māori or New Zealand sign-language.[213] In the 2013 Census, 87,534 people (or 2.2 per cent of the general population) indicated they are not able to have a conversation about every day things in English (an increase of 5,595 people from the 2006 Census). 64 per cent of these people identified with at least one Asian ethnicity, and 59 per cent spoke a Chinese language instead of English. 65 per cent of these people lived in the Auckland region. A majority of non-English speakers are adults who were born overseas (86.1 per cent).[214]

280 Burns reported in 2001 that almost a quarter of new migrants were unable to hold a conversation in everyday English and among Asian people who have lived in New Zealand between five and 15 years, 18 per cent still did not speak English. Among Pacific peoples who have lived in New Zealand for that same amount of time, almost a quarter did not speak English either.[215]

281 These census results correlate with several studies which indicate that, as would be expected, Asian migrants have worse English speaking skills than the general population. However, many studies also suggest that Asian migrants' English skills are not necessarily determined by the length of time they have been in New Zealand, but by their age at arrival and the areas where they have lived upon arrival. These studies are set out below.

282 Professor James Hou-Fu Liu writes that age at migration is a significant factor in a person's ultimate ability to learn English.[216] Similarly Bleakley and Chin in their study of non-English speaking US migrants, found a strong correlation between an immigrant's age on arrival and their ultimate English skills as adults, with the participants who arrived before age nine being uniformly fluent in English, and those arriving later tending to have worse proficiency. Bleakley and Chin report:[217]

> For each year past age nine that an immigrant from a non-English speaking country arrives, the probability of speaking any English decreases 0.6 of a percentage point, speaking English well decreases three percentage points and speaking English very well decreases seven percentage points.

283 This would indicate that an immigrant from a non-English speaking country who arrived at age 14, would be 35 per cent less likely to speak English very well, than if they had arrived before age 9. An immigrant who arrived at age 20 would be 77 per cent less likely.

284 Bleakley and Chin's study concerns the "critical age hypothesis",[218] which predicts that the ultimate language proficiency for a person learning a second language is correlated with the age at which the person begins to learn the language: the younger the learner is when starting, the more proficient they are likely to become. However, beyond the "critical age", although a person remains capable of learning a new language, there is a negative correlation between their age and their likely level of attainment. The older a person is when beginning to learn a new language, the less likely that person is to become as proficient as younger learners.[219] Cook describes the critical age hypothesis as:[220]

> …there is a period when language acquisition takes place naturally and effortlessly… the optimum age for language acquisition falls within the first ten years of life. During this period the brain retains plasticity, but with the onset of puberty this plasticity begins to disappear.

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213 Statistics New Zealand, above n 7, at table 15.
214 Statistics New Zealand, above n 22. Note that at the time of publication this breakdown of figures was not yet available for the 2018 Census.
215 Jennifer Burns "Court Interpreters" [2001] NZLJ 475 at 475.
216 Affidavit of Professor James Hou-Fu Liu *Department of Internal Affairs v Q* HC Auckland CIV-2017-404-132, 9 March 2018.
217 Hoyt Bleakley and Aimee Chin "Age at arrival, English proficiency, and social assimilation among US immigrants" (2010) 2(1) American Journal of Applied Economics 165 at 175 (citations omitted).
218 EH Lenneberg *The biological foundations of language* (1967, Wiley, New York).
219 Zhengwei Pei "The Younger the Better? A Multi-factorial Approach to Understanding Age Effects on EFL Phonological Attainment" (2019) 5(1) Journal of Language and Education 29 at 38–39.
220 V Cook "Multicompetence and Effects of Age" in DM Singleton and Zsolt Lengyel (eds) *The Age Factor in Second Language Acquisition: A Critical Look at the Critical Period Hypothesis* (Cromwell Press, England, 1995) at 51–66.

285 Stevens similarly found that both age at arrival and length of time since arrival showed strong correlation with English ability as adults, observing:[221]

> Very young learners, starting before age five or so, are almost certain to report being proficient (second language) speakers in adulthood. The decay in (second language) learning appears to start in early childhood and to continue through childhood and adolescence.

286 Stevens hypothesises that the timing of immigration sets a person on certain life course trajectories which ultimately affect their English speaking abilities as adults. For example, younger immigrants are more likely to attend school in their new country, which greatly improves their ultimate English skills in comparison to older migrants.[222]

287 Bleakley and Chin also examined the link between the English language proficiency of migrants living in the United States and their residential location. They found that, the greater a person's English language proficiency is, the more likely that person is to live outside an "ethnic enclave" (defined as residential clusters or social networks of immigrant communities).[223] Accordingly, migrants living in ethnic enclaves are likely to have lower English language proficiency than migrants living outside ethnic enclaves. Liu hypothesises that this is due to limited opportunities to practice and improve their English language skills.[224] The concept of "ethnic enclaves" is similar to the concept of "ethnoburbs" explored by Xue, Friesen and Sullivan. Xue, Friesen and O'Sullivan describe ethnoburbs as multi-ethnic communities, with one ethnic group showing significant concentration but not necessarily forming a majority. Their study of Asian "ethnoburbs" in Auckland showed that 60 per cent of Auckland's Chinese population resided in three large contiguous regions, one in each of North Shore City (suburbs in the inner North Shore away from the east coast beaches), Auckland City (extending into Waitakere City; the CBD, Mount Albert, and New Lynn) and Manukau City (including Pakuranga, Dannemora, and Botany Downs).[225] The authors state that from these three large contiguous regions, "we arrive at a picture of a broader Auckland ethnoburb, which can be subdivided into five somewhat distinct (but related) ethnoburbs": North, CBD, Central East, Central West, and East. Interestingly, two of these ethnoburbs correspond with the busiest courts in the country: the Auckland and Manukau District Courts (although note that these Courts also correspond to the areas of greatest population density in New Zealand).[226]

288 There are several implications for access to justice of parties having poor English language skills, and there are many examples of how poor English language skills can prejudicially affect a person's ability to understand and comply with the law in this Report in the *Case Review* section.[227] Research from Professor James Sun and Dr Andrew Zhu also shows that English ability is the most influential factor for Chinese immigrants to live a successful life in New Zealand, and that this is more influential than one's academic qualifications and professional skills.[228]

289 Brière writes that the American "*Miranda* rights" contain legal words difficult enough that immigrants with poor language skills are "highly unlikely" to be able to understand their rights. Brière gives the example of a Thai defendant who had given self-incriminating evidence after waiving his *Miranda* rights. Brière assessed the Thai defendant's English ability as "in the third percentile of beginning high school freshmen", and concluded that due to the low frequency of the words "attorney" and "questioning", it was very unlikely that the Thai defendant would have understood his rights to a sufficient degree to waive them.[229]

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221 Gillian Stevens "Age at immigration and second language proficiency among foreign-born adults" (1999) 28(4) Language in Society 555 at 573.
222 At 574.
223 Bleakley and Chin, above n 217, at 188.
224 Affidavit of Professor James Hou-Fu Liu, above n 216, at [30].
225 Xue, Friesen and O'Sullivan, above n 23.
226 District Court of New Zealand "Statistics 2018" (June 2018) <www.districtcourts.govt.nz>.
227 Under the heading *Low English language capability of parties resulting in Court against them,* in the *Case Review* section.
228 Email from Dr Andrew Zhu (Director, Trace Research Limited) to Mai Chen (Managing Partner, Chen Palmer) commenting on draft report, 14 October 2019. Publication of this research is forthcoming.
229 Eugène Brière "Limited English speakers and the Miranda Rights" (1978) 12(3) TESOL Quarterly 235, at 239 and 241.

290 The low frequency of legal terms in everyday speech and writing is substantiated by reference to relevant English language corpora (corpora are "set[s] of language production samples designed to be representative of a language").[230] iWeb Corpus is a collection of 14 billion words sourced strategically from 22 million webpages. The Corpus ranks 60,000 words in order of their frequency ("the" being the most commonly used word, and "pure-hearted" being the least commonly used word of the 60,000).

291 10 of the most common legal terms and their iWeb Corpus rank are listed below:[231]

Word	**Ranking**
Credibility	6883
Default	1400
Defendant	4054
Discovery	2583
Pleading	19270
Liability	2628
Malpractice	14826
Negligence	8978
Plaintiff	6027
Testify	5617

292 Stuart Webb, Professor of applied linguistics at the University of Western Ontario, has found that a second language learner is unlikely to be able to acquire a vocabulary of more than 3,000 words, even after years of study in a traditional setting.[232] This means that words such as 'credibility', 'pleading', 'malpractice', 'negligence', 'plaintiff' and 'testify' are all unlikely to be understood by second language speakers, and even less so by second language speakers who did not immigrate at an early age.

293 In other words, because legal terms are so uncommon in everyday language, the chances of a second language user understanding them is highly unlikely, even where they are relatively competent in their second language. Dr Ng cites a survey of jurors from Hong Kong courtrooms, where trials are usually conducted in English, but the majority of jurors speak Cantonese as a first language, which found:[233]

> …a significant proportion of jurors have some difficulty in understanding the English language" and may not have a sufficient knowledge of English "to understand the evidence of witnesses, the addresses of counsel and the judge's summing-up.

294 Legal jargon can also produce difficulties in translation, as many western legal concepts do not have suitable equivalents in other cultures and languages. Pecol (a professional interpreter and translator) says, regarding translation into Spanish language in American Courts:[234]

> The legal language, even when it is interpreted into Spanish, many times does not convey any actionable or usable information to the (limited English proficiency) individual, unless there is a more elaborate explanation given, which is seldom the case. Concepts such as jury trial, grand jury, beyond reasonable doubt, preponderance of the evidence, probable cause, indictment, deposition, escrow, liability insurance,

230 Kristina Nilsson Björkenstam "What is a corpus and why are corporat important tools?" (unpublished paper). Ms Björkenstam is a Researcher in Computational Linguistics at Stockholm University.
231 Sourced from Ury & Moskow "10 Legal Terms You Need to Know" (28 May 2007) <www.urymoskow.com>.
232 Beth Sagar-Fenton and Lizzy McNeill "How many words do you need to speak a language?" BBC Radio 4 <bbc.com>.
233 Ng, above n 43 (citations omitted).
234 Nidia Pecol "Reflections on interpreting: Help for the Criminal Practitioner" (2017) 32(2) Criminal Justice 28 at 30.

homeowner's insurance, memorandum of agreement, and a myriad of others either do not exist or are not used in Spanish-speaking cultures.

Relevant cultural factors: *guanxi*, *mianzi* and the Chinese way of doing business

295 Cultural factors also impact Chinese parties' behaviour and this is important for participants in the New Zealand legal system to understand. The concept of *guanxi* is a special Chinese cultural factor that has and continues to play an important role in Chinese social and economic systems.[235] There is no precise translation of the term available, but Zhang and Hong have stated that it can be defined as "relationships or social connections based on mutual interests and benefits, which is achieved by exchanging favours and giving social status between *guanxi* partners."[236] *Guanxi* can have both a social and a commercial function.

296 *Guanxi* is closely linked with Chinese Confucian culture that rules social behaviours between people.[237] There are also similar concepts in Japan, Korea and Russia, among other countries.[238] Victoria University Law Faculty academic Dr Ruiping Ye has noted that Confucian tradition remains "far and wide reaching for ordinary Chinese people because it penetrated every aspect of the society, affected people's lives and has been passed on from generation to generation."[239]

297 A corresponding concept of *guanxi* is *renqing*, or, the exchange of favours. It is the idea that if someone does you a favour, you then owe them *renqing*, to be paid at the appropriate time.[240] Zhang and Hong also note that Chinese people mix personal and business relationships, and so a business favour can be used to repay a personal *renqing* and vice versa.[241]

298 A further corresponding concept of *guanxi* is *mianzi* (face). *Mianzi* relates to a person's reputation and social stature, as well as the power to influence in *guanxi* relationships. Chinese culture places a high value on *mianzi*, and retaining face is a primary objective in Chinese society.[242]

299 *Guanxi* and *mianzi* are important concepts when considering how to ensure equal access to justice for Chinese parties.

300 Face, or *mianzi* is defined as "[t]he conception of self that each person displays in particular interactions with others".[243] This conception of "face" is threatened when another person undermines or challenges you. Therefore, the *Equal Treatment Benchbook* of the English Judicial College, states that East Asian individuals may be concerned with not only saving their own face, but also the face of judges and advocates, and face saving desires will be even more acute if members of their culture are present. The Benchbook recommends that judges should not say phrases such as "do you understand" or "you are not making yourself clear" as this entails loss of face to the person by drawing attention to lack of fluency or clarity in their speech. Accordingly, the Benchbook recommends that any negative or critical comments should be softened when addressed to East Asian people in the courtroom.[244]

301 Professor Sarah Biddulph said in an interview that for people of Chinese ethnicity, being charged with a crime is a big loss of face.[245] As will be demonstrated by the cases analysed in the *Case Review*

235 Zhang Chi and Hong-Seock-Jin "Guanxi Culture: How it Affects the Business Model of Chinese Firms" in E Paulet and C Rowley (eds) *The China Business Model: Originality and Limits* (Chandos Publishing, London, 2017) 19 at 19.
236 At 19–20.
237 At 21.
238 At 22.
239 Ruiping Ye "Chinese in New Zealand: Contract, Property and Litigation" (2019) 25 CLJP/JDCP 141 at 168.
240 At 28.
241 At 29.
242 At 30.
243 Quote from WR Cupach and others *Facework* (Sage Publishing, Thousand Oaks (CA), 1994) in Mark Redmond "Face and Politeness Theories" (2015) 2 English Technical Reports and White Papers at 6.
244 Judicial College, London, above n 121, at 8-12.
245 Interview with Professor Sarah Biddulph, Director – Asian Law Centre, Melbourne University School of Law (Mai Chen, Auckland, 3 and 4 September 2019).

section, this can result in Chinese defendants being less likely to demonstrate remorse for their actions out of a desire to "save face". Even if they might feel remorse, they do not wish to lose face and bring shame on their family by showing it to the court.[246]

302 *Mianzi* may also result in Chinese litigants being less likely to be willing to reach a settlement in a dispute, out of a desire to "save face" and not appear to have "lost."[247] Associate Professor Andrew Godwin has written that judicial mediators in Australia have observed that 'loss of face' is a real concern of parties, and can "significantly hinder negotiations", with parties sometimes unwilling to make the first offer or compromise, out of a fear of how they will be perceived, including in their local ethnic community.[248] Godwin also received feedback from judges that due to a lack of understanding about the legal system and court process in Australia, Asian litigants may view the "mere fact that litigation has been commenced as a significant insult and the continued existence of the legal proceedings can act as a barrier to commercial negotiations."[249]

303 Godwin has also written about how in Chinese culture, one's identity is connected to the group, and that persons of Chinese ethnicity, as well as being concerned with their own face, are also concerned with the face of the community, institution or work unit they belong to.[250] Godwin notes that this can sometimes impact on the willingness of Chinese to speak as individuals and to disclose information that may be considered to be "detrimental to the interests of the group."[251] Lastly, Godwin writes that the hierarchical society in PRC also "results in the individual deferring to authority, responding to questions and providing answers that the individual considers the person in authority wants to hear and also a reluctance to admit when something is not understood or when the individual does not have an answer."[252]

304 *Guanxi* also impacts on a person of Chinese ethnicity's approach to negotiation. Godwin has noted that the modern Chinese term for negotiation, *tanpan* includes the character meaning "discuss" and "decide" which emphasises that negotiation is two parties discussing and agreeing on the outcome. Godwin says "[i]n this respect, the focus is more on the relationship and process aspects rather than the content."[253] When contrasting Western and Chinese conceptions of law, Godwin says:[254]

> … law in traditional China was viewed more as a tool for regulating society. Its primary purpose was to prevent people from doing the wrong thing, rather than to ensure that people did the right thing. As a result, law was more relevant to "public ordering" – regulating the relationship between a state and its subjects – than "private ordering" – regulating the relationship between private individuals… the Chinese have traditionally relied more on relationships to regulate their private affairs and resolve disputes than impersonal rules as embodied in contracts.

305 In our interview with Dr Leo Liao, Senior Lecturer at the Waikato University Law School, he referred to *guanxi* as being like a spider web, with individuals being the spiders on the web. Dr Liao said that without *guanxi*, a person of Chinese ethnicity is like a spider without a web, as relationships and connections are inextricably linked with an individual's identity.[255]

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246 Under the heading *Sentencing Chinese Defendants* in the *Case Review* section.
247 Examples of this are included from our interviews with judges, lawyers and also in the *Case Review* section.
248 Godwin, above n 11. In Australia, most of the State Supreme Courts provide court-annexed mediation services, with mediations conducted by officers of the court. In some courts this is only done by registrars, and in others by both registrars and/or judicial officers: PA Bergin "Judicial Mediation in Australia" (speech delivered to the National Judicial College Beijing, 25–28 April 2011).
249 Godwin, above n 11.
250 Godwin, above n 11.
251 Godwin, above n 11.
252 Godwin, above n 11.
253 Andrew Godwin "Negotiate" (2013) 5 China Business Law Journal 687 at 688.
254 At 688.
255 Interview with Dr Zhixiong (Leo) Liao, Senior Lecturer & Director of International Relations (Law), University of Waikato, (Mai Chen, Auckland, 2 September 2019).

306 Dr Liao also said that "face" is measured by one's reputation in the eyes of others in Chinese culture.[256] This helps to explain why people of Chinese ethnicity place so much weight and emphasis on keeping or saving face.

Cultural factors as a tool to understanding transactions between Chinese parties

307 *Guanxi* often governs the Chinese way of doing business, and is in part the reason why Chinese people are less likely to conduct business by using a formal contract and more likely to do so via a "handshake." As Dr Ruiping Ye notes:[257]

> As written contracts are perceived as evidence for transactions, and requiring evidence for agreements with one's family or friends would appear to be distrusting, many harmony-loving Chinese will find it difficult to ask for a written contract with family, friends or close acquaintances. In cases of close relationship, it is honour that binds the parties, rather than the written contract. Nevertheless, each party would believe that a binding contract exists between them if the terms of the agreement have been discussed and words of confirmation have been spoken unequivocally.

308 Dr Ye notes that where contracts are drafted, they are generally brief. Dr Ye says that this was "sufficient when the society operated on the basis of mutual trust and was governed by social pressure" but that it is "increasingly becoming insufficient as modern life becomes more complicated" and that "parties who are not assisted by competent lawyers do not necessarily turn their minds towards complex or ambiguous matters."[258] This concern, and the challenge that this creates in ensuring the courts are adequately equipped to provide Chinese parties with equal access to justice, is reflected in some of the cases in our case review, and also in our interviews with judges and lawyers.[259]

309 The concept of *xinren*, loosely translated as interpersonal trust, is another aspect of Chinese culture that means Chinese tend to trust individuals more than systems, which is the opposite to Western culture.[260] "This inherently results in difficulties in trusting the legal system (system trust). Therefore, Chinese tend to place their trust in individuals and on personal agreements rather than on contracts."[261] This way of doing business can cause clients difficulties in New Zealand when they find that these dealings go sour, as our legal framework is based around written agreements. Associate Professor Godwin has received feedback from judges in Australia that, in disputes involving parties of Chinese ethnicity, commercial deals are often poorly documented and "the legal documents do not reflect the true position between the parties."[262]

310 Dr Liao has developed a "3D model" or "matrix" to assist in understanding the nature of a transaction between Chinese parties – e.g. is it a gift, loan or investment - where there are no contemporaneous documents. The matrix asks a judge or lawyer to consider the closeness of the connection, the value involved and the party's "stickiness" to traditional Chinese culture, as well as any "interference factors" when considering the nature of the transaction.[263]

311 Dr Liao says the relationship between the parties is important. For example, if the payment was made to a son, it is more likely to have been a gift than if the payment were made to a daughter,[264]

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256 Interview with Dr Zhixiong (Leo) Liao, Senior Lecturer & Director of International Relations (Law), University of Waikato, (Mai Chen, Auckland, 2 September 2019).
257 Ye, above n 239, at 157.
258 At 158.
259 Under the heading *Lack of contemporaneous documentary evidence* in the *Case Review* section.
260 Anna Khan, Judith Zolkiewski and John Murphy "Favour and opportunity: renqing in Chinese business relationships" (2015) 31(2) Journal of Business & Industrial Marketing 183 at 184.
261 At 184 (citations omitted).
262 Godwin, above n 11.
263 Dr Liao's matrix is appended at Appendix 2.
264 In Chinese Society, under the patriarchal tradition, when daughters marry, they move out of their familial home and join their husband's family, whereas the son remains within his family: C Cindy Fan and Youqin Huang "Waves of Rural Bridges: Female Marriage Migration in China" (1998) 88(2) Annals of the Association of American Geographers 227 at 230.

and payments made to blood relatives are viewed differently to payments made to non-blood relatives.[265]

312 The next consideration is the value of the transaction. Dr Liao says if the amount is small, it is more likely to be a gift, when compared to a large amount of money. Dr Liao gave the example of a few thousand dollars paid to a nephew as a wedding gift compared to a payment of hundreds of thousands of dollars to buy property, which is more likely to be an investment.[266]

313 Another important factor to consider is the extent of a party's "stickiness" to traditional Chinese culture. Dr Liao gave himself as an example. He has lived in New Zealand for a reasonably long period of time, and works at a university with people of many different ethnicities, which has allowed him to integrate more easily into New Zealand culture. Dr Liao's stickiness to Chinese culture will be very different to a party who still resides in PRC and has made a payment to someone in New Zealand that is now in dispute.[267]

314 Lastly, Dr Liao refers to "interference" factors such as the type or purpose of the transaction, marriage status, time lapsed, education, policy, understanding of law etc. as all assisting to determine the true nature of the relationship.[268]

The legal system and law reform in PRC

315 The court system in PRC has undergone significant reform since 1978, when PRC reconstructed its legal system.[269] Dr Ruiping Ye conceptualises Chinese legal culture as a mixture of traditional Confucian values, "modern" Western values and the socialist ideology of the Chinese Cultural Revolution.[270]

316 In 1999, the Supreme People's Court (SPC) issued a 5 year plan for reforming PRC's courts, with a second 5 year plan issued in late 2005.[271] These plans resulted in further law reform occurring in PRC. The plans are ongoing, and the fourth plan, from 2019–2023, is now in place.

317 Professor Benjamin J Liebman, Director of the Center for Chinese Legal Studies, Columbia Law School, has described these reforms as "largely either general and overly abstract, or primarily technical changes designed to address competence and fairness, not courts' authority or influence over other state actors."[272]

318 However, some of these reforms were not just technical, but substantive. Article 9 of the Judges Law of the PRC required all new judges to have a Bachelors degree. This has resulted in an increased number of judges now possessing university qualifications (whereas previously, many judges were not university-educated), although this process of education and professionalisation has been ongoing for some time. The SPC has also taken steps to improve the quality of court decisions, including by issuing a notice stating that "opinions should include both accurate descriptions of the facts and evidence and logical arguments and legal reasoning."[273]

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265 Interview with Dr Zhixiong (Leo) Liao, Senior Lecturer & Director of International Relations (Law), University of Waikato, (Mai Chen, Auckland, 2 September 2019).
266 Interview with Dr Zhixiong (Leo) Liao, Senior Lecturer & Director of International Relations (Law), University of Waikato, (Mai Chen, Auckland, 2 September 2019).
267 Interview with Dr Zhixiong (Leo) Liao, Senior Lecturer & Director of International Relations (Law), University of Waikato, (Mai Chen, Auckland, 2 September 2019).
268 Interview with Dr Zhixiong (Leo) Liao, Senior Lecturer & Director of International Relations (Law), University of Waikato, (Mai Chen, Auckland, 2 September 2019).
269 Benjamin L Liebman "China's Courts: Restricted Reform" (2007) 21(1) Columbia Journal of Asian Law 2 at 10.
270 Ruiping Ye "Chinese in New Zealand: Contract, Property and Litigation" (paper presented to Cross Cultural Communication in the Courtroom: Senior Courts Update, Auckland, May 2019).
271 Liebman, above n 269, at 10–11.
272 At 11.
273 At 13.

319 Nevertheless, Professor Liebman notes that intervention by Party officials "continues to be a legitimate action".[274] Liebman also states that, while intervention by Party officials has decreased in more routine proceedings, Party officials continue to intervene in politically sensitive cases. Moreover, the "scope of sensitive cases remains wide, and can include not only major criminal or political cases, but also cases involving the financial interests of either the Party-state or individuals with Party-state ties, cases involving high profile numbers, those involving a large number of potential plaintiffs, and cases receiving extensive media coverage."[275]

320 Liebman states that enforcing decisions remains difficult for courts in PRC. Litigants continue to ignore decisions against them. Local protectionism and intervention in cases by Party-state officials and departments also add to the difficulty in enforcing court decisions.[276] However, in recent years, PRC has piloted a "social credit" system, which allocates "black marks" for those who fail to perform and comply with court decisions.[277] PRC intends to implement this system in 2020, and this may impact on the enforceability of court decisions.

321 Another challenge to a genuine separation of powers in PRC is the politicisation of the courts. Liebman notes that while some steps have been taken which have reduced the extent to which courts are a "political tool of the state", "Courts do not appear more likely to challenge Party authority than in the past" and further that "indeed, depoliticisation – to the degree it has occurred – may be possible precisely because courts are not a challenge to Party authority."[278]

322 Lawyer Fei Fei Teh has also written on the separation of powers in PRC. She writes:[279]

> Meanwhile, there is the "continued uncertain status of the law" in China. On the one hand, one legal scholar can acknowledge that China has the legal framework with all the legislation and law in place. On the other hand, that same person has to acknowledge there is serious doubt as to the effectiveness of the implementation of that multitude of laws. For as long as the power of all of the three branches of the government centres in one Party state, law will continue to be only policy in China.

323 With regard to the independence of the judiciary, the role and status of judges in PRC is explained by Professor Stanley Lubman, as follows:[280]

> …the role of the judge has been defined only ambiguously. In a noteworthy essay, one Chinese law professor who has analysed the content of the internal newspaper of the courts concludes that judges are celebrated for being good soldiers of the state, not wise dispensers of justice. In the same essay he points also to a second aspect of the role of judges when he characterises their behaviour as that of bureaucrats. Chinese judges in his view, do not make decisions in a significantly different manner than their counterparts in administrative agencies when they are administering policies.

324 Lubman states "important roles are played in selecting judges by the Party committee at the court, the local Party committee, and its personnel department."[281]

325 Lastly, it is important to note that research demonstrates that criminal defence lawyers have a limited role in criminal proceedings in PRC.[282] Lawyers have "significant difficulty in meeting their clients, accessing case files, and gathering evidence" during the pre-trial process, and during the trial, their role is "often considered a mere formality."[283] Biddulph et al have further described the

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274 At 15.
275 At 15.
276 At 16.
277 Bing Son "The West may be wrong about China's social credit system" *The Washington Post* (online ed, 30 November 2018).
278 Liebman, above n 269, at 19.
279 Fei Fei Teh "Legal Steps to China Meeting the World in Globalisation with Case Studies: Shenzhen, Hong Kong, Shanghai" (LLB(Hons) Dissertation, University of Auckland, 2011) at 62 (footnotes omitted).
280 Stanley Lubman "Bird in a Cage: Chinese Law Reform after Twenty Years" (2000) 20(3) Northwestern Journal of Law and Bus 383 at 398. Professor Lubman is the Senior Fellow at The Honorable G William and Ariadna Miller Institute for Global Challenges and the Law, and Distinguished Lecturer in Residence (retired), University of California, Berkeley School of Law.
281 At 395.
282 Sarah Biddulph, Elisa Nesossi and Susan Trevaskes "Criminal Justice Reform in the Xi Jinping Era" (2017) 2 China Law and Society Review 63 at 79.
283 At 79.

role of criminal defence lawyers as "precarious," and have noted that justice departments have been "implicated in punishing criminal defence lawyers whose willingness to defend their clients is seen as being too vigorous or crossing some poorly drawn line of political acceptability."[284] Canadian lawyer Clive Ansley, who provided expert evidence in *Kim v Minister of Justice*, (analysed in paragraph [337] below), said that the accused almost never get to meet counsel until the investigation is complete, or sometime until the trial. Ansley said that about 70 per cent of accused are unrepresented. Ansley said that defence counsel are beaten, and sometimes publicly.[285]

Relevant law reform in PRC – insights from Professor Sarah Biddulph

326 Professor Biddulph joined the Asian Law Centre in 1989, and is an expert on the Chinese legal system. Her research focusses particularly on legal policy, law making and enforcement as they affect the administration of justice in PRC. The Superdiversity Institute interviewed Professor Sarah Biddulph, Director – Asian Law Centre, Melbourne University School of Law on 3 and 4 September 2019. The following comments are from these interviews.[286]

327 Expanding on the developments identified by other scholars above, Professor Biddulph spoke to the development of administrative or public law in PRC, specifying the following developments.

- **The 1989 passing of the Administrative Litigation Law of the People's Republic of China. Article 2 states:**

  > If a citizen, a legal person or any other organization considers that his or its lawful rights and interests have been infringed upon by a specific administrative act of an administrative organ or its personnel, he or it shall have the right to bring a suit before a people's court in accordance with this Law.

  Professor Biddulph said that the passing of this law made it clear to bureaucrats and other public servants in PRC that lawful justification was required for their decisions, and that it was the start of the passing of legality reforms that largely created administrative law in PRC.

- **In 1996, the Administrative Punishments Law was passed. Article 1 states:**

  > This law is enacted in pursuance of the Constitution to regulate the establishment and implementation of administrative punishments, to ensure and supervise the effective exercise of administration by the administrative organs, to safeguard public interests and social order, to protect lawful rights and interests of the citizens, legal persons or other organizations.

  This law enabled citizens to take legal action against public officials. This law also set out mandatory procedures in exercising administrative powers (e.g. on the spot fines) and introduced a hearing procedure in relation to some matters. Chinese law has generally been more interested in the substantive outcome than the procedures by which those outcomes were obtained. This law marked the first clear statement that procedural requirements were also a component of legality.

- **The Decision on Some Major Questions in Comprehensively Moving Forward Governing the Country According to Law (the fourth Plenum decision) passed in 2014.**

  Professor Biddulph said that while the Decision is referred to as "Rule of Law," in reality it refers to "rule according to law". The Decision emphasised the unity between Party leadership and rule of law. Since passage of the Decision, the Party has taken a number of steps to strengthen oversight of party officials and has re-asserted the supremacy of the Communist Party. Biddulph, Nesossi and Trevaskes have written that "the socialist rule of

284 At 94.
285 Interview with Clive Ansley (Lucinda King, Wellington, 5 September 2019).
286 Interview with Professor Sarah Biddulph, Director – Asian Law Centre, Melbourne University School of Law (Mai Chen, Auckland, 3 and 4 September 2019).

law envisaged in the Decision is not one that limits the role of the Party in justice affairs, but, rather, strengthens it with the intention of making the administration of justice more efficient and its individual outcomes fairer."[287]

- **The "Lifetime Responsibility" rule implemented in 2017, as part of the judicial reform programme.** This introduced lifetime responsibility for judges who were found responsible for gross negligence rendering a 'wrong' judgment or for wilfully violating the law in trial.[288] The SPC is also planning on establishing judicial disciplinary committees in the provincial high people's courts.[289]

  An example of a 'wrong' judgment provided by Professor Biddulph was a case where a man has been convicted and sentenced for murdering his wife, but the wife subsequently reappears. Professor Biddulph said that in such cases the judge shall be held accountable for the wrong judgment, even after retirement from the bench.

328 Dr Elisa Nesossi has also written about miscarriages of justice such as this:[290]

> ...these cases of miscarriage of justice – some cleared because the real culprit had confessed to the crime, others on the basis of the legal principle of reasonable doubt and the lack of sufficient evidence, highlights the fact that in the recent past there has been something seriously wrong with China's justice system. They prove unequivocally that the system of collecting evidence has still been based on archaic methods of torture aimed at obtaining confessions from criminal suspects through any means necessary; that the police have played an inordinately large role securing convictions in comparison to the other judicial organs; that lawyers have had only a minimal, if any, voice in the process of defending the accused; and that cases were too often decided behind closed doors by the intervention of the all-too powerful political-legal committees. A case like that of Nie Shubin's proved that the interests of the police, the procuratorate, and the political-legal committee, were aligned and needed to be protected at all costs, and that courts were powerless in the event of inconvenient truths emerging. Thus, these cases have also indicated that all too often trials have been a mere formality, intended to corroborate what the police and the procuratorate had already established beforehand—leaving judges relatively powerless to play their rightful roles in the justice system.

329 Dr Nesossi writes that recent reforms, including those set out above, and others to place the trial at the centre of criminal proceedings to counter the traditional tendency of PRC Police to rely on confession, were put in place as a response to the weaknesses of the PRC's justice system, highlighted by such miscarriages of justice.[291]

330 Professor Biddulph said that these changes, coupled with a number of other key legislative changes, mean that the Chinese legal system is now considerably different to how it was before the Cultural Revolution. Professor Biddulph said the system is now "more comprehensive and mature." This means that someone from PRC who arrived in New Zealand who grew up during the Cultural Revolution (1966–1976), will have a different view of the role and importance of law than someone who grew up immediately after the Cultural Revolution ended. Young people born after 1990 would have a different view again, as by the early 1990s the legal system and legal institutions in PRC were much more developed and influential in governing people's daily lives than in the periods before that.

331 So the age and education of a Chinese immigrant to New Zealand makes a considerable difference to their knowledge of and respect for the rule of law and legal institutions, including courts. However, Professor Biddulph reiterated that the Chinese legal system remains hierarchical, with the dominant approach to governance in PRC being that the state is responsible for caring for

287 Biddulph, Nesossi and Trevaskes, above n 282, at 69.
288 Guodong Du and Meng Yu "Why is the Judicial Accountability System the Cornerstone of China's Judicial System Reform?" (5 October 2018) China Justice Observer <www.chinajusticeobserver.com>.
289 Du and Yu, above n 288.
290 Elisa Nesossi "Justice Restored under Xi Jinping: A Political Project" (17 May 2018) Made in China Journal <madeinchinajournal.com>.
291 Nesossi, above n 290.

and guiding its citizens. Governance has a concept of "patrimonial sovereignty," that contrasts with an approach which views the state as responsible to (rather than for) the people, a concept of 'responsible agency'. Dr Nesossi has also said that legal reforms prompted by wrongful convictions are not "merely to increase the accountability of the political-legal system," and that the "paramount concern is to ensure the preservation of the political status quo and the Party's legitimacy."

332 Professor Biddulph said that many common legal concepts and systems in New Zealand do not apply in PRC. For instance, in PRC, there is no automatic award of costs against the losing party in a trial. Secondly, there is no contempt of court power in PRC, although the Chinese criminal law was recently amended to criminalise disruption of court proceedings. Lastly, statistics show that a low number of litigants in PRC are represented, and that most are self-represented.[292] These factors will all impact on a Chinese person's view of the law and lawyers in New Zealand, and whether a lawyer is needed to go to court.

333 Professor Biddulph said that people from PRC who are unhappy with the outcome of a case may pursue their claims through other means, such as petitioning.[293]

334 Lastly, Professor Biddulph spoke to mediation in PRC. She said that mediation is viewed differently in PRC, and unlike in New Zealand where mediation is viewed as mutual agreement between the parties, in PRC there is a more active approach to seeking a resolution between the parties, that might involve one or both parties being persuaded to give way in order to reach a resolution.

335 Associate Professor Andrew Godwin has also written about the perception of mediation by people of Chinese ethnicity, and has said that to Chinese, mediation is more like conciliation, and also that Western ideas of an impartial mediator are not always applicable, with Chinese parties expecting that the mediator will be somebody whom the parties know and are comfortable with.[294] Godwin has also noted that alternative dispute resolution is popular in PRC, as there is a preference for avoiding public exposure associated with court proceedings.[295] As we have recommended above, it is therefore important that lawyers advising Chinese clients encourage mediation and educate their clients on the New Zealand approach to it.

Differences between Chinese and New Zealand rule of law

336 In addition, a key difference between New Zealand European and Chinese culture, particularly for Chinese from PRC, is each culture's approach to business dealings and the rule of law. The Transparency International Corruption Perceptions Index 2018, which ranks 180 countries and territories by their perceived levels of public sector corruption according to experts and business people, also shows significant differences between New Zealand and most Asian countries. Transparency International defines corruption as "the abuse of entrusted power for private gain." In the 2018 Transparency International Corruption Perceptions Index:[296]

- New Zealand is ranked #2;
- Singapore is ranked #3;
- Hong Kong is ranked #14;
- Japan is ranked #18;
- Taiwan is ranked #31;

292 This was also discussed in an interview with Clive Ansley, a Canadian lawyer and expert in the Chinese rule of law. He said that in his view about 70 per cent of criminal accused are unrepresented: Interview with Clive Ansley (Lucinda King, Wellington, 5 September 2019).
293 Petitions to legislatures by those dissatisfied with the disposition of the case, can result in the local People's Congress interfering with the integrity of the court process: Liebman, above n 269, at 30.
294 Godwin, above n 11.
295 Godwin, above n 31, at 74.
296 Transparency International "Corruption Perceptions Index 2018" (2018) <www.transparency.org>.

- Malaysia is ranked #61;
- India is ranked #78; and
- PRC is ranked #87.

NZ Court of Appeal in *Kim v Minister of Justice*[297]

337 In the New Zealand Court of Appeal case of *Kim*, the Court makes a number of findings about the Chinese rule of law which are similar to the academics cited above.

338 Mr Kyung Yup Kim's extradition case is the first occasion New Zealand has been asked to extradite a person to PRC, and the first occasion on which New Zealand has negotiated diplomatic assurances. The charge Mr Kim is facing is murder, which in PRC is punishable by the death penalty.

339 The Chinese approach to the rule of law was an important factor in the Court's decision. Justice Winkelmann said on behalf of the Court:[298]

> …the Minister of Justice is asked to return Mr Kim to a country that has a criminal justice system very different to our own, that has not committed to relevant international instruments in the way or to the extent that New Zealand has – a country in which, it is reliably reported, torture remains widespread (notwithstanding procedural reforms in the last 40 years which have reduced the incidence of torture) and in which the criminal justice system is subject to political influence. New Zealand has obligations under international law to refuse to return a person to a jurisdiction in which they will be at substantial risk of torture, or where they will not receive a fair trial. It is in this context that the courts are asked to review the Minister's exercise of her decision-making power to surrender Mr Kim.

340 The Minister of Justice had earlier determined that Mr Kim was to be surrendered, following the receipt of non-binding diplomatic assurances from PRC that Mr Kim would not face the death penalty and regarding his right to a fair trial and the risk of torture.[299] Mr Kim successfully applied to judicially review that decision: Justice Mallon directed the Minister to reconsider her decision.[300] The Minister's fresh decision was again that Mr Kim should be surrendered, and Mr Kim's application for judicial review of this decision was unsuccessful in the High Court.[301]

341 The Court of Appeal allowed an appeal by Mr Kim against the decision of the High Court to refuse his second application for judicial review.[302] In ruling that the Minister of Justice reconsider the issue of Mr Kim's surrender, the Court allowed the appeal and quashed the Minister's decision to surrender Mr Kim under section 30 of the Extradition Act 1999. In reconsidering the matter of Mr Kim's surrender, the Court found that:[303]

> … the Minister should address the following matters:
>
> a) Whether the general human rights situation in the PRC suggests that the value of the human rights recognised under the [International Covenant for Civil and Political Rights] and the Convention against Torture are not understood and/or valued, and further, if they are, whether the rule of law in the PRC is sufficient to secure those rights.
>
> b) The Minister is to make further inquiry as to whether murder accused are at high-risk, or lower risk, than the notional ordinary criminal.
>
> c) The Minister should not treat the fact that Mr Kim will be tried in Shanghai, the stage of the investigation, or the strength of the case against Mr Kim as reducing the risk of torture, unless

297 *Kim v Minister of Justice* [2019] NZCA 209.
298 At [8]–[9], per Cooper, Winkelmann and Williams JJ.
299 At [4].
300 *Kim v Minister of Justice* [2016] NZHC 1490, [2016] 3 NZLR 425.
301 *Kim v Minister of Justice* [2017] NZHC 2109, [2017] 3 NZLR 823 at [157].
302 *Kim v Minister of Justice* [2019] NZCA 209 at [276].
303 At [278].

further inquiries provide a sufficient evidential basis for proceeding on that basis.

d) In assessing the effectiveness of the assurances to address the risk of torture, the Minister must address such evidence as there is that:

   i. torture is already against the law, yet persists;

   ii. the evidence is that the practice of torture in the PRC is concealed and that its use can be difficult to detect;

   iii. videotaping of interrogations is selective and torture often occurs outside the recorded sessions;

   iv. evidence obtained by torture is regularly admitted in court; and

   v. there are substantial disincentives for anyone, including the detained person, reporting the practice of torture.

e) When addressing the risk that Mr Kim will not receive a fair trial in the PRC should he be surrendered, the Minister should:

   i. seek further information in connection with the extent to which the judiciary is subject to political control, and the extent to which tribunals that did not hear persons, or groups, or tribunals that did not hear the case, control or influence decisions of guilt or innocence;

   ii. seek further information as to the position of the defence bar in the PRC, the right the defence has to disclosure of the case to be met, and the right to examine witnesses; and

   iii. seek further assurances that Mr Kim will be entitled to disclosure of the case against him (detailed as to timing and content), that he will have the right, through counsel, to question all witnesses, and the right to the presence of effective defence counsel during all interrogation.

f) The Minister should address the risk that Mr Kim will be sentenced to a finite term of imprisonment and receive no credit for time already served in New Zealand. Relevant to consideration of this issue will be any assurances the Minister is able to obtain in relation to this.

342 The Court of Appeal stressed at [221] that its view – that it was not reasonably open to the Minister to conclude that Mr Kim's right to be tried before an independent tribunal was addressed on the basis of PRC's diplomatic assurances given the context of the system of criminal justice being subject to political control – was based on the material before the Minister:

> We cannot exclude the possibility that further inquiry will show a different picture of the judiciary to that which emerges from the evidence and the briefing material to date. That inquiry would be directed to ascertaining the extent to which the judiciary is subject to political control, and the extent to which a body that did not hear the case could control or influence decisions of guilt or innocence.

343 The Court did find at [153] that there was sufficient information on the basis of which the Minister could reasonably conclude that the assurances as to the death penalty would be complied with. The Supreme People's Court determination presented along with the extradition request was as follows:[304]

> According to Article 50 of *Extradition Law of the People's Republic of China*, it is hereby decided that, when Kyungyup Kim is extradited from New Zealand to the People's Republic of China, if he is convicted after trial and the crime for which he is convicted is punishable by the death penalty according to Criminal Law, the trial court will not impose the death penalty on him, including death penalty with a two year reprieve.

304 At [141].

344 Otherwise, the Court found the Minister made six separate errors of law in deciding to accept non-binding diplomatic assurances from the PRC to the effect that Mr Kim would receive a fair trial and would not be subjected to torture or the death penalty if extradited to PRC.

345 The errors are summarised at [275]:

- **First ground of appeal:** Before accepting diplomatic assurances from PRC, the Court found the Minister erred in failing to consider whether the "general human rights situation in the PRC was such that assurances should be sought".[305] The Court found the Minister did not address this question at all and that, had she done so, she would have considered whether the value of human rights was respected and the rule of law is respected in PRC.
- **Third ground of appeal:** The Minister made several errors in accepting the assurance that Kim would not be tortured because there was insufficient evidence for her to be satisfied of this.[306]
- **Sixth ground of appeal:** The Minister applied the wrong test when deciding to accept assurances that Kim would receive a fair trial in PRC. The Minister was advised that the correct test was whether he would receive a fair trial that "to a reasonable extent, accords with the functional principles of criminal justice reflected in art 14 of the ICCPR". The test she **should** have applied is "whether there is a real risk of departure from the standard such as to deprive the defendant of a key benefit of the right in question".[307]
- **Seventh ground of appeal:** The Minister erred in accepting the PRC's assurances that Kim would receive a fair trial. The Court found three aspects in which the assurance was defective relating to: the risk that the court in PRC would be politically influenced; the lack of an effective right to present a defence; and the risk that Kim could be interrogated at length without a lawyer present.[308]
- **Eighth ground of appeal:** The Minister failed to seek a specific assurance that Kim would receive credit for five years served in custody in New Zealand if and when he is sentenced in PRC.

346 In each case, the error relates directly or indirectly to section 30(6) of the Extradition Act 1999. Section 30(1) provides that "the Minister must determine in accordance with this section whether the person is to be surrendered" for extradition. Section 30(6) provides that "For the purposes of determining under this section whether the person is to be surrendered, the Minister may seek any undertakings from the extradition country that the Minister thinks fit." In other words, once a person has been found to be **eligible** for extradition, the Minister is required to determine whether he or she **should** be extradited, and that (among other things) the Minister is entitled to seek and rely on undertakings from the other country for the purposes of making that determination.

347 The Court of Appeal accepted that Parliament has conferred the power to make these decisions on the Minister.[309] However, the Court found that in **exercising** that power, the Minister is required to have regard to New Zealand's international obligations (particularly under the International Covenant on Civil and Political Rights) and to the New Zealand Bill of Rights Act 1990.[310] On this basis, it was common ground between the parties that the Court should adopt a "heightened" standard of review. This included scrutiny of whether materially relevant information had been considered by the Minister.[311]

348 In the first judicial review, the High Court found that the Minister gave no weight to the heavy reliance PRC's criminal justice system places on confessions, which the Judge considered to be

305 At [275(b)].
306 At [275(d)–(f)].
307 At [179] and [275(i)].
308 At [265(j)].
309 At [10]–[11] and [272].
310 At [272] and [45].
311 At [45].

a relevant factor.[312] The Court of Appeal stated at [79]: "While we agree with the Judge that it was open to the Minister to seek assurances to meet the risk of torture, we find error in the Minister's failure to expressly address the preliminary question of the general human rights situation in the PRC." The Court held that:[313]

> The fact that human rights breaches occur regularly in a state may be evidence that the importance of human rights is not understood or valued, or alternatively the rule of law is not sufficient in the requesting state to secure to the defendant the benefit of those assurances. In either circumstance, it would not be reasonable to rely on diplomatic assurances that the applicant's human rights will not be breached on return.

349 At [74], the Court highlighted the importance of taking into account the overall human rights and rule of law context, and noted that "broken up, the process could produce a falsely reassuring picture as to the effectiveness of the assurances."[314]

350 On 20 September 2019, the Supreme Court granted the Minister of Justice leave to appeal the decision of the Court of Appeal, and also granted a cross-appeal by Mr Kim.[315]

351 A more detailed discussion of the Court of Appeal's analysis of the rule of law in PRC can be found at *Appendix 3* of this Report.

312 At [121].
313 At [73].
314 At [74].
315 *Kim v Minister of Justice* [2019] NZSC 100.

JUDGES' PERSPECTIVES

Introduction

352 The Superdiversity Institute interviewed 12 senior court judges, together with two retired District Court judges of Chinese ethnicity, in order to gain an insight into the issues and challenges faced when presiding over cases involving Chinese litigants, and to obtain guidance on any recommendations from judges to help ensure equal access to justice for Chinese parties. All of the judges we interviewed volunteered their time to participate in the research.

353 The interviews were conducted on an anonymous basis. Therefore this section does not contain any citations of interview transcripts; however, all of the comments are from the 14 interviews that the Superdiversity Institute conducted with judges between 21 June and 7 September 2019. The comments set out in this section reflect a range of perspectives from the 14 judges interviewed.

354 In summary, the Chinese population (mainly from PRC in the last 10 years) is growing rapidly in New Zealand, which means that the numbers of Chinese parties in the court system is also increasing. There are currently no Chinese judges on the bench in New Zealand, and no judges we know of that speak Mandarin or Cantonese. These Chinese litigants and defendants struggle with the English language, are reliant on interpreters of varying quality, and sometimes represent themselves. There is no data allowing us to confirm that Chinese parties represent themselves more often than the rest of the population. Further, Chinese parties often deal with each other on the basis of trusting relationships, resulting in no or inadequate contemporaneous documentary evidence in civil disputes, and without legal advice or input into any documentation that is created.[316]

355 This increases the importance of the court's reliance on *viva voce* evidence; however, the use of interpreters may distort the meaning and clarity of this evidence. Where there is contemporaneous documentary evidence, it has to be translated from either traditional full form or simplified Chinese characters into English, which again may distort the meaning and clarity of the document, especially when concepts from one legal culture do not translate well into the other.

356 The judges interviewed had observed some, or all of these factors, and discussed the following key themes:

a) The volume of cases: a number of the judges, particularly those working in the High Court at Auckland, commented that they were experiencing a high volume of cases involving Chinese litigants;

b) Challenges in presiding over cases with Chinese parties, including the following:

- Determining credibility of witnesses in cases where there is little or no contemporaneous documentary evidence;
- Understanding the behaviour of Chinese witnesses, for example, in doing business based on trust and relationships, rather than by contractual documents drafted after taking legal advice;
- Some Chinese witnesses in court not understanding their duty to answer questions from the judge or from counsel cross-examining them, and their duty to answer questions truthfully. This is particularly acute where witnesses travel from their home country to give evidence in a New Zealand court, without a briefing on the New Zealand legal system;
- A lack of remorse demonstrated at times by some Chinese defendants, particularly in sentencing decisions, due to cultural motivations. This is relevant in

316 As set out above under *Chinese people in New Zealand and its Courts*, and demonstrated in the *Case Review* section under the heading *Lack of contemporaneous documentary evidence*.

terms of a discount for remorse under section 9(2)(f) of the Sentencing Act 2002, and in terms of a discount for an early guilty plea under section 9(2)(b) of the same Act.

- Misunderstandings of the law. For example, some Chinese accused have refused home detention without understanding that being sent to jail will then be the only option;
- Reluctance by some Chinese parties to settle disputes that New Zealand European parties would likely have settled because the amount at stake did not warrant ongoing court proceedings;
- Difficulties understanding the accents of Asian lawyers and Asian parties; and
- Concerns about the English language proficiency of Chinese parties in courts, and being unsure how much English the Chinese party or deponent really understands. The uncertainty may be exacerbated by the Chinese cultural concept of "face" meaning that some Chinese may say they understand when asked by the judge, as a sign of respect for authority, when in fact they do not.

c) Difficulties experienced presiding over cases requiring interpreting, including as follows:

- The need for substantial additional time in cases involving interpreting, and having to hold unfinished cases over until more court time can be found;
- Credibility findings and determining *mens rea* issues can be more difficult when oral testimony has to be interpreted and there are few, if any, contemporaneous, documents;
- Inconsistent quality of interpreting services, including the quality of an interpreter's spoken English;
- Long discussions between the interpreter and deponent followed by a very short answer from the interpreter, raising the suspicion that the interpreter may be inappropriately advising or summarising the deponent's answer;
- The need for a more formalised administrative system for ensuring that suitable interpreters in civil trials are matched with witnesses from a particular country or part of the country from which they come, so accents, local idioms and provincial nuances are not lost in translation; and
- Judges having no opportunity to "approve" interpreters, or there being no interpreter appointed in cases where an interpreter is clearly needed.

d) Providing additional guidance, support and explanations to Chinese litigants representing themselves when they are not proficient in English and do not understand the rule of law in New Zealand and court procedure; and

e) Growing numbers of Chinese who diligently respond to being summonsed to serve on a jury, but who usually ask to be excused due to poor English language proficiency, or no understanding of the jury's role, resulting in few Chinese on jury panels.

357 In criminal jury trials, the jury is the ultimate decision maker. If the judge is experiencing these difficulties and challenges, juries will find these issues even more difficult.

Volume of cases

358 The judges said that they had noticed an increased volume of cases involving mostly Chinese and some Korean parties, particularly in civil litigation. Some judges commented that they had also observed an increased number of Chinese defendants in criminal cases concerning drugs.

359 One judge that we interviewed commented that the increased volume of Chinese parties in the High Court, in particular, appears to be an Auckland phenomenon. This is supported by the fact that the Asian population in Auckland is proportionally greater than in other parts of New Zealand.[317] This is also supported by the *Case Review*, where we identified ten times as many cases of relevance from the High Court at Auckland than in the other High Court registries combined.

360 Another judge said that all judges needed to build cultural capability, citing the High Court at Christchurch, which is currently grappling with a trial that affects more than 50 Muslim families, and the High Court at Rotorua which services a population where the majority are Māori, for example. In August this year, the Crown began working with the registry at the High Court at Christchurch to move the scheduled hearing date for the man accused of carrying out the 15 March 2019 Mosque shootings, as the scheduled time conflicted with the Muslim holy month of Ramadan.[318]

361 Another judge suggested that all (new) High Court judges should be required to serve on the bench in Auckland, so that they can gain experience through the higher volume of cases in the Auckland courts with parties of different ethnicities.

362 One appellate judge said that, in that judge's experience, this increased volume of cases with parties of Chinese ethnicity was not necessarily resulting in a corresponding increase in numbers of Chinese parties in the appellate courts.

Particular challenges presiding over cases involving Chinese parties

Challenges in making credibility findings due to lack of contemporaneous documentary evidence

363 The judges interviewed had noticed that in cases involving Chinese parties there was often a lack of contemporaneous documentary evidence.[319] Judges also noted that if there was documentary evidence, it was usually created in an informal way, often without legal input. Professor Sarah Biddulph referred to legal documents that are in English as being drafted in "Chinglish", and noted that this can make it very difficult to assess the evidence and determine the meaning behind the document.[320] Judges commented that they had seen an increased volume of resulting trusts' cases, particularly in family disputes where there can be arguments as to the intended purpose of sums of money being transferred with no paperwork.[321]

364 A further complication was the fact that any contemporaneous documentation that does exist will often have been drafted in traditional full form or simplified Chinese characters. Translation of the document into English can make the document more difficult for judges to understand, as key terms and conditions may not be easily translated into English, especially if they were not drafted with legal input (although Dr Henry Liu has noted that professional translators are able to utilise a variety of techniques to resolve terms that are not able to be translated).[322] The judges interviewed commented that this lack of contemporaneous documentary evidence resulted in them on occasion being required to make credibility findings relying solely on oral evidence.

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317 Auckland Council Social and Economic Research Team "Auckland Profile – Initial Results from the 2013 Census" (May 2014) <www.aucklandcouncil.govt.nz> at 2.

318 Anneke Smith "Christchurch terror attacks: Accused gunman's trial delayed by a month" *Radio New Zealand* (online ed, 12 September 2019).

319 Refer to the cases listed in the *Case Review* section under the heading *Lack of contemporaneous documentation*.

320 Interview with Professor Sarah Biddulph, Director – Asian Law Centre, Melbourne University School of Law (Mai Chen, Auckland, 3 and 4 September 2019).

321 See for example *Li v 110 Formosa (NZ) Limited* [2018] NZHC 3418, which is discussed further below in the Case Review section. In that case, Mr Li, the plaintiff, argued that he was the beneficial owner of a golf course in Auckland because he borrowed the money from his mother. Ye, above n 239, at 151 notes that "it continues to be common in contemporary China for a member of the family to hold, manage and dispose of family property, including those under the name of another family member."

322 Email from Dr Henry Liu (Interpreter, former National President of NZSTI and 13th President of the International Federation of Translators) to Mai Chen (Managing Partner, Chen Palmer) commenting on draft report, 15 October 2019.

365 This increases the importance of *viva voce* evidence which may also be a challenge to weigh when it has to be translated from Chinese into English. It is harder to get the nuances, and assess pauses, emphasis, body language and choice of words in this context. Use of an interpreter means that a judge is hearing important evidence through an interpreter, not directly from the defendant, making it harder for the judge to assess a witness' credibility.

366 This issue is exacerbated when the evidence needs to be translated from English to another language such as Vietnamese or Korean, and then translated into Mandarin, and then translated back into English.[323]

367 This issue can also be exacerbated when the oral evidence being presented at trial is "diametrically opposed." As is demonstrated by the cases below, in some civil disputes involving Chinese litigants, judges can find themselves having to favour one party's oral evidence over another's.[324] This is because the evidence of both parties can contain some truth and some untruths, or both parties can be lying and the truth is somewhere in between. One judge commented that it is hard to sustain false facts throughout a trial and for inconsistencies not to become apparent, including by contrary documentary evidence, however limited.

Challenges faced understanding actions of Chinese parties

368 A number of the judges interviewed commented on having to rule in situations where they do not have a real understanding as to the behaviours that have led to the dispute – where the behaviour of Chinese parties was sometimes difficult to understand as it was so culturally nuanced and very different from the New Zealand cultural context.

369 For instance, one judge recalled a case where a Chinese man had lent $1 million to another, based solely on a handshake agreement. The judge said that it was hard to make a decision in this case as it was difficult to imagine, as a New Zealand European and without cultural undertanding, why the parties acted the way that they did.

370 Another judge spoke of increasingly seeing cases where large commercial transactions had been completed orally or with the agreement "written on the back of an envelope." There are many similar cases analysed in the *Case Review* section of this Report.[325] One judge spoke of the importance of growing the understanding and cultural capability of Chinese parties in this area, due to the difficulties faced by Chinese people in New Zealand "remodelling themselves after a lifetime of cultural habits." Another judge said that they always tried to understand matters from the perspective of the parties.

Challenges with witnesses

371 Judges have observed witnesses born in PRC who lacked an understanding that their duty when giving evidence was to answer all questions put to them and to answer questions based on what happened.[326] Judges have observed that some Chinese witnesses can instead feel that they need to say and do what the judge wants, due to the Chinese culture of being respectful to authority, rather than answer questions based on what happened. Some judges spoke of the need for counsel to provide more witness preparation for Chinese witness, so that they have a greater understanding of their role, and one judge recalled a case where the witness had objected to questions asked by the other side, due to inadequate preparation and understanding.

372 Judges have also observed witnesses who had come to New Zealand from PRC solely for the purpose of giving evidence to support a family member, not understanding their role. Judges had

323 See *R v Lot* HC Auckland CRI-2008-004-18323, 17 September 2010, discussed below in the *Case Review* section, under the heading *Sentencing of Chinese defendants on methamphetamine charges*.
324 See for example *Ming Shan Holdings Ltd v Ma* HC Auckland CIV-2000-404-1597, 31 July 2008; and *Zhang v Yu* [2019] NZHC 29.
325 See for example *Li v Chen* [2018] NZHC 2843.
326 Crimes Act 1961, s 109 establishes the crime of perjury, thereby creating an obligation on all witnesses to answer truthfully.

observed these witnesses wanting to give a speech, rather than understanding that their role was to answer questions, and to answer questions based on what happened.

373 This can be the result of differences between the rule of law in PRC and New Zealand. As academic Dr Ruiping Ye has noted:[327]

> Public attitudes towards courts and judges are somewhat ambivalent. On the one hand, courts represent the state authority and Chinese people are submissive to authority. On the other hand, courts and judges do not command the same kind of authority or respect as their Western counterparts do. Courts are not independent, as they are subject to constraints from institutions at the same level: the supervision of the People's Congress (legislature), source of funding from the executive government and the responsibility to report to the Political and Legal Committee of the ruling party.

374 In the interview with Canadian lawyer Clive Ansley, Mr Ansley referred to the fact that in PRC, witnesses rarely give evidence in court, and that their evidence is generally adduced by way of a written statement, which may also cause this lack of understanding as to the process and expectations of being a witness in court in New Zealand.[328]

375 Some of the judges confirmed that Chinese parties sometimes found it hard to understand the concept of the independent judiciary in New Zealand and that no one tells judges what to decide in New Zealand – judges make up their mind depending on the evidence, and not based on the status of the different parties or pressure by others.

376 Some judges also found that Chinese parties expect them to undertake an inquisitorial process, and are not familiar with the adversarial system in New Zealand.[329]

Remorse and sentencing

377 The Chinese culture of "face" or *mianzi*[330] can mean that clients of Chinese ethnicity are less willing to plead guilty or show remorse for their offending, out of a desire to maintain face and pride.[331] Some judges interviewed said that they would benefit from more guidance on these cultural factors to assist them in sentencing people of Chinese or CALD ethnicity.[332] Some judges said that it was important that the Ministry of Justice introduce funding for judges to order reports under section 27 of the Sentencing Act 2002 for them to access such cultural advice.[333]

Unwillingness to reach a settlement in a dispute

378 Some judges had presided over civil disputes between two parties of Chinese ethnicity that would have likely been settled if the case had involved parties of other ethnicities.

379 One judge said that they had presided over a case where the dispute was for quantum of $20,000. The judge had therefore suggested to the parties that they be left alone in the courtroom to allow them to reach a settlement agreement. The judge told the parties that the costs of the dispute

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327 Ye, above n 239, at 168.

328 As referred above, Clive Ansley is a Canadian Barrister and Expert on the Chinese legal system (Interview with Clive Ansley (Lucinda King, Wellington, 5 September 2019).

329 In PRC, the inquisitorial (as opposed to the adversarial) system is used.

330 Discussed under the *Chinese people in New Zealand and its Courts* section of this Report.

331 For example, in the case of *Chen Fu v R* CA476/05, 28 June 2006, the Court of Appeal dismissed an appeal by Mr Fu against the sentencing decision of the District Court. Mr Fu argued on appeal that the District Court Judge had failed to make concession for his late guilty plea. The Court held at [9] that:

> Counsel submitted that he felt cultural pressure to maintain face with his parents, or correspondingly to aid his parents, which delayed the acknowledgement of guilt. Counsel said that it was not until the appellant understood the full impact of text messages that he appreciated the strength of the Crown case. We do not find those submissions persuasive.

And later at [10]: "the plea of guilty was no more than recognition of the futility of continuing to maintain a pretence of innocence." This case clearly demonstrates how cultural factors can weigh heavily in sentencing for Chinese defendants.

332 For example, in the case of *Xie v R* [2019] NZCA 218, Ms Xie appealed against the sentence of four years for wounding her husband with intent to cause grievous bodily harm imposed by the District Court. Ms Xie sought leave to admit an affidavit from her husband at appeal demonstrating that he had forgiven Ms Xie for the offending and that she felt remorse for the offending. In patriarchal Chinese culture, this affidavit from Ms Xie's husband would carry a large amount of weight. The Court declined to admit the affidavit, and said that it was "noteworthy that Ms Xie has not chosen to place any evidence of remorse on the record herself."

333 As recommended in the *Recommendations* section of this Report.

would outweigh the quantum, and that costs would likely be ordered to lie where they fell. Despite this, after the judge returned to the courtroom, the parties said that they could not settle the dispute, even if there would be no costs award, as they were concerned about saving face.

380 Some judges commented that the New Zealand court system relied on large percentages of cases being resolved outside of court. If fewer cases are able to be settled, there is the potential for many more cases to come to court, and thus an increased need for more judges.

381 This highlights the need for the New Zealand Law Society to do more work to train lawyers on effectively advising their clients of Chinese ethnicity on the differences between mediation in New Zealand and PRC, and of the advantages that can come from resolving a dispute through mediation. This is important to ensure that, where cases are capable of being resolved outside of court, this is occurring.

382 The perceived unwillingness to reach a settlement agreement by Chinese parties is evidenced by cases in the *Case Review* section of this Report.[334]

Difficulties understanding Chinese witnesses and counsel and concerns about the English language proficiency of Chinese language speakers in the courts

383 Some of the judges' interviewed noted that they sometimes found it difficult to understand the accents of some Chinese witnesses and Chinese counsel. CALD people who arrive in New Zealand as adults will likely retain an accent, and, the later in their adult life they arrive in New Zealand, the less likely it is that they will be able to obtain complete fluency in spoken English.[335]

384 Another manifestation of the Chinese commitment to *mianzi* or "face" is Chinese parties responding affirmatively to questions by a judge about fully understanding what they are being asked, under cross-examination for example, when in fact they do not.[336]

385 Some judges that we interviewed said that they had found it difficult to know how much English a Chinese party, deponent or juror really understood. One judge recalled an occasion where the judge was instructing a witness who was being cross-examined before an overnight adjournment. The judge was trying to explain to the witness that she could not talk to anyone overnight. The judge said that the witness nodded to indicate that they did understand, but that the judge's impression was that she did not comprehend the instructions. The witness had been assisted by an interpreter, but the interpreter was not present at this point.

Interpreters

386 Some judges interviewed expressed concern about the additional time required in cases where the assistance of interpreters is needed. Some judges said that in their view, the use of interpreters will mean that a case runs for 50 per cent longer than one without interpreters. Another judge said that such cases can take twice as long. Some judges said that the additional time that is likely to be required when an interpreter is needed was not always adequately taken into account when scheduling trials, resulting in cases only being part-heard. One judge said that the court may require a different schedule for cases requiring interpreting, as the current 1.5 hour blocks may be too long for the interpreter to maintain accurate interpreting. This judge commented that they had recently presided over a case where the interpreters worked in teams, and that had been "much more successful." Another judge said that, in criminal cases, the use of two interpreters (one for

334 See for example *Zhou v Lou* [2016] NZHC 1685.
335 This is discussed in greater detail above, under *Chinese People in New Zealand and its Courts*.
336 For example, the *Equal Treatment Benchbook* of the English Judicial College states that face-saving concerns of East Asian parties mean that a judge should never directly ask a litigant if they have understood what the judge has said because "the individual may well say 'yes' even when they do not understand simply to save the fact of the judge if a 'no' might imply that the judge has not explained correctly": Judicial College, London, above n 121, at [56].

the defendant and one for the witness) worked well, and that that system works better than the civil system where there is often only one interpreter.[337]

387 Judges commented that it is more difficult to make credibility findings based only on oral evidence that they are hearing second hand through an interpreter when there is a paucity of contemporaneous documentary evidence.

388 Other judges commented that the quality of interpreters can be variable. One judge said that they had to ask for an interpreter to be replaced because the quality of the interpreter's spoken English was too low.

389 Another issue that some judges had observed was that some interpreters can lack an understanding of their role – which is to be independent, to interpret the statements of witnesses, and not to assist the deponent or to try and summarise or clarify statements made. Judges said that they had noticed discussions occurring between a witness and an interpreter, and expressed concern about not having an awareness of what was discussed because the translation into English is often a very short phrase that does not match the length of the exchange.

390 Judges said that they have experienced instances where Chinese counsel, who speak the language being interpreted, have raised concerns about the accuracy of interpreting during a trial. This is difficult for judges to navigate, as they will often not speak the language that is being interpreted, and cannot reach an independent view on the accuracy of the interpretation. One judge said that they ask that the question be put to the deponent again and then interpreted again.

391 Some judges said that use of interpreters in a trial has the potential to create a less accurate record, and can "undermine the clarity and reliability of the evidence." This is exacerbated in cases where there are different foreign languages that require interpretation, for example where a witness speaks a different language from a defendant and statements need to be interpreted twice. For example, one judge recalled a case where there was a Cambodian defendant and a Thai witness, resulting in testimony having to be interpreted from Thai into English and then English into Cambodian. Another judge said that cross-examination of a Chinese document is very difficult, as the witness has to look at the Chinese version, the judge has to look at the English version and the interpreter is looking at both versions.

392 Other judges interviewed spoke positively of their experience of Chinese interpreters in their courtroom. One judge stated their view that the interpreters in the judge's cases had been "conscientious" and recalled an occasion where an interpreter had thought on reflection that they had not correctly interpreted an answer, and so had asked for permission to go back and ask further questions to clarify matters. Another judge said that the interpreter in a particular case had been "excellent." Lastly, one judge commented that an interpreter had taken steps to explain some of the process to the witnesses, and that he had found this very helpful.

393 Judges that we interviewed said that the court needs to have more oversight over the use of interpreters in court. As set out in the section on *Interpreters*, in civil disputes heard in New Zealand courts, the parties are responsible for organising and paying for interpreters. While the court has to "approve" interpreters, the practical reality is that the judge only realises that an interpreter is needed when they turn up at the hearing and there is a witness requiring an interpreter and an interpreter is present. One judge said that they had presided over a number of cases where, in their view, the parties and witnesses required an interpreter, but they did not have one. Counsel should have brought the need for interpreters to the Judge's attention by memorandum at the earliest opportunity.

337 Although, according to the Court in *Abdula v R* [2011] NZSC 130, [2012] 1 NZLR 534 at [60], where the witness and the defendant both speak the same language, there should not be two interpreters involved as the interpreter should be speaking loud enough for both the witness and the defendant to hear.

394 Judges do think it is important that they have the ability to ensure the quality of interpreters and a proper match with the deponent. For example, if an interpreter from Singapore is matched to interpret for a deponent from rural PRC, even though they both speak Mandarin, it is likely that the dialects spoken and the cultural nuances of those very different countries will result in the interpretation being less accurate.

Self-represented Chinese litigants

395 Some judges interviewed confirmed that they felt that the numbers of self-represented Chinese litigants were increasing, particularly in civil cases. However, no data is kept to corroborate whether this is in fact the case and also whether Chinese parties choose to represent themselves more than any other ethnicity.[338]

396 One judge recalled an appeal where the Chinese party had been self-represented at the first instance hearing. He said that the trial judge had tried to assist the litigant, but that this had resulted in her changing her story to try and adapt to what she believed the judge wanted to hear.

397 Another judge commented that Chinese litigants in person require additional guidance through the process when compared to other litigants in person, particularly when they lack English language capability. The challenges faced by Chinese litigants in person appear to be more acute than for others, due to the different rule of law culture they come from and the fact that they are much less likely to have contemporaneous documentary evidence to assist them.[339] As noted above, this then means an increased reliance on *viva voce* evidence, which will be a real challenge for a self-represented litigant who has a low level of English language capability and who needs to speak through an interpreter.

398 Another factor that may cause self-represented litigants additional challenges is, as noted above, that the Chinese court system is inquisitorial, and that people expect the judge to proactively investigate to find the truth. Self-represented litigants may therefore not understand that they need to put their best case forward, as judges in the New Zealand adversarial court system decide cases based on the evidence adduced by the parties.[340]

Juries and Chinese jurors

399 The judges interviewed commented that, in their experience, Chinese people respond positively to their jury summons, and turn up in court, evidenced by the generally large number of Chinese in a jury pool. However, some judges also said that Chinese jurors were more likely to request to be excused from service due to their limited English language capability, and that in their experience the majority of those summonsed would request excusals for this reason. The Ministry of Justice does not currently collect data on the reasons why jurors are excused, and so it is not possible to gain an understanding as to the precise numbers of jurors that are being excused for lack of English language capability.

400 One judge recounted a situation where a Chinese juror had to be excused because the foreperson raised concerns that the juror did not understand what was going on. Given there were still 11 jurors left, the judge allowed this to happen. However, it meant that the loss of another juror would have necessitated a retrial, so it was not without risk.

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338 A 2015 study on litigants-in-person in New Zealand courts entitled *Keeping Up Appearances: Accessing the Courts as a Litigant in Person* found that while there is a perception that the numbers of litigants-in-person in New Zealand are increasing, there is no data available to show whether this perception is correct: Bridgette Toy-Cronin "Keeping Up Appearances: Accessing the Courts as a Litigant in Person" (PhD Thesis, University of Otago, 2015).

339 See for example *Jia v Auckland Council* [2018] NZHC 1133, a case discussed in the *Case Review* section that demonstrates the challenges faced by Chinese litigants-in-person.

340 John P Capowski has noted that "China's judicial process has placed a premium on objective truth": John P Capowski "China's Evidentiary and Procedural Reforms, the Federal Rules of Evidence, and the Harmonization of Civil and Contract Law" (2012) 47(3) Texas International Law Journal 455 at 496.

401 One judge said he asks what the potential Chinese juror does for a living, and that if the job requires them to speak English, the judge was more likely to assess them as sufficiently English literate and to empanel them. Some judges commented that it is hard to know what the English language capability of a juror is, and said that they took a cautious approach when they believed that language might be an issue for a juror, by excusing them from service.

402 One judge commented that language difficulties can be compounded by cultural factors. This is highlighted by the fact that PRC does not have a jury system like New Zealand and other common law countries.[341] Those from PRC who are summonsed for jury duty will potentially lack an understanding as to the role and purpose of serving on a jury. This lack of cultural awareness may also contribute to Chinese jurors requesting to be excused as they do not understand the importance of jury service in Western culture.

403 These factors have the potential to lead to fewer numbers of Asian jurors serving on juries. With increasing superdiversity across New Zealand, and the rapidly growing Asian population, particularly in Auckland, this has the potential to result in defendants not being tried by a jury of their peers.

341 Yifan Wang, Sarah Biddulph and Andrew Godwin "A Brief Introduction to the Chinese Judicial System and Court Hierarchy" Asian Law Centre Briefing Paper Series <law.unimelb.edu.au> at 22.

LAWYERS' PERSPECTIVES

Introduction

404 Approximately 20 practitioners with experience advising Chinese clients were interviewed for this Report. The practitioners interviewed varied in terms of ethnicity, practice area, years in the law and the work environment they practiced in. Most of the lawyers interviewed were Chinese, both New Zealand-born and born overseas, who acted mostly for Chinese clients. However, we also interviewed lawyers born in Korea, India and Malaysia, as well as New Zealand European lawyers who had acted for or prosecuted Asian parties. The following comments therefore reflect a cross-section of their views.

405 As lawyers, working with any CALD client will result in a unique set of issues and challenges. However, as lawyer Gurbrinder Aulukh noted, the issue is more acute with Chinese litigants, particularly those from PRC, than for others. This is because they do not have the Commonwealth background that countries such as India, Hong Kong and Singapore do, because of the different rule of law culture and because the English language is much less commonly spoken than in countries such as India and Singapore where English is an official language, and in Malaysia, where English is very widely spoken.[342]

406 There were a number of common themes raised by the interviewees, each of which will be discussed in greater detail in this section:

a) *Discrimination and isolation faced by Chinese lawyers working in New Zealand*. Some Asian lawyers we interviewed for this Report expressed concern that they had been discriminated against while at work.[343] We also heard concerning reports about a sense of isolation by Chinese lawyers, who are increasingly working in boutique Asian law firms serving only Asian clients, and speaking Mandarin at the office to other Asian staff and clients, not English. The limited experience and expertise of some principals in charge of these firms was also raised as an issue. Some of these Chinese lawyers ended up as sole practitioners because they could not get appointed to law firms, or the firms they worked in were nervous about liability for advice given in Mandarin that they could not peer review.

b) *Challenges faced when working with Chinese clients*. As set out above, the Chinese culture and rule of law system are significantly different to those in New Zealand. However, some Chinese clients, particularly those who have arrived in New Zealand as adults, expect the New Zealand legal system to work as it does in PRC. Lawyers acting for these clients have to work through this dichotomy in order to advocate effectively for their clients and to get accurate instructions from their clients. Lawyers interviewed commented that they had also experienced difficulties explaining different concepts, such as the Torrens land system to their Chinese clients, even if they were able to do so in their client's own language.

c) The issues highlighted in the *Interpreters* section of this Report also impact lawyers when advocating for Chinese parties in court, and when working with Chinese witnesses in court. Lawyers we interviewed expressed frustration about the varying quality of interpreters available, including the accuracy and competency of interpreters. Some lawyers who spoke the same language as the persons being interpreted in court found themselves in a difficult position when they were aware that the interpreting was not accurate, while others expressed concern about inappropriate discussions between interpreters and witnesses (for example, witnesses asking interpreters to help them or tell them what to say in response to questioning).

342 Interview with Gurbrinder Aulukh, Auckland City Lawyers (Mai Chen, Auckland, 27 June 2019).
343 Interview with Samantha Hiew, Solicitor, Crotfield Law (Mai Chen, Auckland, 19 June 2019); and Interview with Anonymous, Lawyer (Mai Chen, Auckland, 10 June 2019).

Demographic make-up of the legal profession

407 According to the Law Society, 3.3 per cent of lawyers practising in New Zealand identify as Chinese, 1.8 per cent as other Asian, 1 per cent as south-east Asian and 2.2 per cent as Indian.[344]

408 The following table sets out the types of legal work done by Asian lawyers, as well as New Zealand European lawyers:[345]

	Multi-lawyer firm	In-house	Barristers (including QCs, barrister soles and employed barristers)	Sole practice
Chinese	69%	19%	5.4%	5.4%
Indian	53%	25%	7.8%	13%
Southeast Asian	64%	27%	3.6%	2.9%
Other Asian	65%	20%	6%	7.7%
New Zealand European	58%	22%	12%	7.1%

409 Chinese and South-East Asian had the lowest numbers of lawyers practising as barristers (apart from Latin American, an ethnicity where there are no lawyers practising as barristers). Overall, 12 per cent of lawyers practice as barristers. This appears to align with anecdotal evidence from interviews with judges and lawyers that suggest there are not many Chinese lawyers working in litigation.

410 The demographic data provided by the New Zealand Law Society shows that the legal profession, like New Zealand, is becoming increasingly diverse. Law Society Communications Manager Geoff Adlam says "the changing ethnic makeup of the legal profession is perhaps best shown when it comes to time since admission. The proportion of new lawyers in the most commonly selected ethnicity, New Zealand European, is below the national total. Just under 70 per cent of lawyers in that ethnic group were admitted over 10 years ago, a long way ahead of the proportion in all other ethnicities."[346]

Discrimination and isolation faced by Asian lawyers

Alleged discrimination

411 The majority of the Asian lawyers interviewed for this Report were not born in New Zealand. Some came to New Zealand as adolescents and completed high school before attending law school, and others arrived in New Zealand as adults and were not legally trained before embarking on study and a career in law. While only anecdotal evidence is available, this seems to be indicative of the Chinese lawyers working in New Zealand – i.e. a large number were born overseas. It would be useful for the New Zealand Law Society to ask in their next questionnaire whether the respondent was born in New Zealand.

412 As already discussed above, arriving in New Zealand as an adolescent or adult means that these lawyers will likely retain an accent and experience difficulty becoming entirely fluent in the spoken and written English language. This will be a barrier for all CALD lawyers practising in New Zealand who are not born here.

344 Geoff Adlam "Snapshot of the Profession 2019" *Law Talk* (March 2019) at 34. This is a large increase from 2012, the first year the Law Society has provided ethnicity data for the profession, where 5.7 per cent of lawyers were "Asian" (no further breakdown was given): "A Snapshot of the New Zealand Legal Profession as at March 2012" New Zealand Law Society (March 2012) at 9. When added up, the 2019 figures equate to 12.1 per cent of the legal profession identifying as Asian.

345 Adlam, above n 344.

346 Geoff Adlam "Diversity in the New Zealand legal profession: At a glance" *LawTalk* (September 2019) at 65.

413 One lawyer we interviewed, who wishes to remain anonymous, arrived in New Zealand as a 30 year-old and noted that, for their first two years in court, post admission to the bar, they struggled to be understood.[347] The person was not a lawyer on arrival in New Zealand and subsequently obtained legal qualifications. The lawyer, who worked in a firm in a smaller New Zealand city, appeared in court on a regular basis, but stated that they had to take extra steps to ensure the judge understood what they meant when making oral arguments. They also stated that they relied more on written submissions than other counsel perhaps would.[348]

414 Another lawyer, Alice Nie, said that she had practiced law for seven years before arriving in New Zealand, but that her knowledge of English had only come from books, so when she arrived in New Zealand, she really struggled with language. Nie advised that she still finds the spoken English language the biggest barrier to practising law as a Chinese lawyer in New Zealand, even though she has practiced here since 2006.[349] One experienced Chinese lawyer had been asked by a judge what the Chinese opposing counsel was saying. The judge was experiencing difficulty understanding the lawyer due to their strong accent.[350]

415 A small number of Chinese and Korean lawyers noted that they had felt discriminated against in the courtroom and in their day-to-day work as a lawyer. One anonymous lawyer recounted a time when she was in communication with another lawyer at work. As the interviewee had a Chinese surname, the other lawyer stated in correspondence that the fact that English was their second language was clearly the reason for the perceived lack of empathy in correspondence. The interviewee said that this demonstrated inherent racial bias on the part of the other professional.[351] This lawyer speaks fluent English. Another anonymous interviewee said that she had experienced judges who were openly critical of her, and that she had at times felt patronised by judges.[352]

416 Royal Reed gave the example of a judge asking her why the Chinese client on the other side (who was represented by a New Zealand European lawyer) was acting in a certain way. Reed responded that it would not be appropriate for her to comment on the ethics or the behaviour of the person her client was suing.[353]

417 Stella Chan said that, in her experience, some clients might prefer to go to a firm with predominantly New Zealand European lawyers, believing that they might get better treatment from the judge if they do so.[354] The thinking is that New Zealand European judges would not discriminate against New Zealand European lawyers. Chan said that she is concerned that if a judge has had a poor experience Chinese lawyer, that may colour their impression of all Chinese lawyers. Chan did however comment that her actual experience is that judges have been courteous and helpful and have treated everyone the same.[355]

418 The concept of "face" which we will discuss further below could explain why some lawyers we interviewed were reluctant or hesitant to say that they felt discriminated against in the law, while noting that friends, clients and colleagues had experienced this. Clinical psychologist Eve Yee Han Graham has conducted research on this topic, and notes that "under the influence of a collectivist culture, Chinese people find it extremely difficult to face up to racism … racial discrimination embarrasses Chinese people and makes them suffer severe loss of face."[356]

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347 Interview with Anonymous, Lawyer (Mai Chen, Auckland, 17 June 2019).
348 Interview with Anonymous, Lawyer (Mai Chen, Auckland, 17 June 2019).
349 Interview with Alice Nie, Alice Lawyers Ltd (Lucinda King, Auckland, 18 July 2019).
350 Interview with Anonymous, Lawyer (Mai Chen, Auckland, 29 July 2019).
351 Interview with Anonymous, Lawyer (Lucinda King, 30 August 2019).
352 Interview with Anonymous, Lawyer (Mai Chen and Lucinda King, Auckland, 5 February and 4 July 2019).
353 Interview with Royal Reed, Principal, Prestige Lawyers (Mai Chen, Auckland, 27 February 2019).
354 Interview with Stella Chan, Partner, Forrest Harrison, (Mai Chen, Auckland, 7 August 2019).
355 Interview with Stella Chan, Partner, Forrest Harrison, (Mai Chen, Auckland, 7 August 2019).
356 Eve Yee Han Graham "Chinese Immigrants Experiences of Racial Discrimination in New Zealand" (MA Thesis (Psychology), Massey University, Auckland, 2001) at 7.

Emerging issue – isolation of Chinese lawyers

419 Young lawyer Samantha Hiew spoke of her experience working in a small, boutique Chinese law firm on the North Shore in Auckland, where all of the lawyers in the firm are Asian (all born overseas, in Malaysia, Korea and PRC), and the majority of the clients are also Asian.[357]

420 Many of the interviewees we spoke with expressed concern about the growing phenomenon of Asian lawyers, generally born overseas, working in sole practice or in small, boutique law firms. Anecdotal evidence suggests that these firms are often located in "ethnoburbs," and that they are increasing in number to meet the growing Chinese population in particular regions. Lawyer Fei Fei Teh noted that her time working in a New Zealand European law firm had provided her with a good foundation to advise her clients, now that she has started her own law firm.[358]

421 An emerging issue is that working for these boutique style law firms is resulting in some young Asian lawyers feeling isolated.

422 Another emerging issue is that isolation in boutique Asian law firms can exacerbate English language difficulties. As set out above, research on "ethnic enclaves" has demonstrated that migrants who live in these ethnic enclaves will have limited opportunities to practice and improve their English language skills.[359] Where lawyers have arrived in New Zealand as adults, qualified to practice law and then immediately start work in a boutique Asian law firm, this may limit their opportunities to practice and improve their English language skills.[360]

423 The concept of *mianzi* may also result in Chinese lawyers being unwilling to bring in lawyers with specialist expertise as that would indicate to the client that they have limited knowledge in that area.

Challenges faced when working with Chinese clients

424 When representing Chinese clients, particularly those who are either new to New Zealand or those who have arrived as adults and still live in an ethnoburb – within a largely Chinese community – lawyers experience a number of additional challenges. Some of these are challenges that are unique to Chinese clients, for example the Chinese "way of doing business", but others will be a challenge for lawyers representing any CALD client, such as addressing the differences between the New Zealand legal system and the legal system in the client's country of origin.

Rule of law system in country of birth

425 One lawyer interviewed for this project noted that Asian clients will often colour the advice that they are given based on their own assumptions, and their experience of the legal system in their country of origin.[361] The different rule of law culture Chinese clients are brought up with is entrenched and impacts on their life in New Zealand. For example, one anonymous Chinese lawyer we interviewed from PRC said that public law is very rare in PRC, and that clients in New Zealand do not understand that you can sue the government. This means that they instead try to suggest other options, such as bribery or trying to use a connection or relationship to get their desired outcome.[362]

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357 Interview with Samantha Hiew, Solicitor, Crotfield Law (Mai Chen, Auckland, 19 June 2019).
358 Interview with Fei Fei Teh, Partner, Millennium Lawyers (Mai Chen, Auckland, 2 August 2019).
359 Bleakley and Chin, above n 217.
360 This was borne out in interviews. For example, Alice Nie, who was admitted to practice in New Zealand in 2006 and opened her own practice in 2009. She stated that she still experiences difficulty in litigation practice due to her English language capability.
361 Interview with Anonymous, Lawyer (Mai Chen and Lucinda King, Auckland, 5 February and 4 July 2019).
362 Interview with Anonymous, Lawyer (Lucinda King, Wellington, 30 July 2019).This is also supported by our interview with Professor Sarah Biddulph under the heading *Relevant law reform in PRC - insights from Professor Sarah Biddulph*, which shows that the development of public law is a relatively recent phenomenon in China.

426 It is therefore crucial that lawyers representing Chinese parties are able to adequately explain how the New Zealand rule of law framework applies to a dispute, and why options such as bribery are illegal in New Zealand.[363] Michael Kan recalled that a client had advised him to "do what needs to be done, money is no problem," implying they wanted him to bribe the relevant decision makers to achieve their desired outcome.[364] Due to their cultural background, this client did not understand the correct process to follow in New Zealand, and that bribery is illegal in New Zealand.[365]

427 Senior Chinese lawyer Stella Chan said that younger Chinese clients would be more likely to understand these concepts if they were explained to them properly, but clients over about 50 years old would find it harder to grasp concepts such as the independent judiciary. Chan said that they would have come from a PRC that operates very differently to New Zealand in terms of the rule of law.[366] Chan said, in contrast, that litigants in Chinese courts are also liable to the judge being influenced by external factors, such as the best political outcome.[367]

428 An anonymous lawyer said that, in her experience, advising a Chinese client can take 1.5 to 3 times as long when compared to advising a New Zealand European client.[368]

429 Another anonymous interviewee said that most Chinese clients are vulnerable as, without any knowledge of the New Zealand system, they are more reliant on the advice of lawyers than other clients are.[369]

New Zealand legal framework

430 In addition to these concerns about the different rule of law culture, other differences in the New Zealand legal framework compared to the Chinese legal framework can be challenging for lawyers to explain to Chinese clients. This will also be the case for lawyers representing other CALD parties – for example, a lawyer representing a client from a civil law country, such as France or Germany, will have to explain the differences between the civil and common law systems in the same way that the lawyer would have to explain this to a Chinese client not born in New Zealand.

431 Lawyers interviewed stated that, even when they were explaining these concepts to their clients in their first language, the client still found it very difficult to understand. For example, one Mandarin speaking lawyer, who wishes to remain anonymous, stated that Chinese clients struggle to understand the Torrens system of land transfer registration, as it is completely different to the Chinese system.[370] While this lawyer was able to speak to his clients in their language, they often found that their clients could not understand the concept, even when it was explained in Mandarin. Another lawyer said that they had difficulty explaining the steps that lead to a hearing to an Asian client, such as filing dates and paperwork, with some clients not understanding why these steps were necessary, and instead expecting the matter to go straight to a hearing.[371]

432 One lawyer represented a client who was applying for a limited driver licence.[372] However, her application for a limited licence was for the purpose of taking a child that was visiting New Zealand on multiple trips daily for multiple weeks. The lawyer had tried to explain to the client, in her own language, that this justification would not meet the test for a "limited" licence, as not being able

363 See for example Ling Li "Performing Bribery in China: Guanxi Practice, corruption with a human face" (2011) 20(68) Journal of Contemporary China 1. In this paper the author explores how bribery operates within the Chinese courts, and gives examples of unsuccessful and successful accounts of bribery.
364 Interview with Michael Kan, Michael Kan Law (Mai Chen, 22 January 2019).
365 Bribery of judges and public officials are specific offences under the Crimes Act 1961 which carry a maximum penalty of seven years' imprisonment: ss 101 and 105.
366 Interview with Stella Chan, Partner, Forrest Harrison, (Mai Chen, Auckland, 7 August 2019).
367 Interview with Stella Chan, Partner, Forrest Harrison, (Mai Chen, Auckland, 7 August 2019).
368 Interview with Anonymous, Lawyer (Mai Chen, Auckland, 24 July 2019).
369 Interview with Anonymous, Lawyer (Mai Chen, Auckland, 17 June 2019).
370 Interview with Anonymous, Lawyer (Lucinda King, Auckland, 4 July 2019).
371 Interview with Anonymous, Lawyer (Mai Chen and Lucinda King, Auckland, 5 February and 4 July 2019).
372 Interview with Samantha Hiew, Solicitor, Crotfield Law (Mai Chen, Auckland, 19 June 2019). Such licences can be granted to people who have been disqualified from driving to allow them to drive for specific reasons at specified times, where not being able to drive would cause extreme hardship to them or someone else.

to drive in these circumstances would not cause her or someone else hardship, but the client struggled to comprehend why.[373]

433 Another lawyer gave the example of a client who was appearing for speeding in court and failing to stop when asked. His client had not seen the sign indicating a temporary reduction in speed due to roadworks, and had been travelling at 100kph when police began a pursuit with lights. His client believed that the police wanted to pass him and did not understand that they wanted him to stop or that the law required him to stop. As a consequence the client had incurred additional penalties.[374]

434 Another example of how the different legal framework can impact adversely on Chinese parties was noted by interviewee Ashley Oh.[375] Oh noted that in PRC, the law around drink driving is very different, which means that Chinese people may lack an understanding of the legal limit in New Zealand, as well as an understanding of the consequences for drink driving. In 1998, the "Regulations on Traffic Management of the People's Republic of China" were officially implemented, including restrictions on drink driving. Harsher penalties were introduced in 2011.[376]

435 If a person born in PRC arrived in New Zealand prior to 1998, they would come from a background where driving under the influence is not an offence, which is very different from the current law in New Zealand. In New Zealand, a person can be convicted of an offence under section 56 of the Land Transport Act 1998 if their blood-alcohol level is more than 80 milligrams per 100 millilitres of blood, as shown by a blood test. Drivers who have a blood alcohol level between 50 and 80 milligrams per 100 millilitres of blood can be given an on-the-spot infringement notice similar to a speeding ticket.[377]

436 Another example that was referred to by interviewees concerned domestic violence. David Young said that he has experienced defendants in domestic violence cases that expect the case to be thrown out if the complainant does not show up in court.[378] Michael Kan said that Chinese complainants can lack an understanding of the consequences of calling the police for a domestic violence matter, thinking that the police are there just to "tell their partner off," rather than arrest them.[379] Ashley Oh referred to another example of a defendant in a domestic violence case who referred to the fact that his wife was arguing with him about his mother, something that would be very disrespectful in Asian culture, to mitigate culpability. However, while Oh understood this, the New Zealand European judge did not understand how this could mitigate culpability due to the different cultural understanding.[380]

437 Alice Nie said that many clients have misunderstood New Zealand family law because of their cultural background, and felt that New Zealand rules are unfair. Nie gave the example of guardianship, as in PRC usually the mother gets sole custody following a divorce, and grandparents usually have greater rights of custody over children in PRC than they do in New Zealand. However, Dr Andrew Zhu has said that these rules relating to custody only apply if the child is less than two years old.[381] Nie also said that Chinese parents often lend large sums of money to their sons, without any real written evidence, and cannot understand why their evidence of this fact is not accepted in New Zealand courts.[382]

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373 Interview with Samantha Hiew, Solicitor, Crotfield Law (Mai Chen, Auckland, 19 June 2019).
374 Interview with Michael Kan, Partner, Michael Kan Law (Mai Chen, Auckland, 22 January 2019).
375 Interview with Ashley Oh, Police Prosecution Service (Lucinda King, Auckland, 16 July 2019).
376 Patrick Mattimore "New drunk driving law shouldn't be watered down" *China Daily* (online ed, China, 19 May 2011) <www.chinadaily.com.cn>.
377 Ministry of Transport "Land Transport Amendment Act (no 2) 2014 questions and answers" (Updated 27 September 2014) <www.transport.govt.nz>.
378 Interview with David Young, Barrister (Mai Chen, Auckland, 9 August 2019).
379 Interview with Michael Kan, Partner, Michael Kan Law (Mai Chen, Auckland, 22 January 2019).
380 Interview with Ashley Oh, Police Prosecution Service (Lucinda King, Auckland, 16 July 2019).
381 Email from Dr Andrew Zhu (Director, Trace Research Limited) to Mai Chen (Managing Partner, Chen Palmer) commenting on draft report, 14 October 2019.
382 Interview with Alice Nie, Alice Lawyers Ltd (Mai Chen, Auckland, 18 July 2019).

438 Another challenge that lawyers representing Chinese parties face is the unique way that Chinese do business.[383] In particular, the Chinese way of conducting business dealings through *guanxi*, or through the power of relationships, rather than in the Western way – through contracts and written agreements – can cause difficulties for lawyers representing Chinese parties.[384] One lawyer we interviewed said she was a solicitor in a case where parties had been involved in multi-million dollar transactions with no written contract.[385] This interviewee said that the judge made a comment at an injunction hearing, asking how so much money could have been transferred without a contract. The lawyer said that they had instructed a New Zealand European barrister and that despite briefing him on the cultural factors that contributed to this behaviour, the barrister did not explain this properly to the judge. The interviewee said that the judge's lack of understanding that this is common practice in PRC meant that their client who had spearheaded the business transaction was cast in a bad light.[386]

439 Another lawyer said that clients who had lived in New Zealand for a longer period of time realise the importance of a legally drafted written contract when conducting business, but that clients who are newer to the country are more naïve, and are more likely to trust the relationship when doing business.[387]

440 Alice Nie noted that it is particularly common among Chinese families to conduct business transactions without proper written documentation, which results in difficulties for lawyers advocating for their client in court. Nie gave the example of a Chinese person who sent their cousin a large amount of money to buy a property in New Zealand on their behalf, only for the cousin to then mortgage that property to buy his own property. Nie said that there can be misunderstandings as to the purpose of the transaction. The lender thought that the cousin was investing on their behalf, whereas the cousin thought it was a loan. Nie said that the lack of documentary evidence means that lawyers can only make arguments based on what their client *said*, rather than what the documentary evidence demonstrates, because there is no documentary evidence to verify the *viva voce* evidence of the client.[388]

441 In the criminal context, a senior prosecutor Steve Symon said that prosecutors and regulatory agencies were finding the documentary evidence in cases with Chinese defendants very difficult and time-consuming to analyse.[389] Symon said that there are increasing numbers of cases where there is a very high volume of evidence in Chinese in the form of WeChat or WhatsApp messages. Symon said that prosecutors have to consider firstly, whether it is worth translating all of the evidence due to the time and cost required to do so, and whether the level of resource required is warranted given the seriousness of the alleged crime. If so, then prosecutors have to consider how they are going to present the evidence to an English speaking jury and court. Symon said that regulatory agencies such as Customs and the Companies Office have to rely on investigators who may speak Mandarin or Cantonese to conduct a preliminary assessment of the evidence.[390]

442 Symon also noted that this had perhaps resulted in an increased reliance by investigators on interviewing suspects, thus increasing the reliance on viva voce evidence, which, as is set out above in the *Judges' Perspectives* section, brings with it inherent challenges when interpreters are being used.[391]

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383 This was discussed above in the section on *Judges' Perspectives*, but it can also cause difficulties for lawyers representing Chinese clients in civil disputes.
384 As noted above in the *Chinese Parties in New Zealand and its Courts* section.
385 Interview with Samantha Hiew, Solicitor, Crotfield Law (Mai Chen, Auckland, 19 June 2019).
386 Interview with Samantha Hiew, Solicitor, Crotfield Law (Mai Chen, Auckland, 19 June 2019).
387 Interview with Anonymous, Lawyer (Mai Chen, Auckland, 24 July 2019).
388 Interview with Alice Nie, Alice Lawyers Ltd (Lucinda King, Auckland, 18 July 2019).
389 Interview with Steve Symon, Partner, Meredith Connell (Mai Chen, Auckland, 16 July 2019).
390 Interview with Steve Symon, Partner, Meredith Connell (Mai Chen, Auckland, 16 July 2019).
391 Interview with Steve Symon, Partner, Meredith Connell (Mai Chen, Auckland, 16 July 2019).

Alleged discrimination against Chinese clients by the judiciary and juries

443 A number of the lawyers we interviewed noted that their clients had, at times, experienced discrimination or criticism from judges. However, some of the lawyers interviewed also said that they had not experienced discrimination from judges.

444 Part of the Chinese culture of "face" requires a person to look one's best in terms of dress and appearance, which can be at odds with the more informal nature of New Zealand culture, where the wearing of a full suit and tie is becoming less common. Wearing expensive brands may give the wrong impression about the wealth of the client.

445 One lawyer noted that she felt the judge in a trial took a dislike to their client, in part because of the way that they were dressed, and that she advised this client to dress down for court.[392] Another lawyer confirmed this view, and noted that she often advised her clients not to dress up for court, and not to wear a suit.[393] Ashley Oh said that the law firm where she had previously worked had taken steps to make sure that their clients did not come across to the court as Asian stereotypes. Oh recalled a client who fitted the "rich Asian who lives on the [North] Shore" stereotype, who they had to tell not to wear expensive clothes when he appeared in court.[394]

446 Royal Reed gave the example of a client who continually cleared his throat during a trial, which, while very normal and expected in PRC, was distracting in the trial. Reed said that on the second day, the judge told her to buy some throat lozenges for her client. Reed said that it would have been more helpful if she had been able to explain her client's behaviour to the judge, and establish that it is not something that he could easily stop. The client came from a culture where this was acceptable, and he was not being disrespectful to the judge or the court.[395] However, Dr Andrew Zhu said that he has not seen any examples of this culture in China, and that in his opinion a judge in PRC would also deem this to be a distracting behaviour.[396]

447 Reed gave another example where recently she heard an outburst from a judge who said "what is it with you Chinese people". Reed said that if it had been any culture other than Chinese, people would be horrified. Reed said that as the number of Chinese litigants increases, frustration by judges seems to increase.[397]

448 One interviewee, lawyer Michael Kan noted that Chinese people believe that "I am right, and if you don't believe me then you are wrong", which can be detrimental to their behaviour when they are asked questions by a judge. Kan noted that litigants and witnesses may have been high ranking officials or people of status in PRC, and are not used to being questioned when they say something, but rather expect to have their rank recognised by the judge.[398]

449 Another factor that lawyers representing Chinese clients will need to address in court is the idea that Asian cultures often see eye contact as a sign of disrespect, and accordingly Chinese clients will not make eye contact with people higher in the hierarchical structure than them, such as judges. This is also the case for people from Pacific cultures, and is another reason why it is important that judges and lawyers are culturally aware.[399]

450 Kan noted that judges can also be impatient where interpreters are required. Lawyers said that cases where interpreters are required take significantly longer. Kan noted that some witnesses do speak English but nonetheless choose to use an interpreter when giving evidence, which affords

392 Interview with Samantha Hiew, Solicitor (Mai Chen, Auckland, 19 June 2019).
393 Interview with Anonymous, Lawyer (Mai Chen and Lucinda King, Auckland, 5 February and 4 July 2019).
394 Interview with Ashley Oh, Police Prosecution Service (Lucinda King, Auckland, 16 July 2019).
395 Interview with Royal Reed, Principal, Prestige Law (Mai Chen, 26 February 2019).
396 Email from Dr Andrew Zhu (Director, Trace Research Limited) to Mai Chen (Managing Partner, Chen Palmer) commenting on draft report, 14 October 2019.
397 Interview with Royal Reed, Principal, Prestige Law (Mai Chen, 26 February 2019).
398 Interview with Michael Kan, Partner, Michael Kan Law (Mai Chen, Auckland, 22 January 2019).
399 Commisceo Global "China Guide" <www.commisceo-global.com>.

them additional time to think of an appropriate answer to the question posed.[400] Another senior Chinese lawyer confirmed this. The same lawyer said that Chinese clients can feel disadvantaged if they are interrupted by the judge, and that, in her view, it was important that judges made sure their body language remained positive so that Chinese clients did not get the perception that they had not been heard.[401]

451 Steve Symon said that use of interpreters in a trial can be a source of frustration for both the judge and the jury. Symon said that the judge may take it out on the prosecution, and question why they have included peripheral evidence that may not be necessary for the case and that, in cases involving interpreters, prosecutors may come under pressure to forego evidence. Symon said that the jury may also be likely to get angry or frustrated with the defendant, as they have to spend longer serving on the jury due to the need for an interpreter, particularly when the defendant can speak some English.[402]

452 Symon also said that there may be prejudice or stereotyping by jurors against Chinese defendants, particularly in drug or fraud cases. Symon said that the court may wish to consider providing judges' directions to juries in cases where there may be biases as a result of cultural stereotyping.[403]

'**Face**'

453 Our interviews disclose that the concept of face, or *mianzi*, can impact on a Chinese litigant's experience in court in three key ways:

a) *Agreeing to settle a case*. A number of lawyers interviewed recounted their experience that Chinese litigants were less likely to settle disputes than their New Zealand European counterparts. A number of factors will have a bearing on this, however, *mianzi* is a significant factor that can result in an unwillingness to settle;

b) *Sentencing*. The Sentencing Act 2002 establishes that "any remorse shown by the offender" is a mitigating factor the court must take into account when sentencing an offender.[404] However, the concept of face means that Chinese parties will be much less willing to publicly say that they feel remorse, even if they are fact feeling remorseful, as evidenced further below, and in the *Case Review* section; and

c) *Chinese defendants agreeing to interviews in English out of their respect for authority, when in fact they require an interpreter*.

Settlement

454 In an address published in the Victoria University Law Review, Justice Matthew Palmer, speaking in 2018 about his experiences on the High Court bench, noted:[405]

> …I have been struck by how often first-generation Chinese litigants are in court with each other over matters which most Pākehā or Māori usually settle without reaching the Courts. Lawyers may contribute to that or perhaps there are cultural factors at play. I do not know. And as far as I can tell, there appear to be different cultural views of what it means to tell the truth, how binding the law is and whether court orders need to be strictly followed or not.

455 Justice Palmer's comments that there may be cultural factors at play are supported by the interviews we conducted with lawyers for this Report.

456 An anonymous interviewee remembers an incident where a judge had to tell both parties at a judicial settlement conference that they were "both being very stupid" due to their unwillingness

400 Interview with Michael Kan, Partner, Michael Kan Law (Mai Chen, Auckland, 22 January 2019).
401 Interview with Anonymous, Lawyer (Mai Chen, Auckland, 24 July 2019).
402 Interview with Steve Symon, Partner, Meredith Connell (Mai Chen, Auckland, 16 July 2019).
403 Interview with Steve Symon, Partner, Meredith Connell (Mai Chen, Auckland, 16 July 2019).
404 Sentencing Act 2002, s 9(2)(f).
405 Matthew Palmer "Impressions of Life and Law on the High Court Bench" (2018) 49 VUWLR 297 at 299.

to settle and resolve the matter.[406] An anonymous lawyer said that Chinese parties are fixated on pride and saving face.[407] Another anonymous interviewee noted that an unwillingness to settle can also come from distrust in the system.[408]

457 Fei Fei Teh recalled a case where she was in court in a dispute over a right of way. Teh said that the judge had shown contempt that such a small matter should be before the court. Teh said she got the impression that the judge viewed the case as a waste of the court's time. Teh said that the other party had insisted upon taking the matter to court.[409] Teh said both Chinese and New Zealand European lawyers need to be better trained to dissuade Chinese clients from pursuing litigation when it is not the best option to resolve a dispute.[410]

458 Frances Joychild QC gave the example of a client who was experiencing difficulty with a regulator in the education sector. The client was a Chinese teacher who had been asked to do a further study unit as part of her continuing registration with the intention that she teach the curriculum from a more creative rather than literal perspective. She felt insulted, ashamed and humiliated, and did not believe she should have to do this, and her aim was to punish the manager who had set the requirement. At no stage would she agree to mediate the dispute. In the end, she lost her registration due to her rigidity and inflexibility. The teacher was otherwise competent, but could not acknowledge that there was a cultural difference in that teaching in PRC is very literal; whereas in New Zealand, a more creative approach is taken.[411] This is an example of how a Chinese person's desire to maintain 'face' can cause them to fail to engage in steps that may resolve a matter, meaning that solvable or resolvable matters become intractable with more adverse consequences for the Chinese party.

459 Joychild QC referred to cases with other Chinese clients, where saving face and punishing wrongdoing were the driving motivations. She has seen little willingness from these clients to taking a pragmatic approach to the proceedings, even where the legal fees incurred outweighed the amount the client would receive from pursuing the proceeding. At times, Chinese clients' desire to be proved right is a greater incentive than the financial outcome.[412]

460 In the criminal context, Ashley Oh said that she had been told by a restorative justice facilitator that there was lesser demand for restorative justice conferences from Asian defendants, which may be another manifestation of *mianzi*.[413]

Sentencing

461 Senior prosecutor David Johnstone said that there is a "phenomenon" of Chinese accused not being "big pleaders" – i.e. being less willing to plead guilty, even where there is significant evidence of the client's guilt. Johnstone said that if the accused does not plead guilty when they should in light of overwhelming evidence against them, then the judge might take from this that they have no insight into their wrongdoing and therefore no remorse, which will negatively affect them at the sentencing stage.[414]

462 Johnstone recounted a case where an accused refused to plead guilty in the face of overwhelming evidence as he said it would bring great dishonour on his family. The result was a very long jail sentence. However, when the Court of Appeal reduced the sentence on appeal, considering the

406 Interview with Anonymous, Lawyer (Mai Chen and Lucinda King, Auckland, 5 February and 4 July 2019).
407 Interview with Anonymous, Lawyer (Mai Chen and Lucinda King, Auckland, 5 February and 4 July 2019).
408 Interview with Anonymous, Lawyer (Mai Chen and Lucinda King, Auckland, 5 February and 4 July 2019).
409 Interview with Fei Fei Teh, Partner, Millennium Lawyers (Mai Chen, Auckland, 2 August 2019).
410 Interview with Fei Fei Teh, Partner, Millennium Lawyers (Mai Chen, Auckland, 2 August 2019).
411 Interview with Frances Joychild QC (Mai Chen, Auckland, 29 July 2019).
412 Interview with Frances Joychild QC (Mai Chen, Auckland, 29 July 2019).
413 Interview with Ashley Oh, Police Prosecution Service (Lucinda King, Auckland, 16 July 2019).
414 Interview with David Johnstone, Partner, Meredith Connell (Mai Chen, Auckland, 24 July 2019).

young age of the accused (22 at the time of the offending), who was isolated from his family and his lack of support networks in New Zealand.[415]

463 Barrister David Young said that accused can take some time to plead guilty, for a variety of factors.[416] If a guilty plea comes late, the courts are less likely to look favourably on it, but an early guilty plea is not always desirable or practicable for a defendant. For instance, a client may want an opportunity for some charges to be dropped, to find evidence that may exonerate them, or evidence that clearly demonstrates the client's guilt may only come up at a late stage. Young said that when he is working with a CALD client, the process of deciding whether or not to plead guilty can take longer, as going through documentary evidence with someone who does not speak English takes more time, and the client will want to review all of the evidence against them before they commit to a guilty plea.[417]

Interviews with Police

464 David Young commented that he had represented Chinese clients who had been interviewed by Police without an interpreter when an interpreter should have been provided, particularly when explaining difficult legal concepts, such as the technicalities of drink driving.

465 Young said that in his experience, *mianzi* coupled with the Chinese culture of being respectful to authority, can mean that the Chinese accused will be more willing to agree to a police interview without an interpreter present.[418] This is because they want to save face by not admitting to their need for an interpreter, and also because they want to respect the police officer's authority and act as instructed, rather than refuse to answer questions until an interpreter is present.[419]

466 Steve Symon also commented that in his experience there may be a lack of understanding by investigators that a Mandarin speaking person is more likely to come from a culture that is respectful of authority, and that they are therefore more likely to agree to answer questions without an interpreter being present even though they need one.[420]

467 Symon said that in his opinion, interviewers are both more likely to accept a Mandarin-speakers' assessment of their English language ability as accurate/correct, while at the same time being less likely to accept a Mandarin-speaker saying that they do not speak English well.[421]

468 Symon said that a lack of English language capability is more acute where there are complex questions that relate to the legal aspects of, for example, drug charges. Symon said that there may be an assumption that, because an accused can speak some English, they can speak every level of English; however, in reality just because an interviewee can understand the early stages of an interview, does not mean they can understand the more technical questions and implications of the questions being asked (and, for example, may fall victim to self-incrimination).[422]

469 Symon said that there are protocols in place for interviewing children – concerning, for example, legal concepts they may or may not understand – but there are no protocols around interviewing those who do not speak English. Symon said that steps should be taken to ensure there is access to interpreters and that they are both readily available and of a high quality. Symon gave the

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415 Interview with David Johnstone, Partner, Meredith Connell (Mai Chen, Auckland, 24 July 2019). This case is analysed in greater detail below, in the *Case Review* section at paragraphs [901]–[904].
416 Interview with David Young, Barrister (Mai Chen, Auckland, 9 August 2019).
417 Interview with David Young, Barrister (Mai Chen, Auckland, 9 August 2019). This point will be set out in greater detail in the *Case Review* section of this Report, as it is demonstrated by some of the cases that we analysed.
418 Interview with David Young, Barrister (Mai Chen, Auckland, 9 August 2019).
419 In the study into jury trials in Hong Kong, Ng notes an example from a Chinese trial where a witness gave evidence in English. Eva Ng, above n 43, at 181 notes:

> … the back-channelling (such as "Mmm"…), generally understood to be an acknowledgement of comprehension, in this case should rather be viewed as the doctor's tactic to mask his incomprehension in a failed attempt to avoid embarrassment. Similarly, the short response "yes"… may not serve as a direct confirmation to the question asked as would be the case in most other situations, but a short response uttered by the doctor to feign his comprehension.

420 Interview with Steve Symon, Partner, Meredith Connell (Mai Chen, Auckland, 16 July 2019).
421 Interview with Steve Symon, Partner, Meredith Connell (Mai Chen, Auckland, 16 July 2019).
422 Interview with Steve Symon, Partner, Meredith Connell (Mai Chen, Auckland, 16 July 2019).

example of the police interview with Teina Pora, who was wrongfully convicted in 1994 of the rape and murder of Susan Burdett. Pora, who has learning difficulties arising from foetal alcohol syndrome, and who was 17 years old at the time, falsely confessed to the crime during police interviews. Pora was held in custody for four days, and was questioned for 14 hours without a lawyer present. Symon said that when we look at this example when compared to the interview practices used today, we are shocked. Symon wonders whether in 10–15 years' time we will look back at interviews with CALD parties in the same way.[423]

Legal fees

470 A number of the lawyers that we interviewed noted that they had to take particular caution with their Chinese clients about the matter of fees. Lawyers noted that with Chinese clients they had to ensure that they were very upfront and clear about the potential costs, and provide regular updates and reports to ensure that the client was not surprised by fees. While only anecdotal information was available, the majority of those interviewed stated that Chinese clients were more likely to complain about fees, threaten to complain to the Law Society in order to avoid paying their fees, or to seek to recoup fees paid once the lawyer had already provided advice or representation in court.

471 One lawyer we interviewed, who previously worked for a mid-sized law firm in Auckland, stated that her firm provided as much information as possible with bills for their clients, and that this high level of transparency aims to help avoid complaints.[424]

472 Another lawyer interviewed stated that fees are an important issue that lawyers need to discuss with Asian clients, although she noted that she now feels more comfortable having difficult conversations with her clients about fees.[425]

473 Alice Nie had practised law in PRC before arriving in New Zealand, and advised that fixed fees are the norm in PRC, and that lawyers do not charge on an hourly basis. This helps to explain the difficulties that lawyers face, and also why Chinese clients are far more likely to request a fixed fee than other clients.[426]

474 An anonymous interviewee commented that fixed fees or contingency fees are far more common ways of charging for legal work in PRC.[427] Contingency fees, where the lawyer only receives payment if the client is successful, in the form of a percentage of the award, appeal to Chinese clients as it means they only have to pay if they are successful. Another anonymous interviewee advised that Chinese clients can also ask for a retainer, whereby a lawyer agrees to act for the client for an annual fixed sum, and advise them on whatever issues arise. They stated that Chinese clients prefer the certainty of a fixed amount.[428]

475 Another anonymous interviewee said that Chinese clients will often spend significant time trying to build a relationship with their lawyer, and that they do not understand that this is time which will be billed.[429] This lawyer noted that they had one client who would call them on a daily basis, to talk about personal matters and did not understand that these phone calls would be billed.[430] The interviewee also said that due to the importance of relationship building in Chinese culture, the first meeting between lawyer and client will involve personal conversation to establish a relationship, unlike a lawyer/client meeting with a New Zealand European client, where it is more likely that the

423 Interview with Steve Symon, Partner Meredith Connell (Mai Chen, Auckland, 16 July 2019).
424 Interview with Luisa Wong, Lawyer (Lucinda King, Auckland, 8 July 2019).
425 Interview with Anonymous, Lawyer (Mai Chen and Lucinda King, Auckland, 5 February and 4 July 2019).
426 Interview with Alice Nie, Alice Lawyers Ltd (Lucinda King, Auckland, 18 July 2019).
427 Interview with Anonymous, Lawyer (Lucinda King, Auckland, 30 July 2019).
428 Interview with Anonymous, Lawyer (Mai Chen, Auckland, 24 July 2019).
429 Interview with Anonymous, Lawyer (Lucinda King, Auckland, 30 July 2019).
430 Interview with Anonymous, Lawyer (Lucinda King, Auckland, 30 July 2019).

discussion will be focussed on the legal issues. They noted that this initial meeting can easily use up a significant amount of a small budget if multiple lawyers are present.[431]

CALD in combination with other communication difficulties

476 Belinda Sellars QC recalled in an interview a 2018 case, where she represented a Fijian-Indian murder accused that had communication difficulties due to cognitive issues, which resulted in significant comprehension difficulties in both English and Hindi.[432] The case is illustrative of a number of different types of communication issues that can arise and some of the types of approaches to mitigate these issues that a court and counsel can use. Specifically, Sellars QC referred to:[433]

a) The use of a Hindi speaking junior barrister to communicate with the client in his own language. Sellars QC said that although the defendant appeared, at first blush, to have good English language skills this was incorrect. Instead, the defendant had learned strategies to make it appear that he understood. Trust was also an issue. Sellars QC said that it was very helpful to have a junior who could facilitate communication in an effective way and build a relationship beyond that of an interpreter. In a Minute of Powell J, he refers to the junior counsel playing "an important role in monitoring the translation being given" and "checking with Mr Singh at the end of each witness as to whether any further issues have arisen";[434]

b) Allowing time prior to the defence opening statement for counsel to take the defendant through a transcript of the Crown's opening address. Sellars QC also referred to Counsel being required to prepare closing addresses in writing, in order to allow defence counsel the opportunity to take the defendant through the Crown's closing arguments prior to the defence closing address;

c) The judge providing defence counsel with the opportunity after the conclusion of questioning of a witness to confer with the defendant to ascertain whether there were any matters that needed to be addressed, and if so, allowing these to be addressed prior to dismissal of the witness;

d) Providing counsel leave throughout the trial to request an adjournment as may be required to confer with the defendant;

e) Requesting during the trial that the defendant be brought to court earlier in the day in order to allow time for counsel to go through the evidence presented at trial. Powell J granted this request; and

f) Appointment of standby counsel as an additional measure to ensure the defendant's comprehension when giving evidence (particularly when under cross-examination). Ms Pravina Singh (no relation) was appointed to monitor the defendant's understanding of the proceedings in general while he was giving evidence, and to communicate any needs or concerns that arose out of this.[435] In particular, Ms Singh was advised to "bring to the Court's attention any disjunction between any question asked by counsel and the translation provided to Mr Singh, or in any answer provided by Mr Singh and the translation given to the Court." Further, Ms Singh was advised that in her discretion she was able to request counsel questioning the defendant to put a particular question in writing to assist the interpreter, if she thought there was a risk of miscommunication. Standby counsel was also advised that

431 Interview with Anonymous, Lawyer (Lucinda King, Auckland, 30 July 2019).
432 *R v Singh* [2019] NZHC 148. Impaired verbal abstract thinking, vocabulary skills, verbal reasoning, impaired immediate and delayed verbal memory particularly narrative memory.
433 Interview with Belinda Sellars QC, Barrister, Freyberg Chambers (Mai Chen, Auckland, 8 October 2019).
434 *R v Singh* [2019] NZHC 148 (Minute (No 9) at [4]).
435 At [4].

> if she identified any other issue arising which might affect that defendant's right to a fair trial, that she could request that the jury retire so the issue could be discussed in chambers.[436]

477 It is important to highlight these measures to effectively manage communication issues and ensure equal access to justice for CALD parties who may also have other communication issues, as they are not evident from the sentencing notes of the decision.

478 Sellars QC said that she had also arranged for the client to be assessed by a Communication Assistant (as discussed below) prior to the commencement of the trial, and that this assessment concluded that the client did require communication assistance.[437]

479 A Communication Assistant was not utilised in the trial, as one was not available, and the appointment of one would therefore have required a late adjournment. Further, Powell J found that the defendant could be assisted by a Hindi interpreter throughout the trial. It was agreed between the judge and defence counsel the other techniques used (listed above), coupled with the use of an interpreter, meant that the need for communication assistance could be met.[438]

480 Communication assistance is able to be provided under section 80(1) of the Evidence Act 2006, to "enable the defendant to understand the proceeding" Section 80(2) provides that "Communication assistance may be provided to a defendant in a criminal proceeding on the application of the defendant in the proceeding or on the initiative of the Judge." Sellars QC said that knowledge and use of Communication Assistants has only become widespread in the past few years, and that they seem to be more commonly utilised in the District Courts than the higher courts.[439] However, the provision has existed in the Evidence Act 2006 since its enactment.

481 Communication assistance is utilised in cases where a parties have communication issues other than English language difficulties, such as low IQ, cognitive impairments, Traumatic Brain Injury and stroke related impairments.[440] Where a party's communication difficulties stem from low English language capability only, the appointment of an interpreter to assist them in proceedings should suffice.

Interpreters

482 A number of lawyers that we interviewed commented on the frustrations and difficulties they have faced in cases where interpreters were required.

483 One lawyer we interviewed, who wished to remain anonymous, expressed concern at the speed of interpreting in court. She said that she feared that her clients would not necessarily fully understand what was being discussed and be able to keep up.[441] Michael Kan also expressed concern about interpreters lacking sufficient time in court to properly translate, due to insufficient time being allocated to hear cases involving interpreters. This can result in the case running over time, and the court being required to find more time to hear the remainder of the case, often at a later date, which increases the cost for the parties and also makes it more difficult for the judge, as he or she will have to refresh their memory of the case. Kan also referred to Chinese witnesses speaking in long sentences, which can make it more difficult for interpreters to keep up.[442]

484 David Johnstone said that he had experienced occasions where the court had attempted to save time by using part-interpreting – i.e. only having an interpreter present in case their client or the

436 At [5].
437 Interview with Belinda Sellars QC, Barrister, Freyberg Chambers (Mai Chen, Auckland, 8 October 2019).
438 Interview with Belinda Sellars QC, Barrister, Freyberg Chambers (Mai Chen, Auckland, 8 October 2019).
439 Interview with Belinda Sellars QC, Barrister, Freyberg Chambers (Mai Chen, Auckland, 8 October 2019).
440 Interview with Belinda Sellars QC, Barrister, Freyberg Chambers (Mai Chen, Auckland, 8 October 2019).
441 Interview with Anonymous, Lawyer (Mai Chen and Lucinda King, Auckland, 5 February and 4 July 2019).
442 This appears to be something that is unique to deponents from Asian countries, with the *Equal Treatment Benchbook* of the English Judicial College noting "Certain South Asian witnesses when answering a question will adopt a 'narrative style', providing lengthy context first, before arriving at a point": Judicial College, London, above n 121, at 8-1.

deponent needs assistance. However, Johnstone said that the problem is that very strong judicial intervention is required in such cases once it is clear that the deponent does not understand what is being said in English. Johnstone said that when this happens, the judge needs to intervene and ask the prosecutor to repeat their question, so that it can be interpreted in full and so the deponent understands the question in its full context. There is a risk that judges who are not attuned to witnesses' comprehension of the content of the proceedings will not intervene to ensure the integrity of the proceedings. The deponent may also be unaware of their lack of comprehension; thus no one is in a position to identify and correct comprehension issues (particularly, the need for full interpretation of the proceedings).[443]

485 Alice Nie stated that in her experience, while the interpreting in court is often accurate, interpreters can often miss the full meaning and context of what witnesses say.[444] A lawyer from PRC who spoke fluent Mandarin said that, in their view, up to 20 per cent of the content of a witness's testimony can be lost through interpretation, and that judges who do not speak Mandarin may not appreciate or understand this.[445] Another anonymous lawyer spoke of an interpreter who had said to their client that the application had been successful, but it had in fact been declined, which resulted in great disappointment for the client when the lawyer had to explain what had actually happened.[446]

486 Lawyer Luisa Wong recalled an interpreter who tried to placate and talk to a witness during examination, which they were not allowed to do so, and that this had resulted in the evidence being unusable. Non Mandarin-speaking lawyers that we interviewed commented that they felt in the dark at times where there were long exchanges between interpreter and deponent that did not match the length of the statement interpreted into English.[447] Steve Symon commented that he had also experienced instances where a witness gave a lengthy answer to a question but that only a short phrase was provided as the interpreted response. Symon said that he had noticed defence counsel utilising a second interpreter for the defendant, due to concern that not all phrases were being interpreted by the court interpreter.[448]

487 Many of the lawyers interviewed stated that they understood that qualifications are required for court interpreters. An anonymous interviewee gave the example of a client who recognised their interpreter (who had only recently arrived in New Zealand) from school in their home country. It was unclear how the interpreter would have sufficient knowledge of New Zealand English and the legal culture to competently act as an interpreter in the District Court.[449]

488 Stella Chan said that one difficulty is that people may hold themselves out as an interpreter, but in reality, cannot adequately speak the (non-English) language they say they can interpret.[450] A number of lawyers recounted instances in court where there had been issues with the quality of interpretation that was taking place in a language they understood, but that they felt uncomfortable and out of place raising the issues with the judge, with one lawyer referring to this as "awkward".[451]

489 Another issue relates to the translation of documents. Stella Chan said that translation of Chinese documents can be a challenge because some concepts and words used in Chinese documents cannot be easily translated[452] (although Dr Henry Liu has noted that professional translators

443 Interview with David Johnstone, Partner, Meredith Connell (Mai Chen, Auckland, 24 July 2019). This is demonstrated by the case of *R v Peh* HC Auckland CRI-2005-092-007733, 16 December 2005, which is set out in greater detail in paragraphs [919]-[927]. Mr Peh did not have an interpreter present at sentencing, and was advised by the Judge that he was to put his hand up if he had any trouble, and that his co-accused, who had greater English language capability could assist if necessary.
444 Interview with Alice Nie, Alice Lawyers Ltd (Lucinda King, Auckland, 18 July 2019).
445 Interview with Anonymous, Lawyer (Mai Chen, Auckland, 17 June 2019).
446 Interview with Anonymous, Lawyer (Mai Chen and Lucinda King, Auckland, 5 February and 4 July 2019).
447 Interview with Frances Joychild QC (Mai Chen, Auckland, 29 July 2019).
448 Interview with Steve Symon, Partner, Meredith Connell (Mai Chen, Auckland, 16 July 2019).
449 Interview with Anonymous, Lawyer (Mai Chen and Lucinda King, Auckland, 4 July 2019).
450 Interview with Stella Chan, Partner, Forrest Harrison (Mai Chen, Auckland, 7 August 2019).
441 Interview with Anonymous, Lawyer (Mai Chen, Auckland, 24 July 2019).
452 Interview with Anonymous, Lawyer (Mai Chen, Auckland, 24 July 2019).

are able to utilise a variety of techniques to resolve terms that are not able to be translated).[453] As noted above in the section setting out judges' perspectives, this can be exacerbated when documents in Chinese are not drafted by a lawyer.

Australian research on CALD parties in the courts

490 Many of these issues and challenges raised by lawyers have also been identified in two Australian reports.

491 Firstly, in 2012, in response to a request from the Attorney-General, the Family Law Council published a report titled *Improving the Family Law system for Clients from Culturally and Linguistically Diverse (CALD) backgrounds*.[454]

492 The report set out a number of challenges faced by the family law system to meet the needs of people from culturally and linguistically diverse parties. These include:[455]

- The additional time needed to provide meaningful advice to clients who are unfamiliar with the legal norms and processes in Australia, and for whom English is not a first language;
- The time needed to build trust with communities whose pre-arrival experiences may have engendered a fear of government agencies;
- The need for flexible service delivery models in organisations that have defined charters and where both court-based and alternative dispute resolution processes are steeped in a history of Western tradition;
- The difficulties of recruiting staff across the range of culturally and linguistically diverse communities where a relatively small number of professionals from these communities have relevant qualifications; and
- The challenges of providing a seamless service to clients across a system characterised by fragmentation and where migrant and family law services operate in 'silos'.

493 The report also pointed out a number of positive programmes in Australia that are helping to address these barriers. They cited the development of legal literacy strategies, particularly by Legal Aid Commissions and Community Legal Centres, that provide targeted community education programmes to newly arrived communities.[456] Other initiatives included the development of partnerships between family law and migrant support services, to educate migrant communities, and the establishment of information and referral "kiosks" in particular courts to link litigants with support services.[457] Lastly, the report pointed to developments in the family law workforce:[458]

> While some sectors appear to have few bilingual and bicultural staff, others have created dedicated positions and/or training programs to address this gap, including the provision of scholarships in family dispute resolution and counselling to professionals from culturally and linguistically diverse backgrounds and the employment of Community Liaison Officers and Community Outreach Workers by Family Relationship Centres to engage with local cultural communities.

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453 Email from Dr Henry Liu (Interpreter, former National President of NZSTI and 13th President of the International Federation of Translators) to Mai Chen (Managing Partner, Chen Palmer) commenting on draft report, 15 October 2019.

454 Family Law Council, above n 187. The report cited the case of Edelman and Ziu which concerned the living and care arrangements for a six year old boy that had an Australian father and a Chinese mother from PRC. The Family Court held that the child should live with his mother on the basis that he have a better chance of having a more even exposure to both Chinese and Australian cultures, and that if he resided with his father he would not have the opportunity and ability to maintain contact with his Chinese heritage: *Edelman and Ziu (No 2)* [2010] FamCAFC 236.

455 Family Law Council, above n 187, at 5.

456 At 5.

457 At 6.

458 At 6.

494 The report made a number of recommendations, including community education, building cultural competency, enhancing service integration, workforce development (including scholarships and cadetships for CALD professionals to work in family law), engagement and consultation, enhancing the use of interpreters, a legislative review and research and monitoring.[459]

495 This report follows an earlier report from 2009 by the Access to Justice Taskforce from the Attorney-General's Department, titled *A Strategic Framework for Access to Justice in the Civil Justice System*.[460] While this report did not focus on CALD parties or Chinese in particular, there was a section on "Recognising Diversity". It states:[461]

> People from CALD backgrounds and their communities, in particular those who recently arrived in Australia or have difficulty with English, may have a low awareness of available legal services or little or no understanding of Australian law. They may also have previously lived in countries with a repressive government, unresponsive justice system or a compromised rule of law. People need information about the law to see the options that are available to them, whether it be making the informed choice to do nothing, or seeking assistance so that the problem does not escalate or trigger broader legal issues. Access to quality legal assistance and information can help people from CALD backgrounds and their communities by removing misconceptions, reducing fear of victimisation, promoting belonging and building trust in government and the justice system. This also reinforces the resilience of our system, as it encourages respect for the rule of law.

496 Again the report pointed to a number of ways that the justice system could address some of these issues, including outreach to help CALD communities learn about the law, access to "factual, clear and relevant information … in their own language" and assistance for CALD litigants in person. The report also noted the importance of face-to-face assistance for CALD people. Many of the recommendations made in both of these reports are similar to those suggested by stakeholders interviewed for this report.

Conclusion

497 As lawyers, working with any CALD client is likely to result in a unique set of issues and challenges. However, as Gurbrinder Aulukh noted, the issue is more acute with Chinese litigants, particularly those from PRC, than for others. This is because they do not have the Commonwealth background that countries such as India, Hong Kong and Singapore do, because of the different rule of law culture and because the English language is much less commonly spoken than in countries such as India and Malaysia.[462]

498 Some of the issues set out above are unique to litigants who identify as Chinese, across the Chinese diaspora, such as legal fees, "face" and the Chinese way of doing business. Some issues, such as the commentary on the Chinese rule of law, are unique to clients from PRC. Others will be issues and challenges faced by lawyers representing any CALD party.

499 An increased understanding of these issues and challenges across the legal profession will help to ensure equal access to justice for not only Chinese parties in the New Zealand courts, but for all CALD parties.

459 At 10–11.
460 Access to Justice Taskforce, above n 38.
461 At 154.
462 Interview with Gurbrinder Aulukh, Auckland City Lawyers (Mai Chen, Auckland, 27 June 2019).

INTERPRETERS

Introduction

500 The difficulties that many Asian immigrants face in speaking English mean that it is crucial adequate court interpretation services are provided to ensure equal access to justice. Interpretation services are also necessary as they directly affect the quality of evidence provided by CALD witnesses. Interpreters can shape the impressions of witnesses and influence the outcomes of trials by their interpretation.[463] Davis and Isaacson write, "Inadequate interpretation of the participation of any of these [limited English proficiency] persons may result in miscarriages of justice and may put the community at risk".[464]

501 Interpreting is not a simple mechanical exercise. There are several different methods of interpreting. Interpreting can be either simultaneous (often called conference interpreting), where the person speaking and the person interpreting what is spoken, speak at the same time, with the interpretation heard by multiple people; and consecutive, where the speaker and the interpreter take turns to speak. The Supreme Court has held that consecutive interpreting is preferable to simultaneous, however, there are still instances in lower courts where simultaneous interpreting has been used.[465]

502 A survey of interpreters in the Washington County Court system found that one of the most common challenges encountered in court is a lack of cultural understanding on both the witness' and the court's behalf.[466] Cognisance of the differences between Chinese and Western culture is necessary to avoid miscommunication in the courtroom, particularly where the consequences of miscommunication can be severe for the parties involved.[467]

503 The Law Commission identified in 1999 that for disabled and immigrant women, access to interpreters was a major barrier between them and the justice system, and consequently it was more difficult for diverse people to access legal services; a finding which is even more relevant today, given the increase in New Zealand's ethnic and cultural diversity over the last twenty years:[468]

> It seems that lawyers are more aware of immigrants' need for interpreters, but immigrant women still reported using family members as interpreters in circumstances where they would prefer the services of an independent person. Concerns about the quality of interpreters were also raised.

504 There is a clear need and demand for interpreters in New Zealand courts. Interpreting data provided by the Ministry of Justice shows the number of hearings where interpreters were used in a given calendar year:[469]

Calendar year	2015		2016		2017		2018	
	High Court	District Court	High Court	District Court	High Court	District Court	High Court	District Court
Chinese	21	840	38	1430	36	1577	23	1654
Samoan	9	656	31	1308	8	1421	17	1807
Tongan	6	269	3	641	6	723	7	705
Punjabi	13	74	4	255	3	354	6	329

463 Ester Leung "Right to be Heard and the Rights to be Interpreted" (2003) 49(4) Babel 289 at 299.
464 Lynn Davis and Scott Isaacson "Ensuring Equal Access to Justice for Limited English Proficiency Individuals" (2017) 56(3) The Judge's Journal Chicago 21 at 21. See also a study of interpreters in the Washington County Court system, which noted that interpreters have a role in setting procedural precedent for courts. Where a court gets accustomed to the interpreting procedure of one particular interpreter, the court can expect subsequent interpreters to perform in the same manner, even where that method of interpreting is actually contrary to best practice: Ricardo Tapia Mosqueda "Perceptions of Effectiveness of Interpretation Services in the Washington County Court System" (Undergraduate Honors Thesis, East Tennessee State University, 2013) at 42.
465 *Abdula v R* [2011] NZSC 130, [2012] 1 NZLR 534; and see Interview with Anonymous, Interpreter (Mai Chen, Auckland, 10 June 2019).
466 Mosqueda, above n 464, at 42.
467 Pecol, above n 234, at 28.
468 See for example Law Commission *Women's Access to Legal Services* (NZLC SP1, 1999) at [715]–[724].
469 Language interpreted per hearing, May 2015 – June 2019" (Statistics provided by Ministry of Justice to Superdiversity Institute, 11/10/2019).

505 Burns reported in 2001 that 28 languages were used in the District Court in approximately 350–400 cases over a two-month period, with some interpreters attending several cases a day, and this is likely to have increased exponentially since.[470]

Arrangement and payment of interpreters in New Zealand

Criminal proceedings

506 In criminal proceedings, individual defendants are entitled to the free assistance of an interpreter if they cannot understand English. This is provided for by section 24 of the New Zealand Bill of Rights Act 1990, which states, "Everyone who is charged with an offence … shall have the right to have the free assistance of an interpreter if the person cannot understand or speak the language used in court".

507 Section 80 of the Evidence Act 2006 provides that defendants in criminal proceedings and witnesses in both civil and criminal proceedings are entitled to "communication assistance" where they do not have sufficient proficiency in English to understand court proceedings or give evidence. Communication assistance is defined as "oral or written interpretation of a language, written assistance, technological assistance and any other assistance that facilitates communication". However, communication assistance is generally utilised in cases where parties have cognitive disadvantages in communicating effectively, rather than language disadvantages (See paragraphs [478] – [487] above).

508 *In Alwen Industries v Collector of Customs* the Court said:[471]

> …the right of an accused person to an interpreter is well established at common law. The right is not a separate language right but an aspect of the fundamental right to a fair trial… and to have the trial conducted in their presence. Justice requires that 'presence' of a defendant be interpreted in its active sense, as referring not simply to the corporeal presence but to the ability of the defendant to understand the proceedings in order to participate meaningfully in them.

509 It further noted:[472]

> Generally in criminal prosecutions the party wishing to have the assistance of an interpreter during the trial makes an application to the Judge prior to the trial. If the request is granted, the Court appoints from an approved panel of interpreters, who are paid in accordance with the Witnesses and Interpreters Fees Regulations 1974 (SR 1974/124). These regulations provide for payment to be made by the Registrar of the Court, not the prosecuting party.

510 However, we have been informed by the Ministry of Justice that although the court arranges and pays for interpreters in criminal cases, it does not match cases with interpreters, other than in terms of language requirements (Mandarin or Cantonese, for example). Interpreters are managed centrally by the Ministry of Justice, so the only involvement of the registry is to send the request through to the Central Processing Unit (CPU).[473] Therefore the process of "appointing" interpreters occurs within the CPU, with the court approving the recommended appointment.

511 This means that the court does not itself assess competency or consider whether an interpreter is best suited to act for a particular party, having regard to the cultural background and local dialect of the interpreter and the person in need of assistance (as Chinese speakers can come from several different countries and language sub groups). The judges we interviewed said that they have no real opportunity to "approve" the interpreter. Sometimes judges receive no forewarning that an interpreter is even required; and only become aware of this need when an interpreter arrives for the hearing.

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470 Burns, above n 215.
471 *Alwen Industries v Collector of Customs* [1996] 3 NZLR 226 (HC) at 229 (citations omitted).
472 At 233 (citations omitted).
473 Email from Anton Youngman (Manager Analytics & Insights at the Ministry of Justice) to Mai Chen (Managing Partner, Chen Palmer) regarding Court Staff involvement in arranging interpreters (20 June 2019).

512 Interpreters interviewed also expressed concern about the "ad hoc" nature of the arrangement of court interpreters in both civil and criminal trials. They noted a disconnect between the agencies arranging interpreter services, and the CALD litigants requiring that service.[474] We were also informed by interviewees that there is no official system for feedback or complaints about interpreters within the courts (note that there is a complaint mechanism in place at the Ministry of Justice, however, the comments from the interviewees reflect a lack of understanding and awareness of the complaint system in place).[475] Pecol, in her writing, openly criticises the "arbitrary 'seat-of-the-pants'" approach to interpreting as one which lowers the quality of court interpreting services for all parties involved.[476]

Civil proceedings

513 In civil cases, the arrangement and payment of interpreters is left to the parties calling the witness that requires translation. As *Li v Commissioner of Police* observes:[477]

> The practice that has developed in civil proceedings is that it is not the Court's responsibility to arrange or meet the costs of an interpreter. Rather, the party calling the witness who needs an interpreter generally meets the costs involved, at least in the first instance. The costs are then treated as a disbursement which can be incorporated into a costs order by the Court.

514 In civil cases where the litigant requires an interpreter, the parties themselves are again responsible for the arrangement of one.[478]

515 The interpreter is required to be approved by the court before they can act as an interpreter in the trial. This is described in *Zinck v Sleepyhead Manufacturing Co Ltd*:[479]

> In civil proceedings in the District Court, the High Court and the Court of Appeal Mr Kiely told me that the position is that a party wanting an interpreter is responsible for providing and paying for that service. Counsel told me that a Judge must "approve" the interpreter but otherwise the Court has no further involvement. Mr Kiely told me that the approval process involves the consent of (or I presume at least the opportunity to have submissions from) the other party and reference is usually made to either an approved list of interpreters or other evidence of competency in the relevant language.

516 In the discovery process there is no positive obligation on a party to provide translated copies of documents in a foreign language. In *Amatal,* Priestly J approved the decision of Hoffmann J in *Bayer AG v Harris Pharmaceuticals Ltd* [1991] FSR170 that there is no "obligation upon the party giving discovery of a document in a foreign language to provide a translation of that document."[480] Justice Priestly also compared the provision of translated documents to the provision of copies of discovery documents under rule 309(3) of the High Court Rules, which requires the requesting party to pay "the reasonable expenses of the producing party incurred in copying requested documents."[481] Priestly J had "difficulty in seeing why at the discovery/inspection stage, any different principles should apply to foreign language documents."[482]

517 Where a party wishes to provide an affidavit in a foreign language, it must be accompanied by an affidavit from an interpreter, to which is exhibited a copy of the foreign language affidavit and the interpreter's translation of that affidavit.[483] In *Li*, the court noted that the implication of this Rule

474 Interview with Anonymous, Interpreter (Mai Chen, Auckland, 21 June 2019).
475 Interview with Dr Olga Suvorova, Interpreter, NZSTI (Mai Chen, Auckland, 5 June 2019).
476 Pecol, above n 234, at 29.
477 *Li v Commissioner of Police* [2016] NZHC 1383 at [14].
478 *Zhang v King David Investments Ltd* [2016] NZHC 1479 at [6].
479 *Zinck v Sleepyhead Manufacturing Co Ltd* EC Auckland AEC 130/95, 8 December 1995.
480 *Amatal Corp Ltd v Marahu Corp* (2003) PRNZ 968 (HC) at [21].
481 Rule 309 of the High Court Rules 1985, which allowed parties to make copies of discovered documents, has no equivalent in the 2016 Rules. Despite this, the policy behind Priestley J's decision has not changed in respect of translation, which unlike copying documents, continues to require significant time and cost. Accordingly, we would expect the same result if *Amatal* had been argued under the 2016 Rules.
482 *Amatal Corp Ltd v Marahu Corp* (2003) PRNZ 968 (HC) at [28].
483 High Court Rules, r 1.15.

is that the party wishing to file an affidavit in a foreign language will meet the costs of having it translated.[484]

Interpreters in comparable jurisdictions

518 The Federal Circuit Court of Australia Interpreter Policy specifies that interpreters are paid for by the court whenever the court considers that "if such services were not provided, the person/s would be disadvantaged in their business with the Court because they do not speak or understand the English language or they are deaf, hearing impaired and/or speech impaired."[485] The court also has a "responsibility to consider the interests of other parties which may be involved in litigation who may be disadvantaged if another party does not have access to the interpreter services they require."[486]

519 However, the policy then goes on to refer to the court providing interpreter services for persons who are unable to meet the costs of an interpreter, such as those who are or would be entitled to an exemption or reduction of Court fees and those represented under a pro bono scheme.[487] Further, the policy states that the decision about whether the costs of an interpreter will be met by the Court is to be made by the Registrar.[488] The court will only pay for interpreters when their engagement is authorised and booked by court staff, and not where interpreters have simply been arranged by a barrister and solicitor.[489]

520 Lastly, the policy states that if the court will meet the costs of the interpreter service, it will usually only accept interpreters who are accredited and registered with the National Authority for the Accreditation of Translators and Interpreters and that "[t]he Court (i.e. the Judge, Registrar or their delegate) retains the discretion to determine whether an interpreter is acceptable for the circumstances for which they have been employed."[490]

521 In the United States Federal Courts, interpreters are appointed by judges and paid for by the state in criminal cases, and in civil cases where the plaintiff is the United States (i.e. the State is the plaintiff), including where interpreters are needed for defence witnesses.[491] In all other civil proceedings, interpreters are arranged and paid for by the parties themselves, with some exceptions, such as Habeas Corpus petitions.[492]

522 In criminal proceedings and civil proceedings where the United States is the plaintiff, interpreters used by defence counsel to facilitate communication between counsel and the defendant out of court are also paid for by the state.[493] Court interpreters are sourced from the National Court Interpreter Database, which is maintained by the Director of the Administrative Office of the US Courts. Each local court is also required to keep a local roster of interpreters where they have been satisfied with the interpreter's performance.[494]

523 However, in some state courts, judges are utilising persons present in the court, such as a probation officer to interpret, or, where interpreters are not available, defendants and civil litigants are being instructed to either hire a interpreter or bring a friend to assist.[495] An American attorney has said that interpreter resources are often targeted at criminal cases and litigants in civil cases are not always given interpreters.[496]

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484 *Li v Commissioner of Police* [2016] NZHC 1383 at [13].
485 Federal Circuit Court of Australia, above n 158, at [2].
486 At [2].
487 At [4].
488 At [7].
489 At [8].
490 At [9]–[14].
491 United States Courts "Guide to Judiciary Policy: Vol 5" (10 October 2017) <www.uscourts.gov> at §210.10.
492 At §260.
493 At §210.10
494 At § 330.20.
495 *PBS News Hour*, above n 159.
496 *PBS News Hour*, above n 159.

Guidelines for interpreters

524 The Ministry of Justice has published guidelines for interpreters on appropriate courtroom conduct. These specify that an interpreter must:[497]

- Be unobtrusive, firm and dignified at all times;
- Work with full awareness of the nature of the proceedings, and the goals of the court and tribunal;
- Avoid professional and personal conduct that could discredit the court or tribunal;
- Keep details of all cases they work on confidential;
- Not recommend a lawyer, law firm, business or agency to clients;
- Not make any comment, professional or otherwise, about any lawyer, law firm, representative, business or agency; and
- Not conduct research into the case or come to any conclusions about the facts of the case or the law.

525 They further specify that an interpreter is expected to:[498]

- Speak clearly, and loud enough to be heard in the hearing room;
- Interpret in the first and second grammatical person – that is, using "I" or "you", except when summarising legal argument or exchanges between parties;
- Not alter, add, or omit anything when interpreting – the interpretation should be precise including, as far as possible, translating offensive language such as derogatory terms and swear words;
- Ask for a statement to be repeated, rephrased, or explained if it is unclear;
- Immediately acknowledge mistakes by informing the court and parties – the interpreter can ask for a pause, and inform the court when they are ready to continue;
- Immediately inform the court or tribunal if the interpreter and the person who requires the interpreter need to have a conversation for the sake of clarifying something;
- Immediately inform the court or tribunal if a statement or question cannot be accurately interpreted because of cultural or linguistic differences between the two languages – if possible, the interpreter should help the lawyer, representative, party, or presiding officer to re-phrase the statement or question so it can be accurately interpreted; and
- Decline to interpret in a case, or ask to be replaced if the case has begun, if they feel their interpreting skills are not adequate for it.

Abdula v R

526 As stated in the New Zealand Law Report:[499]

> Mr Abdula was charged, along with another, with rape. His first language was Oromo. At trial, an interpreter was obtained from Australia who had experience interpreting before tribunals and, to a lesser extent, the courts, and had a NAATI level 2 qualification in Oromo. NAATI level 3 qualifications were recommended by the Ministry of Justice for court interpreters. He was not a member of a professional organisation but said

497 Ministry of Justice, above n 173.
498 Ministry of Justice, above n 173.
499 *Abdula v R* [2011] NZSC 130, [2012] 1 NZLR 534 at 534.

> that he considered himself bound by their codes of ethics. During the first week of trial, the interpreter sat between the two accused in the dock and interpreted for both at once. He did not speak at a volume that everyone in the courtroom could hear. Some of the time, the interpreter was interpreting simultaneously rather than consecutively. Mr Abdula unsuccessfully appealed against conviction on the ground that the standard of interpretation had been insufficient and then appealed to the Supreme Court.

527 On appeal, the Supreme Court held that the interpretation had not fallen below the standard needed to meet the defendant's rights. The trial Judge, Judge Behrens, took steps to make sure the interpretation process was working, including giving directions to witnesses to wait between question and answer, requiring that documents be read out or passed to the interpreter to facilitate translation of their contents. The Court held that "following the Judge's lead, counsel told witnesses to wait until questions had been translated before they commenced to answer them."[500] Further, the Court considered that the accused never raised objections to the standard of interpretation during the trial, and the trial concerned straightforward factual issues.[501] The Supreme Court found that the appropriate standard was not onerous, nor were any particular qualifications on the interpreter's behalf required.[502]

528 The Supreme Court said the following on the nature of court interpreting:[503]

> Interpretation is concerned with conveying the sense of spoken language and the information and ideas it incorporates into another language. At times this involves explaining the meaning of words used. A literal word for word rendering in the target language will be inappropriate where exact lexical correspondence is inapt to convey the meaning that was intended in the source language. Interpretation during a trial is a spontaneous process which allows the interpreter minimal opportunity for reflection. It can be contrasted in this respect with translation from one written text into another. Interpretation, in brief, is not a mechanical exercise. An interpreter at a court or tribunal hearing should, however, always convey, as accurately as the target language permits, the idea or concepts expressed in the words that are being interpreted.

529 In holding that the standard of interpreting had been sufficient, the Supreme Court nevertheless identified three areas where the trial court had lapsed from best practice, and. provided the following guidance for best practice in cases where a litigant requires interpretation assistance:[504]

- The use of consecutive interpreting at all times is desirable (as opposed to simultaneous), because "[i]t enables an accused to react in response to what is said in court immediately and without being distracted by the voices of counsel and witnesses speaking at the same time as the interpreter. It avoids the very real risk that the interpreter will fall behind and miss passages of evidence";
- "The interpreter should at all times speak in a voice loud enough for all in the courtroom to hear. This meets the needs of all present in court who are likely to require interpretative assistance. It will also help the judge to ensure that interpretation does not become the subject of simultaneous over-speaking"; and
- "An audio recording should be made of all criminal trials in which one or more interpreters provide assistance for an accused. The recording, which would be transcribed or released to the parties only by order of the court if and when necessary, would be the appropriate and best means of resolving issues arising on appeal about the accuracy and general competence of interpretation."[505]

530 With regard to consecutive interpreting being preferred to simultaneous, in addition to those reasons noted by the Supreme Court, we also note that our research and interviews have indicated

500 At [55].
501 At [59]
502 At [50].
503 At [40].
504 At [60].
505 At [60].

that simultaneous interpretation is a highly technical skill, and that it is very difficult to achieve high quality simultaneous interpretation.

Key themes from interviews with interpreters

531 The Superdiversity Institute conducted interviews with six experienced court interpreters, four of whom were Chinese and spoke either Mandarin or Cantonese. The Institute also interviewed Professor Charles Qin, the Managing Director and Chief Interpreter of Chin Communications in Australia. All interviewees had more than 10 years of experience in court interpreting. However, four of the interpreters interviewed wished to remain anonymous in this Report, as they did not want to appear to be critical of the court system or the Ministry of Justice, and were concerned about continuing to obtain appointments in criminal cases.

Quality of court Interpreters in New Zealand declining

532 The majority of the interpreters interviewed said the expertise and qualifications of court interpreters vary considerably. While parties who receive help from experienced and qualified court interpreters usually have their testimony translated accurately, parties who do not receive adequate interpretation assistance can give inaccurate testimony leading to miscarriages of justice.[506]

533 A common trend in the comments from interpreters interviewed was that the quality of interpretation was declining.[507] One interviewee said that in the criminal cases he observed, the court appointed interpreters were usually very experienced and competent. However, civil interpreters he observed, who had been engaged privately by the parties themselves, were often not of the same level of quality.[508] One interviewee noted that the levels of qualifications obtained by members of the profession varied according to language, and in languages which were uncommon in New Zealand, such as Bhutanese, court interpreters were often unqualified.[509]

534 Another interpreter said that, even in criminal cases, the quality of interpreters can be low due to poor case matching. This interviewee said that cultural understanding is required to match an appropriate interpreter to a case they are translating for, but due to time concerns, often the Central Processing Unit will approve matches which do not ensure the highest interpretation outcomes.[510] Several interviewees told us that the Central Processing Unit simply picks interpreters from a list without any regard for their proficiency or qualifications, or any regard to matching the interpreter's local dialect and cultural background with that of the party needing their services.[511]

535 A number of interviewees noted that there is currently no uniform certification required for a person to act as an interpreter in court.[512] One interviewee drew attention to the Ministry of Justice website, where the only specified requirement to apply to become a court interpreter is a current CV.[513] The Ministry of Justice has advised that there are no set Ministry terms and conditions it applies when setting face to face interpreting services, and that the Central Processing Unit operates a master list of individual interpreters and interpreting agencies. The Ministry of Justice further advised that before interpreters are added to this master list they are required to undertake an assessment or interview as to their suitability for providing face to face interpreting services in courts and tribunals, and that this includes a criminal history check. Lastly, the Ministry said that most face to face interpreters used in criminal cases belong to an agency, and that it considers that this

506 Pecol, above n 234, at 29.
507 Interview with Dr Olga Suvorova, Interpreter, NZSTI (Mai Chen, Auckland, 5 June 2019).
508 Interview with Daniel Zhang, Lawyer, Amicus Law (Mai Chen, Auckland, 18 June 2019).
509 Interview with Henry Liu, Interpreter, NZSTI (Mai Chen, Auckland, 17 June 2019).
510 Interview with Henry Liu, Interpreter, NZSTI (Mai Chen, Auckland, 17 June 2019).
511 Interview with Royal Reed, Principal, Prestige Law (Mai Chen, Auckland, 26 February 2019).
512 Interview with Dr Olga Suvorova, Interpreter, NZSTI (Mai Chen, Auckland, 5 June 2019).
513 Ministry of Justice "Interpreting in courts & tribunals" (15 March 2019) <www.justice.govt.nz>.

agency would make the decision whether the interpreter had held an appropriate qualification that would make him or her suitable to interpret in a court.[514] The Ministry of Business, Innovation and Employment website says that "there are no formal entry requirements to work as an interpreter or translator".[515]

536 One interpreter mentioned that interpreters are often bilingual people who were born overseas, and often do not speak very good English themselves.[516]

537 Most of the interpreters we interviewed are currently full members of the New Zealand Society of Translators and Interpreters (NZSTI), which is the national representative body for interpreters. There are requirements to join NZSTI. In order to qualify as a full member of NZSTI, a person must:[517]

- Live and work in New Zealand;
- Have an NZSTI approved tertiary qualification (recognised qualifications in New Zealand include a Masters level degree in Translation from the University of Auckland or Victoria University of Wellington, or a Bachelors level degree in Interpreting from Auckland University of Technology);[518] and
- Have passed the National Accreditation Authority for Translators and Interpreters (NAATI) Professional Translator or Interpreter (recently updated by NAATI to "Certified Interpreter")[519] examination.

538 We have not been able to find any statistics on the percentage of court interpreters who are full members of NZSTI. It would be helpful for the Ministry of Justice to collect this data.

NAATI accreditation

539 The NAATI accreditation is the Australia-based "National Accreditation Authority for Translators and Interpreters Ltd".[520]

540 The NAATI Certified Interpreter certification is described by the Judicial Council on Cultural Diversity in the following terms:[521]

> NAATI's certification system is designed to evaluate whether an individual is competent to practice as a translator or interpreter. It does this by setting minimum standards of performance across a number of areas of competency. Certification is an acknowledgement that an individual has demonstrated the ability to meet the professional standards required by the translation and interpreting industry in Australia.

541 NAATI is currently accepted in New Zealand as a method of accreditation. The Ministry of Business, Innovation and Employment Language Assistance Services project has recommended that NAATI accreditation be utilised throughout the public sector in New Zealand:[522]

> In 2017 a comprehensive consultation survey of practitioners indicated strong agreement with the set of standards posited – those developed by the Australian National Accreditation Authority for Translators and Interpreters (NAATI). The recommendation was for the NAATI standards and certification framework to be adopted across the New Zealand public sector, and this recommendation was agreed to in 2018.

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514 Email from Anton Youngman (Manager Analytics & Insights at the Ministry of Justice) to Mai Chen (Managing Partner, Chen Palmer) commenting on draft report (10 October 2019).
515 Ministry of Business, Innovation and Employment "Interpreters and Translators" <occupationoutlook.mbie.govt.nz>.
516 Interview with Henry Liu, Interpreter, NZSTI (Mai Chen, Auckland, 17 June 2019).
517 New Zealand Society of Translators and Interpreters "How to Join" <www.nzsti.org>.
518 New Zealand Society of Translators and Interpreters "Courses in NZ" <www.nzsti.org>.
519 Judicial Council on Cultural Diversity "Addendum to the Recommended National Standards for Working with Interpreters in Courts and Tribunals" (May 2019) <jccd.org.au> (note that there is a further specialised accreditation available – "Certified Specialised Legal Interpreter").
520 Interview with Dr Olga Suvorova, Interpreter, NZSTI (Mai Chen, Auckland, 5 June 2019).
521 Judicial Council on Cultural Diversity, above n 519, at 1.
522 Immigration New Zealand, above n 162.

542 The Language Assistance Project intends to have this recommendation fully implemented across the public sector by 2023.[523] We have recommended that the NAATI accreditation also be adopted in New Zealand courts, or that the Ministry of Justice consider a New Zealand system of accreditation for court interpreting.

543 This is important, as the interpreters we interviewed told us that courts do not require that interpreters are members of NZSTI before they are appointed as interpreters in a criminal case, and therefore do not require any qualification or accreditation for interpreters.[524] Many interpreters and translators of foreign languages in New Zealand are independent contractors who only work on call.[525] Generally, interpreters operate as contractors for themselves or a range of government, non-government and private interpreting organisations.[526] Interpreter agencies do not always require NZSTI registration in order to join, and some agencies train interpreters in-house rather than having them complete formal qualifications.[527] While large agencies usually require a freelance interpreter to present qualifications, accreditations and pass tests before they are engaged, smaller agencies often do not. This means that there are a significant number of unqualified translators working as interpreters in New Zealand courts.[528]

544 The absence of unified qualifications for interpreters has the potential to result in unqualified and/or self proclaimed untested bilingual people acting as interpreters where courts and Police require an interpreter on short notice. Unqualified interpreters can lead to miscarriages in justice where they misinterpret witnesses' testimony, and have also been regarded in the literature as lowering the status of the profession.

Aspects of courtroom interpreting that can lead to lower quality

545 One interviewee said the day-to-day work of most interpreters is in the health sector, not in the courts.[529] However, there are numerous factors which make court interpreting more difficult than healthcare interpreting, and interpreters who are experienced in healthcare interpreting will not necessarily find that their skills can be easily transferred to courtroom interpreting.

546 Multiple interviewees drew attention to the fact that interpreters are not given time to prepare, as they are requested on short notice, are not given court documents in order to help them prepare, and are not paid for their preparation time.[530] One interviewee also mentioned that there is no official feedback mechanism or debrief for court interpreters after a trial has been completed.[531]

547 Multiple interviewees mentioned that courtroom staff members do not appreciate the nuances of interpreting work, and the fact that interpreting can not be done to a high standard on short notice and without adequate preparation time.[532] These interpreters emphasised that interpretation is not a simple mechanical exercise, but requires additional knowledge of the factual and cultural context in order to interpret accurately. To interpret meaningfully an interpreter must use judgment and discernment, rather than giving automatic responses.

548 Multiple interviewees said that, around three to five years ago, it became much more difficult for court interpreters to successfully obtain court documents from the CPU in order to help them prepare for trial.[533] One interviewee said that it was Ministry of Justice policy to release documents

523 Immigration New Zealand, above n 163.
524 "Interview with Dr Olga Suvorova, Interpreter, NZSTI (Mai Chen, Auckland, 5 June 2019).
525 Ministry of Business, Innovation and Employment, above n 515.
526 Immigration New Zealand "Fair and Accessible Public Services: Summary Report on the Use of Interpreters and Other Language Assistance in New Zealand" (November 2016) <www.immigration.govt.nz>.
527 Interpreting New Zealand "Using Trained Interpreters" <interpret.org.nz>.
528 Interview with Henry Liu, Interpreter, NZSTI (Mai Chen, Auckland, 17 June 2019).
529 Interview with Henry Liu, Interpreter, NZSTI (Mai Chen, Auckland, 17 June 2019).
530 Interview with Dr Olga Suvorova, Interpreter, NZSTI (Mai Chen, Auckland, 5 June 2019).
531 Interview with Dr Olga Suvorova, Interpreter, NZSTI (Mai Chen, Auckland, 5 June 2019).
532 Interview with Anonymous, Interpreter (Mai Chen, Auckland, 10 June 2019).
533 Interview with Anonymous, Interpreter (Mai Chen, Auckland, 10 June 2019); and Interview with Anonymous, Interpreter (Lucinda King, Wellington, 21 June 2019).

on request from interpreters, but their requests were often rejected.[534] One interviewee referred us to statements she had received from the CPU that they did not consider it appropriate to provide interpreters with background information and that interpreters do not require such information in order to prepare for trial.[535] In one statement the interpreter was advised by the CPU that they were "only to interpret what is said in the hearing and no more" and in another, the request for documents to prepare for the hearing received the response that "they just need to interpret what the parties say and not provide any legal advice."[536] One interviewee said that she and other interpreters had been required to turn down work due to their concern that they could not adequately perform their duties as interpreters without access to court materials for preparation.[537]

549 The Ministry of Justice has advised that this is due to the fact that the CPU is not a part of the court, and therefore does not have the ability to provide court documents to third parties such as interpreters. It noted that the change about five years ago would have been the result of the responsibility for the organisation of interpreters shifting from the Registry (i.e. the court, a body that has the power to consider requests under the relevant Access to Court documents rules) to the CPU (a unit within the Ministry that does not have that power), and that the CPU should be refusing all requests and referring them to the court registry.[538] Our recommendation that responsibility for the arrangement of interpreters be moved back to the court should therefore mean that interpreters are able to access court documents to help them prepare for a trial. Should this recommendation not be implemented, it is important that the CPU refer requests to the relevant court in every instance, as it appears from our interviews with interpreters that this is not occurring.

550 One interviewee mentioned that these issues were the result of a disconnect between the CPU, which arranges interpreters at the Ministry of Justice, and the users of interpreters in the courts. This interviewee said, as the CPU is at a distance from the courtroom, the administrators do not understand the complexities of interpreting, and do not think it is necessary to provide interpreters with adequate preparation materials.[539]

551 Another interpreter said that courtroom work is extremely tiring, as it is highly stressful and requires a high level of concentration. An interpreter may only be working (and getting paid) for one or two hours in a courtroom, but may have to wait several hours for a trial to start. This interviewee said that interpreter fatigue can significantly decrease the quality of interpreting services.[540]

552 One interviewee said that interpreters in court must be careful to maintain their independence, as litigants, lawyers and court staff can confuse the interpreter as an advocate for the litigant, particularly where the litigant has paid for the interpreter's assistance.[541]

553 One interviewee mentioned that medical witnesses in criminal cases often use highly technical medical jargon which is difficult to translate, and even when translated, is unable to be properly understood by non-English speakers, as there is often no equivalent word or concept in the target language.[542]

554 One interviewee emphasised that there are large differences between languages in terms of phonetics, grammar, syntax, vocabulary etc. This means that it can be difficult to give literal

534 Interview with Anonymous, Interpreter (Mai Chen, Auckland, 10 June 2019).
535 Interview with Anonymous, Interpreter (Lucinda King, Wellington, 21 June 2019).
536 Interview with Anonymous, Interpreter (Lucinda King, Wellington, 21 June 2019).
537 Interview with Anonymous, Interpreter (Mai Chen, Auckland, 10 June 2019).
538 Email from Anton Youngman (Manager Analytics & Insights at the Ministry of Justice) to Mai Chen (Managing Partner, Chen Palmer) commenting on draft report (10 October 2019).
539 Interview with Anonymous, Interpreter (Lucinda King, Wellington, 21 June 2019).
540 Interview with Dr Olga Suvorova, Interpreter, NZSTI (Mai Chen, Auckland, 5 June 2019).
541 Interview with Anonymous, Interpreter (Mai Chen, Auckland, 10 June 2019).
542 Interview with Anonymous, Interpreter (Mai Chen, Auckland, 10 June 2019).
543 Interview with Dr Olga Suvorova, Interpreter, NZSTI (Mai Chen, Auckland, 5 June 2019).
544 Interview with Dr Olga Suvorova, Interpreter, NZSTI (Mai Chen, Auckland, 5 June 2019).

translations of courtroom dialogue where there are not equivalent phrases available in the target language. This interviewee said that in addition to language differences, cultural differences between languages exist which increase the complexity of interpretation. This interviewee said that not only is a witness' verbal communication important, but it is also important to interpret a witness' non verbal communications to the court. This interviewee gave the example of eye contact and smiling, which have different meanings between cultures, and has the potential to be misinterpreted by a trial judge when assessing veracity, for example.[543]

555 This interviewee recommended that the court interpreter role should be connected to a language and cultural specialist role. This interviewee said that while interpreters are not anthropologists, they should have knowledge of the cultural aspects of non verbal communication. This interpreter is a dual trained interpreter-anthropologist with a PHD in interpreting, and therefore possesses additional knowledge and skills that other interpreters might not have. This interviewee said:[544]

> For an interpreter, extra-linguistic knowledge relevant to the proceedings is paramount… inevitably for justice to be served, due attention must be paid to the knowledge, skills and professional capabilities and cultural awareness of both interpreter and translator.

556 However, other interviewees have said that the interpreter role is separate from that of cultural specialist and the two roles should not be combined. Thus, we have recommended that this issue be given more consideration.

Current state of the interpreting profession

557 Schedule A, clause 2 of the Witnesses and Interpreters Fees Regulations 1974 allows for a payment of "$25 for each hour or part of an hour: provided that the fee in respect of any day shall be not less than $75 nor more than $175". The regulation specifying this pay rate was last amended in 1996.[545] This compares to the average pay rate for certified and professionally qualified interpreters in United States Federal Courts of USD 418 per day,[546] and the minimum pay rate for interpreters in Victorian State Courts in Australia of AUD 326.71 per day,[547] for certified interpreters.

558 Multiple interviewees said that large numbers of qualified interpreters were leaving the profession, with one believing that low remuneration rates were the cause.[548] A lack of available jobs for qualified interpreters was also a commonly cited reason.[549]

559 One interviewee observed that a large number of Cantonese-speaking interpreters had recently migrated to Australia.[550] Professor Charles Qin (the most senior translator of Mandarin in Australia, who also interprets Mandarin in New Zealand from time to time), said that there is a system in Australia whereby migrants who pass a Credentialed Community Language Test can achieve additional points for their visa application, which may also result in interpreters choosing to leave New Zealand for Australia.[551]

560 One interviewee mentioned that interpreters are often the subject of complaints by unsuccessful litigants, and that baseless complaints against interpreters are common.[552] Some examples of unsuccessful appeals related to the standard of interpreting can be seen in the *Case Review* section.[553]

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545 Witnesses and Interpreters Fees Regulations 1974.
546 United States Courts "Federal Court Interpreters" <www.uscourts.gov>; and Helen Akers "How Much Money Do Court Interpreters Make?" (1 July 2018) Chron <work.chron.com>.
547 Victorian Multicultural Commission "Victorian Government – Minimum Rates for Interpreters" (1 July 2018) <www.multicultural.vic.gov.au>.
548 Interview with Albert Deng, Interpreter (Mai Chen, Auckland, 18 June 2019); and Interview with Dr Olga Suvorova, Interpreter, NZSTI (Mai Chen, Wellington, 5 June 2019).
549 Interview with Anonymous, Interpreter (Mai Chen, Auckland, 10 June 2019).
550 Interview with Henry Liu, Interpreter, NZSTI (Mai Chen, Auckland, 17 June 2019).
551 Interview with Professor Charles Qin, Managing Director and Chief Interpreter, Chin Communications (Australia) (Mai Chen, Auckland, 1 August 2019).
552 Interview with Henry Liu, Interpreter, NZSTI (Mai Chen, Auckland, 17 June 2019).
553 Under the heading *Interpreters*.

561 A common theme in all of the interviews was that the status of interpreting as a profession needs to be upgraded. Multiple interviewees mentioned the changing demographics of New Zealand and the growing demand for interpreters meant that government investment in the interpreting profession was necessary to inject quality and increase the numbers of people joining and staying in the profession.[554] Professor Qin also noted that this was necessary to improve the interpreting profession in New Zealand, and that there needed to be a government organisation that maintained oversight over the profession.[555]

Key themes from literature on interpreters

Issues and Challenges faced by interpreters in Court

562 Nidia Pecol, a professional American court interpreter and former faculty member of the Modern Languages School at Ricardo Palma University, highlights that CALD litigants face language difficulties at all stages of the legal process, which is not limited to the confines of the courtroom. She recommends establishing of a system to provide "legal interpreting" at all stages of the legal process for CALD litigants.[556] Likewise, the American National Center for State Courts, Language Access Services Section, recommends providing language assistance right from first contact, including placing language identifying cards and posters at first contact points in courtrooms.[557] A number of factors make court interpreting difficult, and can lead to inaccurate interpretation and in some cases a miscarriage of justice, including the following.

Innocent phrases

563 Pecol describes the difficulty with "innocent" phrases as a matter of cross-cultural communication. Even where a phrase is perfectly translated from one language to another, that phrase can still have different cultural meanings to people from different cultural and linguistic backgrounds. Mikkelson writes, "Even when no attempt is made to confuse a witness, the logic accepted by one culture may be totally unfamiliar to another".[558]

564 A 2013 survey of lawyers, judges and interpreters in the Washington County Court system found that all respondents expressed concern about the need for interpreters to have relevant cultural understanding of the person needing their assistance. The author writes, "[i]t is very important to recognise the difference in norms, beliefs, and behaviours so that an efficacious court process can be carried out and potential biases are avoided."[559]

565 Pecol gives the example of the phrase "do you have a problem with alcohol?" which can mean two different things to an English speaker and to a Spanish speaker, due to their different cultural contexts. An English speaker would be likely to interpret that phrase as a problem with alcoholism or alcoholic beverages, however a Spanish speaker would interpret that phrase as a problem with medicinal alcohol, such as ethanol, and would therefore be confused. This is because in Spanish the word "alcohol" is typically understood as referring to medicinal alcohol and not to alcoholic beverages. Pecol states that innocent phrases must be properly qualified in order to avoid miscommunication in the courtroom.[560]

554 Interview with Dr Olga Suvorova, Interpreter, NZSTI (Mai Chen, Auckland, 5 June 2019).
555 Interview with Professor Charles Qin, Managing Director and Chief Interpreter, Chin Communications (Australia) (Mai Chen, Auckland, 1 August 2019).
556 Pecol, above n 234, at 6.
557 Davis and Isaacson, above n 464.
558 Holly Mikkelson "Towards a Redefinition of the Role of the Court Interpreter" (1998) 3(1) Interpreting 21 at 33.
559 Mosqueda, above n 464, at 42.
560 Pecol, above n 234, at 6.

Cultural differences

566 Similarly, cultural differences mean that phrases take on different meanings to the Chinese and English speaker, even when perfectly translated into the other language. Chinese and Western communication styles are very different. Chang writes:[561]

> …in contrast to Western styles that are said to stress precise, straightforward expression of thought (due to emphasis on individualism), Chinese verbal style is often described as imprecise and ambiguous (due to emphasis on collectivism). Thus, while Western speakers tend to fashion meanings clearly in verbal utterances, Chinese speakers emphasise listener interpretation of received messages.

567 Fang and Faure, give the example of the phrases "Maybe I'll come with you" and "Perhaps it is too far to walk". These phrases to an English speaker are suggestions; "Perhaps it is too far to walk" means that "I think it may or may not be too far to walk". However to a Chinese speaker, these phrases are imperative; "Perhaps it is too far to walk" means "Don't walk". They are phrased only as suggestions for the sake of politeness.[562] Gladwell describes this speech pattern as "mitigated speech", whereby a person downplays or "sugar-coats" the meaning of their speech in order to appear polite or deferential to authority, in order to save face.[563]

568 The New South Wales *Equality Before the Law Benchbook* notes that, in Asian cultures, it is considered generally impolite for someone being questioned to flatly disagree with a questioner, even where they do disagree.[564] The *Equal Treatment Benchbook* of the English Judicial College states that face saving concerns of East Asian parties mean that a judge should never directly ask a litigant if they have understood what the judge has said because, "the individual may well say 'yes,' even when they do not understand, simply to save the face of the judge if a 'no' might imply that the judge has not explained [the matter] correctly".[565]

569 Some commonly identified aspects of Chinese cultural communication tendencies are as follows:

- *Indirectness*. In a situation of conflict, a Chinese communicator tends not to address conflict directly, but instead will do so in a tangential fashion. Writing of Chinese conflict resolution techniques, Chang states that "instead of communicating directly to solve problems, superiors may treat subordinates with human heartedness, while subordinates can appeal for sympathy or fair treatment based upon past loyalty". Furthermore, he states, "Chinese interaction is often based upon the contents of relationship; as a result, Chinese tend to use more convoluted approaches – such as going to acquaintances – to communicate messages".[566]

  This particular cross-cultural issue may explain the case of *Deng v R*, where the appellant complained at the Court of Appeal that his interpretation assistance was insufficient at trial. The appellant had raised the issue with junior counsel; however, the Court of Appeal said, "if Mr Deng or Mr Wong (the appellant and junior counsel respectively) had concerns about the standard of translation, we would expect the matter to have been raised with Mr Haigh as senior counsel. There is no reason to explain why neither of the two took that route".[567] Ultimately the appeal was dismissed. However, Mr Deng's "indirectness" of communication, viewed in the context of his Chinese cultural background, may explain why he decided to tell only junior counsel at trial, and not the judge or senior counsel;

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561 Hui-Ching Chang "The 'well-defined' is 'ambiguous' – indeterminacy in Chinese conversation" (1999) 31 Journal of Pragmatics 535 at 536 (citations omitted).
562 Tony Fang and Guy Olivier Faure "Chinese communication characteristics: A Yin Yang perspective" (2011) 35 International Journal of Intercultural Relations 320.
553 Malcolm Gladwell *Outliers: The Story of Success* (Little, Brown and Company, New York, 2008) at 194.
554 Judicial Commission of New South Wales, above n 129.
565 Judicial College, London, above n 121, at 8-12.
566 Chang, above n 561.
567 *Deng v R* [2012] NZCA 597 at [22].

- *Politeness*. Gu writes that politeness is another easily misinterpreted aspect of Chinese communication which is linked to face saving concerns. Gu writes that politeness can be understood through its function as a way of remedying face threatening acts. Gu writes that Chinese speakers tend to "minimise" requests when they speak in order to be more polite. For instance, a Chinese speaker who wants another person to peel a whole bucket of potatoes might ask, "can you peel one potato", thus politely minimising the cost. The other person would then be obliged to peel all the potatoes in order to appear polite and save face themselves.[568] This means of operating is likely to be misunderstood by a Western listener.
- *High Context*. Hall writes that the Chinese are a high context culture, meaning that when they communicate, they expect the listener to already know a large amount of background information, and are likely to communicate without a lot of explanation. In comparison, low context cultures assume that the listener knows very little, and are likely to take large amounts of time explaining background details.[569] This manner of speaking can be misconstrued as evasive by Westerners. This supports observations from our interviewees that Chinese people have sometimes addressed judges in a confusing manner, assuming that the judge already knew information about them, when giving evidence.[570]

570 Chang also writes that Chinese often make reference to their standing in social hierarchy when speaking, and use communication as a means of reaffirming their status in the collective.[571] Leung writes that "kinship terms" have significantly different connotations between Chinese and English. Leung gives the example of a Chinese witness using the Chinese phrase "Sister's daughter" to describe his niece. Leung writes:[572]

> The monolingual English speaker present was not aware of the significance of this choice of terms by the interpreter. A kinship term in Chinese generally means not just a particular relationship but also implies duties. In this situation the witness's use of (sister's daughter) indicates his relationship to the appellant is a close one, and that as an older brother he has the responsibility to look after his younger sister's daughter.

571 One of the interpreters we interviewed mentioned that interpreters must act as both a language expert and a cultural expert for the court, in order to ensure that a witness' testimony is conveyed as accurately as possible,[573] as is their ethical duty under the 2016 Ministry of Justice Guidelines for interpreters.[574] This interpreter mentioned that she would like to see the court interpreter role reworked into an official cultural and linguistic expert role.[575] Burns writes:[576]

> An interpreter must maintain a delicate balance between the need to convey nuances of meaning in the testimony of a witness - social and cultural implications that were often left unsaid in the original tongue - with a duty to avoid embellishment, editing or siding with the witness… as only the interpreter's version is recorded, placing an awesome burden on the interpreter when such evidence is greatly relied on.

Body language and non verbal behaviours

572 Pecol writes that in addition to language, non verbal communication such as body language can be easily misunderstood between cultures. Pecol gives the following examples of cultural behaviours of Latin American witnesses which are likely to be misunderstood by a Westerner:

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568 Yueguo Gu "Politeness Phenomena in Modern Chinese" (1990) 14 Journal of Pragmatics 237 at 242.
569 Edward T Hall and Mildred Reed Hall "Key concepts: Underlying structures of culture" *International HRM: Managing diversity in the workplace* (2001) 24.
570 Interview with Michael Kan, Partner, Michael Kan Law (Mai Chen, Auckland, 22 January 2019).
571 Chang, above n 561.
572 Leung, above n 463, at 295.
573 Interview with Dr Olga Suvorova, Interpreter, NZSTI (Mai Chen, Wellington, 5 June 2019).
574 Ministry of Justice, above n 173.
575 Interview with Dr Olga Suvorova, Interpreter (Mai Chen, Auckland, 5 June 2019).
576 Burns, above n 215, at 476.

- *Eye Contact*. "To many Latin Americans (especially from rural areas), avoiding eye contact is a sign of humility or lack of confrontational intent toward a person; for people in the United States, it means deceit or lack of interest."[577] The *Equal Treatment Benchbook* of the Supreme Court of Queensland notes that "an impressive witness according to Anglo-Australian culture will look her or his questioner in the eye and answer questions confidently and clearly. However, in many cultures, direct eye contact may be considered rude and challenging";[578]
- *Nodding*. "Generally speaking, when people in Latin America nod to someone who is talking to them, this tends to be equivalent to saying "I am listening to you, I am paying attention to you," not "I agree or accept what you are saying"; for people in the United States, nodding usually means acceptance, affirmation, or confirmation";[579]
- *Expressiveness*. Latin Americans tend to be animated and use their hands when expressing themselves; for people in the United States, that tends to mean the person is overexcited or distressed;[580] and
- *Reservation*. Latin American people are far more reluctant to speak about their personal or family issues because they feel there is no need to air the dirty laundry in public; people from the United States are more open to express and discuss their personal issues with therapists and other people.[581]

573 Chinese body language and non verbal behaviours identified by the literature are in many respects similar to those of Latin Americans as identified by Pecol, and as such have a similar likelihood of being misunderstood by a English speaking courtroom, if the interpreter does not make it clear what they mean:

- *Eye Contact*. It is uncommon to make direct eye contact when speaking to another person in PRC, and prolonged eye contact is seen as confrontational and disrespectful. Again, this has the potential to be misinterpreted by Westerners as the interviewee being deceitful or lacking interest;[582]
- *Physical Contact*. In Chinese culture close contact is kept to a minimum in public, professional and business situations. While to a Chinese person this is respectful, to a Westerner this can be a sign of dislike or prudishness;[583] and
- *Expressiveness*. In comparison to Westerners, emotions are usually conveyed by Chinese through expressions of the eye as opposed to the whole face, and most Chinese maintain an impassive expression when speaking.[584] This has the potential to be misinterpreted by Westerners as a lack of interest or emotion.[585]

Accommodating fear and anxiety

574 A survey of interpreters by the International Association of Conference Interpreters in 2000 found that court interpreters, in comparison to conference interpreters, often face added difficulty as "the average "client" of a court interpreter is rarely as articulate or fluent as a conference delegate. Fear and uncertainty also renders their language incoherent."[586]

577 Pecol, above n 234.
578 Supreme Court Library Queensland, above n 128, at 54.
579 Pecol, above n 234.
580 Pecol, above n 234.
581 Pecol, above n 234.
582 Commisceo Global, above n 399.
583 Exploring China "Verbal and Non-Verbal Language" <sites.psu.edu/chinaportfolio>.
584 Exploring China, above n 578.
585 Commisceo Global, above n 399.
586 Liese Katschinka "What is Court Interpreting?" (10 September 2000) AIIC <aiic.net>.

575 Pecol writes that although this finding reflects harshly on litigants, it can be true, as a non-English speaker can be paralysed by fear and nervousness, leading to their speaking becoming unfocused.[587] Pecol advises that court interpreters should interrupt and clarify with non-English speaking parties as to what they are trying to say, before attempting to translate.[588]

576 The *Equality Before the Law Benchbook* of the Judicial Commission of New South Wales notes that judges must be cognisant that "an individual's ability to communicate in English is often reduced in situations of stress – such as court appearances".[589] This reflects the comments of the New South Wales Supreme Court case, *Adamopoulos v Olympic Airways SA*, that:[590]

> The mere fact that a person can sufficiently speak the English language to perform mundane social tasks or even business obligations at the person's own pace does not necessarily mean that he or she is able to cope with the added stresses imposed by appearing as a witness in a court of law… It is typical of a country with poor skills in languages other than English that even educated judicial officers sometimes show an intolerance to the predicament of parties and witnesses whose first language is not English and who seek the provision of an interpreter.

577 Leung writes that difficulties between different Chinese dialects can also be exacerbated by a nervous witness. Leung gives the example of a Toi Shan (a dialect of Cantonese) speaking witness who was made to speak to a Cantonese-speaking interpreter (as the court was unable to source an interpreter proficient in Toi Shan). Even though the witness could speak Cantonese, it was not his mother tongue, and therefore he accidentally said many incorrect words in Cantonese to his interpreter which were translated literally, to the annoyance of the court. Leung writes that courts must be aware of the regional varieties of Chinese.[591]

Legal language

578 Another issue commonly identified in the literature is difficulty with interpreting legal jargon. Burns writes that, in order to be effective, an interpreter must have absorbed some of the dynamics and culture of the legal system and its language, as legal words can be too complicated for a lay person to understand, particularly if they do not already speak English.[592] Leung gives the example of "swearing" and "affirming" which were not understood by a witness in a trial in which she acted as an interpreter. She writes that, although she attempted to explain the concepts to the deponent and they ultimately elected to affirm, Leung was not sure that the deponent properly understood the difference and the implications of that decision.[593]

Interpretation as a profession

579 An Australian study of court interpreters revealed very similar insights to our interviews.[594] Many interpreters in that study complained of their profession being seen as low status and disrespected. The study found that interpreters are viewed as "outsiders who visit the court rather than officers of the court",[595] and 27–31 per cent of the interpreters surveyed reported that they were not usually or always respected by the other court participants. The study concludes that:[596]

> …interpreters do not feel that their professional status is appreciated by other stakeholders in court or by the system as a whole, and that the nature of their working conditions are influenced by the perceptions of their professional status. That is, interpreters feel that the less respected they are or the lower their professional status is, the poorer their working conditions are in court. Therefore, we can suggest that the

587 Pecol, above n 234, at 31.
588 Pecol, above n 234, at 6.
589 Judicial Commission of New South Wales, above n 129, at [3.2.2].
590 *Adamopoulos v Olympic Airways SA* (1991) 25 NSWLR 75 (SC) at 77.
591 Leung, above n 463, at 297–298.
592 Burns, above n 215, at 276.
593 Leung, above n 463, at 292.
594 Hale and Napier, above n 63.
595 At 4.
596 At 25.

> perceptions of court interpreter professional status has an impact on the quality of the interpreting work, because if working conditions are poorer, their interpreting output may also be poorer in quality.

580 Similarly, Leung writes that the status of interpreters in British courts is undefined, with many stakeholders having different impressions of the role which an interpreter is supposed to fulfil.[597] Leung writes, "some legal practitioners expect the interpreter to be just a language conduit, someone who should just 'say what is said'; some expect the interpreter to act as a cultural broker between the legal practitioners and their clients; others expect the interpreter to be fully responsible for the effectiveness of the communication".[598] This can lead to difficulties for the interpreter, as misunderstandings about the interpreter's roles can lead to witnesses expecting them to act as their advocate, or think that harsh words from the judge are the interpreter's own words.[599]

581 An American study on the perceptions of interpreters in the Washington County Court system noted several comments made by respondents who were interpreters regarding the relationship between themselves and the court. Many interpreters noted that the court's preference for hiring interpreters on an "as needed" basis, rather than full time, lowered the status of their profession, and drove away veteran interpreters.[600]

582 The Australian study also takes issue with the lack of uniform qualifications for interpreters to act in Australian courts, the authors writing:[601]

> The absence of a universal requirement for interpreters to be adequately trained is indeed an indication of the low social status of the interpreting profession, as professional status relates to the publicly perceived superior ability of the professional to do something that others in society cannot do. People who are bilingual do not necessarily have the required expertise, knowledge and skills to function as an interpreter. Thus, the optional nature of pre-service training can only serve to reinforce the common misconception that any bilingual should be able to interpret accurately, which in turn lowers the status of the profession.

583 However, this study was published in 2016, and in 2017, the Australian Judicial Council on Cultural Diversity published the *Recommended National Standards for Working with Interpreters in Courts and Tribunals*.[602] These recommend that where "NAATI professional interpreters are reasonably available, they should be employed."[603] The Standards divide all languages in Australia into four tiers, based on NAATI data on the number of accredited practitioners for each language. Tier A languages include Mandarin and Cantonese, and the Standards state that Courts should always employ interpreters with the appropriate NAATI accreditation for such languages (although the standards do grant the Court the ability to allow qualified, non accredited interpreters to interpret if the interpreter can demonstrate they have the requisite qualifications).[604] For languages in the lower tiers, i.e. those with fewer interpreters available, different standards apply, and these standards are clearly defined. This is a pragmatic solution where interpreters are needed in rarer languages, such as Burmese, and some Aboriginal and Torres Strait Islander Languages.[605]

584 Various courts and tribunals throughout Australia have either adopted, or are in the process of adopting these recommendations.[606]

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597 Leung, above n 463, at 292.
598 At 292.
599 At 294.
600 Mosqueda, above n 464, at 41.
601 Hale and Napier, above n 63, at 3.
602 Judicial Council on Cultural Diversity, above n 156.
603 At 41.
604 At 42–43.
605 At 43 and 47–48.
606 For example, in Queensland Courts and Tribunals, guidance issued in June 2019 states "Courts should prefer to engage a Qualified Interpreter," and that for languages in Tier A "a Professional Interpreter should be engaged, subject to cultural and other reasonable concerns" (Guideline: Working with Interpreters in Queensland Courts and Interpreters (Queensland, 28 June 2019 at 11.1 and 11.4). In Western Australia, a committee was established in 2018 to implement the recommendations: The Honourable Wayne Martin AC Presentation at "Launch of National Standards for Working with Interpreters in Australia's Courts and Tribunals" (Perth, 17 May 2018).

585 The *Strategic Plan for Language Access in the California Courts*, also made the finding that using well-meaning but unqualified interpreters can be extremely dangerous, as their participation can give the appearance of meaningful interpretation assistance, when in fact the unqualified interpreters lack of understanding of court terminology and procedures led to miscommunications and errors, which the English speaking court was not aware of.[607]

586 The issue with the large numbers of unqualified interpreters does not end with the status of the profession, but also has flow on effects for the quality of evidence provided in individual cases. The legal implications of using underqualified interpreters in court was set out by the New Zealand Law Commission in 1999 and is still relevant today:[608]

> Clearly, there are many dangers associated with using unqualified interpreters in legal matters. They may lack professional interpreting skills (as opposed to conversational skills) and be unfamiliar with the meaning and use of particular legal terms. Lawyers cannot be certain in these circumstances that their clients have obtained the greatest benefit from their advice.

587 On the topic of the interpreting profession, Dr Henry Liu has written:[609]

> I would argue it ought to be imperative that the whole profession be supported by researchers to redefine the role and responsibilities of all interpreters, elevate the overall status, standard and professionalism of practitioners across all domains and in language pairs however obscure.

588 Dr Liu has also written on the impact of technology on the interpreting profession, in particular about remote interpreting. He says:[610]

> Whilst it is intuitive that the interpreters have been historically (physically) visible in most bilingual communications (much more so than translators), thanks to the invention and wider-spread adoption of simultaneous interpreting, and the increase in multilingual conferences and consequent need to locate interpreters in sound-proof booths, interpreters are often outside of the visual fields of the delegates, diplomats and dignitaries. With the increasing use of remote technology, this increases the distance, both physical and therefore perceptional as well as professional, between the users and the interpreter, thereby rendering this inherently human experience much more impersonal. Furthermore, it is much harder to consider someone you cannot see as an active co-participant, let alone a member of your communicative team.

589 Dr Liu questions whether the distance enabled by technology enables interpreters to be more impartial, or, whether the lack of visibility means that interpreters are less accountable.[611] Dr Liu also says that the dependence on technology for accurate simultaneous interpretation means that it is practised in only a small number of languages. He writes "the challenges faced by court and judicial interpreters are immense with multiple stressors and considerable emotional efforts, let alone the discrepancy between standards and praxis, between court users depending on their language and location."[612]

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607 Judicial Council of California, above n 171, at 32.
608 Law Commission, above n 468 at 189.
609 Liu, above n 109, at [3.2].
610 At [3.3].
611 At [3.5] (citations omitted).
612 At [3.7].

CASE REVIEW

Introduction

590 The purpose of reviewing cases involving Chinese parties in the High Court, Court of Appeal and Supreme Court, was to identify particular cases where issues and challenges arose that were directly related to their Chinese ethnicity or cultural background. Our interviews with judges, lawyers and interpreters provided valuable insight into their individual experience and perspectives of the issues and challenges for Chinese and CALD litigants and witnesses in accessing justice in the New Zealand court system. However, those findings needed to be matched by a review of actual reported judgments in those courts are to provide the necessary context of how issues and challenges for Chinese parties arise and are addressed in individual cases. This enables us to identify recurrent themes and systemic issues that raise challenges to the court system in providing equal access to justice.

591 This wider overview allows us to identify and examine separately issues and challenges that are particular to:

a) The actions, perspectives, assumptions and expectations of Chinese parties engaging in the New Zealand courts;

b) How the lawyers of Chinese parties engaging in the New Zealand courts contribute to the actions, perspectives, assumptions and expectations; and

c) The response of judges to those actions, perspectives, assumptions and expectations.

592 CALD parties will inevitably place special demands on the justice system. As Lord Steyn noted "context is everything" – but context in a court setting becomes harder where value judgements about veracity and credibility must be made about people who speak a different language and present themselves and act in a manner driven by different cultural norms and assumptions/ expectations of the court process.[613] As noted earlier, the cultural background and language limitations of many Chinese parties who come before the New Zealand courts affects:

- The way they present evidence;
- The way they respond to questioning of their actions and motivations;
- The way they verbally or physically express themselves or visibly show (or do not show) emotions such as remorse, empathy or contrition;
- Their sense of what is the right thing to do when they perceive that a particular outcome could reflect adversely on their personal honour or that of their family ("*mianzi*");
- Their confidence in representing themselves without the assistance of legal counsel and their sense that this is not a disadvantage;
- Their expectation of how judges will determine the "truth" – an inquisitorial process where the truth is distilled from an active judge-led examination and evaluation of competing perspectives of what happened and why, or an adversarial process where the judge determines which of two competing versions of the truth he or she finds more credible;
- Their expectation that judges will take account of who they are, and their status and wealth in determining credibility and the "truth." To that extent, they assume that judges are not truly independent; and
- Their acceptance that they have been treated fairly and that the court did give them a fair opportunity to be heard. As Megarry J observed in *John v Rees*, "Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the

613 *R (Daly) v Secretary of State For the Home Department* [2001] 2 AC 532 (HL) at [28].

feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events" – the likelihood of Chinese parties' harbouring a grievance that the court system has not treated them fairly is heightened by any language and cultural background challenges that are not handled appropriately.[614]

593 However, respect for the law and the administration of justice in New Zealand depend on public trust and confidence that we are all treated equally. Ultimately, ensuring equal access to justice for all before the New Zealand courts is an outcome that all New Zealanders want and expect. The increasingly superdiverse country that New Zealand is becoming means the court system needs to be adequately equipped to ensure that courts do not face insurmountable barriers to delivering justice when presented with parties of different ethnicity and cultural backgrounds.

594 The case review starts with the hypothesis that, with the increasing Chinese population in New Zealand, there is likely to be a corresponding increase in the number of Chinese litigants, witnesses and lawyers in New Zealand courts, and that these cases will raise issues unique to Chinese litigants, in respect of their ethnicity, cultural perspective and expectations and language:

a) Chinese litigants, witnesses and lawyers, particularly those from PRC, face unique issues and challenges when compared to New Zealand Europeans appearing in the New Zealand courts; and

b) These issues and challenges will be either explicitly identified in, or able to be inferred from, reported judgments of cases involving Chinese litigants, witnesses and lawyers.

Methodology

Sampling

595 We identified potential cases for review from three sources. The first group was identified through a keyword search of the following databases: LexisAdvance; Westlaw; NZLII; and Judicial Decisions Online (from the Ministry of Justice).

596 We searched for the following keywords: China/Chinese; Asian; Mandarin; Cantonese; Interpret/Interpreter/Interpreting; and Culture/Cultural. Collation of this group of cases identified 37 cases for closer analysis.

597 The second group of cases was generated by a search of the Ministry of Justice database for any and all judgments in the senior courts since 1 January 2000 where: a party was recorded as being of an Asian ethnicity and/or a party was recorded as being born in an Asian country.

598 This search produced a list of 1,668 cases. This list was then sorted using the same keywords listed in paragraph above, from which we identified 204 cases. The Ministry of Justice case list was then assessed against the following criteria:

a) Any judgment where the presiding judge explicitly made a finding on issues related to an Asian or Chinese litigant, witness or lawyer's ethnicity, culture, or language, and where those issues impacted the ultimate outcome of the case;

b) Any judgment where the presiding judge explicitly drew attention to issues related to an Asian or Chinese litigant, witness or lawyer's ethnicity, culture, or language, but did not make a finding on those issues;

614 *John v Rees* [1970] Ch 345, [1969] 2 All ER 275.

c) Any judgment where the subtext of the judgment indicates that an Asian or Chinese litigant, witness or lawyer faced unique issues relevant to their ethnicity, culture or language, but these issues are not explicitly noted in the judgment; and

d) Any judgment where it is able to be inferred from the facts and outcome of the case that an Asian or Chinese litigant, witness or lawyer faced unique issues relevant to their ethnicity, culture or language, but these issues are not explicitly noted in the judgment.

599 Using these criteria, the Ministry of Justice case list was further reduced to a shortlist of 83 relevant cases.

600 Thirdly, these sample groups of cases were supplemented by cases identified and referred to us by our interviewees, and in other research.

601 The "cut off" date for cases identified from all sources was 13 September 2019.

602 Both batches of cases (the initial 37 and shortlisted 83 (together with extra cases referred to us by our interviewees and identified from other research)) were then analysed together as a sample size of 123 "relevant cases" to identify the key themes. These key themes were then compared against the key themes identified in the interviews and literature.

Self reflection on research methodology

603 Overall we consider that this methodology was an effective means of identifying the cases of relevance and analysing their key themes. The number of cases in the sample of cases helped provide an assurance that issues would not be missed.

604 However, while most issues identified in the interviews and literature were replicated in the *Case Review*, certain issues identified in interviews were not apparent in the cases analysed. This is not surprising given that judgments focus on the law and factual findings, and not on the challenges that Chinese parties, lawyers or judges may have experienced in reaching the findings. Also, some issues raised by the lawyers interviewed were not necessarily directly relevant to the outcome of a case and therefore not referenced in the reported decision. For example, a lack of legal information available in Asian languages, which a number of the lawyers interviewed identified as an issue, was not expressly mentioned in the judgments.

Individual Case Analysis

605 The cases reviewed do indicate that Chinese litigants experience unique issues arising from their ethnicity, culture, or language which can make it more challenging for the court system to ensure they get equal access to justice when compared to New Zealand Europeans.

Language barriers

606 A major challenge of the New Zealand court system for Chinese litigants is an English speaking judge who cannot speak the Chinese language deciding a dispute between two Chinese speaking parties who are not proficient in English. For example, *Ming Shan Holdings Ltd v Ma & Ors*[615] concerned a dispute between two Chinese brothers from PRC, but resident in New Zealand, about the ownership of several companies registered in this country, which involved the investment of over $10 million that had been remitted from Hong Kong. Both brothers only spoke Mandarin, requiring the help of interpreters to give evidence, and all contemporary documents were written in Mandarin, requiring translation. At trial, both brothers gave conflicting factual accounts of what had transpired, resulting in the presiding judge, Lang J, being required to decide the case

615 *Ming Shan Holdings Ltd v Ma & Ors* HC Auckland CIV-2000-404-1597, 31 July 2008.

on a finding of credibility. Finding for the plaintiff, Lang J noted the difficulties that language and cultural barriers caused in assessing veracity:[616]

> …none of the protagonists speaks English. All speak Mandarin. As a result, it has been necessary for all of the evidence and all of the important documents to be translated into English. Allowance must therefore be made for the fact that the full flavour of the Chinese version of the evidence may not have been captured in the English translation.

607 In *Lee v Lee*,[617] van Bohemen J experienced similar difficulties as the case concerned a defamation action brought by a Korean plaintiff against a Korean defendant, regarding an article written by the defendant in a Korean language newspaper, the New Zealand Sunday Times. In an introductory comment, van Bohemen J observed:[618]

> There are a number of unusual aspects about this proceeding. First, it is a case conducted in English about an article written in Korean for a Korean speaking audience. That raises a question about whether an English translation of an article in Korean can adequately capture the meaning of the original and its significance to the intended audience.

608 However, at trial, the parties had agreed to an English translation of the article as well as a list of 15 English meanings of Korean passages in the article, alleged by the plaintiff to be defamatory. The only word which the parties disputed the correct English meaning of was the Korean word "yi-myin-gye-yak", which the plaintiffs said carried negative connotations of secretiveness, but the defendants said simply meant "undisclosed or hidden". van Bohemen J agreed with expert evidence adduced by the plaintiff that it carried the negative connotations they alleged. Accordingly, after analysing each of the 15 English meanings, the Court held that the plaintiff had been defamed in a number of the ways alleged by the plaintiff.

609 In *Zeng v Cai*, concerning a property dispute between two persons who had previously been in a relationship, the plaintiff and defendant were both Chinese and spoke Chinese as a first language. Associate Judge Bell noted that the Chinese language element had caused procedural difficulties during the case, saying (emphasis added):[619]

> All parties are Chinese. Their first language is Chinese… It is desirable that those giving evidence be able to do so in their preferred language (invariably their first language). That way, they will have greater confidence that their evidence is true and correct. If evidence is given in a foreign language, it should be translated into English for the assistance of the other parties and the court. **The Chinese language difficulties have added to the complexity of this case**.

610 In *Tang v Collins*, the eldest son of a deceased man, who executed a will bequeathing his house to his youngest son, challenged the will on the ground that it had not been correctly translated into Laotian by the younger brother before being signed by the deceased. The elder brother argued that the younger brother was not fluent in Laotian and would not have correctly translated the legal words. Brown J found that the brother could speak conversational Laotian, and would not have had difficulty translating the will as it was straightforward. Brown J held that the defendants had discharged the burden of proving that the deceased knew and approved of the contents of the will, as the younger brother translated the will in the presence of another Laotian speaker who did not raise any objection to the translation.[620]

611 In *R v Leigh*, the Police intercepted a number of telephone conversations between Chinese drug dealers, speaking in Mandarin and Cantonese, and charged them with importation and supply of methamphetamine. The Police applied to admit translations of the transcripts as evidence

616 At [33].
617 *Lee v Lee* [2018] NZHC 3136.
618 At [2].
619 *Zeng v Cai* [2015] NZHC 1798 at [4] (emphasis added).
620 *Tang v Collins* [2014] NZHC 1011.

under section 18 of the Evidence Act 2006. Priestly J noted that there were several issues with the translated documents, as unlike telephone recordings and transcripts in English, persons assessing the evidence would be unable to ascertain if statements in the transcripts were attributed to the wrong person, if the words transcribed had been done correctly, or if any "code" had been used to disguise the contents of what had been said. Both counsel indicated to the Court that agreement could be reached on what documents could be admitted as evidence. The Court ordered that the recordings were to be provided to the defendants to comment on before the trial could proceed.[621]

612 *R v Chen* concerned a Chinese defendant who pled guilty to charges of importing a class C drug (ContacNT, an ingredient used in the production of methamphetamine) and with escaping from custody.[622] The defendant had escaped from prison after being convicted for robbery and kidnapping and had borrowed money from Chinese criminals. In payment for the debt, the defendant had arranged to import ContacNT from PRC.

613 Williams J noted that ContacNT was a "growing problem here in New Zealand… all of which are sourced from China, [the defendant's] home country".[623] The Court considered that the defendant's offending was serious and sentenced him to one year and nine months imprisonment on the importation charges, cumulative on his sentence for robbery and kidnapping, and one year imprisonment on the escaping charge, to be served concurrently with his sentence for importation.

614 It is unclear from the judgment whether or not the defendant was assisted by an interpreter. However, the judgment is notable for the way in which language issues were sensitively handled by Williams J. Williams J paused five times throughout the judgment to explain the meaning of legal terms to the defendant in layman's terms (those terms being "totality principle", "concurrent", "aggravating factors", "mitigating features", and "cumulative sentence").[624] This was important in ensuring understanding, given our findings in the *Chinese Parties in New Zealand and its Courts* and *Interpreters* sections of this Report, that English as second language speakers are unlikely to understand complicated legal terms.

615 In *R v Xu Lei*, the Chinese defendant appeared in front of Woodhouse J for sentencing regarding two offences of importing the class C controlled drug pseudoephedrine.[625] His Honour noted that the defendant was 26 years old and had come to New Zealand on a student visa seven years earlier, in 2002, to study English. At the time of sentencing, he was enrolled in a diploma. His student visa expired in 2009, meaning that he was illegally in New Zealand, but Woodhouse J noted that he had applied for an extension.[626] He had no family in New Zealand.[627] The defendant had pleaded guilty and had co-operated with the Police.[628]

616 In deciding whether to impose home detention rather than imprisonment, His Honour noted the following:[629]

> There are some factors which suggest that home detention would not be appropriate. One is that you have committed serious offences relating to illegal drugs - and I have already made that quite clear. Another is that you are now illegally in New Zealand and may become subject to a removal order. In other cases where people convicted for similar offences were subject to removal orders, the Court took this into account in deciding that home detention was not appropriate and sentences of imprisonment were imposed. However, the fact that you are illegally in New Zealand does not mean I cannot impose a

621 *R v Leigh* HC Auckland CRI 2006-019-008458, 27 August 2008.
622 *R v Chen* HC Auckland CRI-2005-4-2191, 11 October 2005.
623 At [6].
624 At [24]–[27].
625 *R v Xu Lei* HC Auckland CRI-2009-004-13740, 7 December 2009 at [2].
626 At [5] and [7].
627 At [6].
628 At [8].
629 At [12].

> sentence of home detention. The Crown recognises that there are some special circumstances in your case which may justify home detention.

617 His Honour imposed a final sentence of seven months home detention. Woodhouse J stopped a few times to check that the defendant understood. He also explained the process of sentencing in a clear manner.

a) In setting the starting point Woodhouse J stated: [630]

> Do you understand my English? Yes, you have acknowledged that you do, thank you.

b) When explaining the fact that he could impose a sentence of home detention but had no control over immigration authorities, Woodhouse J again checked whether the defendant understood:[631]

> …It may very well be that the Labour Department - the immigration authorities - will decide that you should immediately be deported. I have no control over that. Do you understand? [Mr Xu indicated he did understand.]

618 Woodhouse J further checked whether the defendant understood the condition that he was to travel straight to the address where he would serve his home detention and wait for the probation officer and the person responsible for the electronic monitoring.[632]

619 *Wang v R* concerned a husband and wife, Mr Wang and Ms Liu, who had moved with their two children from PRC to New Zealand in 2002. In 2003, the company Top International Trading Limited ("TITL") was incorporated. Mr Wang was the sole director and shareholder. TITL operated three stores that sold low cost items. The business was run from the family home by Mr Wang and the business accounts were sent to this address. Ms Liu brought home the cash and other records from one of the stores, while Mr Wang or an employee from the relevant store would bring back the cash and transaction details from the other two stores.[633]

620 TITL's revenue was significantly under-reported between 2008 to 2011 in the company's GST and income tax returns.[634] Inland Revenue began an investigation in 2012.[635] In 2013, the investigators found cash and USB drives that were described as the "Mandarin cash books" which had TITL's full sales records. It was calculated that when the Working for Families Tax Credits Mr Wang was receiving were added in, the total tax evaded was $1.184 million.[636] When on bail for this, Mr Wang evaded more tax by selling the businesses and the private property and putting the proceeds in a bank account in PRC and extracting money from banks and ATMs.[637]

621 Mr Wang was sentenced to three years and nine months imprisonment.[638] Ms Liu was convicted of sixteen omission charges and charges based on being a party to TITL's offending as she "aided the act."[639] Relevant to our analysis is Ms Liu's appeal against her conviction and sentence on the basis that the Judge was incorrect to conclude she had knowledge of what was happening, but also the lack of evidence of aiding or a duty to prevent the offending. The "key ingredient" of every charge the Crown had to prove was that she **knew** that false returns were being filed for the purpose of evading tax.[640] The appeal was focused on her knowledge.[641] The Court of Appeal was not satisfied

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630 At [10].
631 At [14].
632 At [17].
633 *Wang v R* [2016] NZCA 56 at [1].
634 At [6].
635 At [6].
636 At [7].
637 At [9].
638 At [11].
639 At [44].
640 At [49].
641 At [49].

that the evidence the prosecution adduced and the findings by the Judge in respect of the evidence, was sufficient to prove the critical element (of knowledge) beyond reasonable doubt.[642]

622 The Court did not agree with the Judge's finding that since the bank statements were addressed to the family home that "[t]he status of those accounts were therefore available to [Ms] Liu from the outset."[643] The Court pointed out:[644]

> …the evidence of the son, Chenwei (Kevin) Wang, was that Ms Liu could only speak a little English and understand some simple words. **There was no suggestion Ms Liu could read or write English**. The Judge did not make a finding whether to not Ms Liu could read English. He appears to have overlooked this important point.

623 The Court quashed all the convictions entered in the District Court against Ms Liu and verdicts of acquittal were entered.[645]

624 In *Du Ling Trustee Limited as Trustee of the Du Ling Family Trust v C An and All In One Asset Management Limited*, the Court considered an application for summary judgment to recover $744,000 alleged to have been wrongfully taken by the first defendant from the family trust.[646]

625 In the first instance, the Court had to consider the admissibility of an affidavit from Ms Du. The affidavit was originally filed in English, but Ms Du claimed that she neither spoke nor understood English.[647] The Court had ruled that it was "uneasy about accepting a process by which a person is deposing to the truth of a document in a language which she herself cannot read for understand."[648] Ms Du resubmitted the affidavit after it had been translated by a "freelance interpreter and translator," which the Court found was compliant with the High Court Rules.[649]

626 The case was essentially a relationship property dispute between Ms Du and her ex-husband Mr An. Both had emigrated from PRC under the Investor category.[650] Associate Judge Christiansen held there were "a number of significant matters including important facts upon which the parties disagree," and held the factual differences could not be resolved by the affidavit evidence.[651] The application for summary judgment was dismissed.[652]

Language barrier between a litigant and their counsel

627 Language barriers can also exist between a litigant and their counsel, where the litigant is unable to find a Chinese speaking lawyer. In *Department of Internal Affairs v Xiao*, on application to set aside a notice of bankruptcy, a Chinese applicant raised the ground that he had been significantly disadvantaged by being unable to find a Mandarin speaking lawyer who would act on civil legal aid.[653] The High Court accepted that the applicant had difficulty finding a Mandarin speaking lawyer, but held that no issue about the safety of the underlying judgment arose from his lack of legal representation. The Court said, "A lawyer who speaks Mandarin would have clearly been an advantage but in the circumstances here, far from necessary".[654]

628 In *Shin v New Zealand Police*, the South Korean appellant had been convicted, following a guilty plea, on a charge of kidnapping. He was sentenced to five years imprisonment.[655] The appellant

642 At [60].
643 *R v Top International Trading Ltd & Ors* DC New Plymouth CRI-2013-043-562, 23 October 2015 [Oral judgment] at [49] cited in *Wang v R* [2016] NZCA 56 at [67].
644 *Wang v R* [2016] NZCA 56 at [67] (emphasis added).
645 At [77]–[78].
646 *Du Ling Trustee Limited as Trustee of the Du Ling Family Trust v C An and All In One Asset Management Limited* [2017] NZHC 1938.
647 At [2].
648 At [3].
649 At [10].
650 At [26].
651 At [73]–[90].
652 At [93].
653 *Department of Internal Affairs v Xiao* [2018] NZHC 2599 at [36].
654 At [36].
655 *Shin v New Zealand Police* HC Auckland CRI-2006-404-024, 1 June 2006 at [1]–[2].

appealed against the conviction to the High Court on the basis that he believed he suffered a miscarriage of justice:[656]

a) He was a Korean national and had only been in New Zealand for a short time at the time of the offence. His English was limited;

b) When he pleaded guilty, he did not understand the significance of the charge and that on conviction he could be sentenced to prison for a significant period;

c) The focus was him returning to South Korea as soon as possible. His counsel did not explain the charge and the probable sentence through an interpreter; and

d) His counsel did not interview him using an interpreter about the events regarding his charge, before he pleaded guilty.

629 Frater J noted that the lawyer, Mr Newell, who was representing the defendant at the time, had sworn an affidavit. Mr Newell claimed that at each meeting with the defendant he always had an interpreter, either an official one, or one of two acquantences of the defendant assisted the defendant by interpreting.[657] He said that after explaining the options to the appellant (an interpreter was present), he acted in accordance with the instructions given, which were to have the appellant back in Korea as soon as possible and to continue dispositions.[658] He said he confirmed these instructions again with an interpreter,[659] and also talked to the appellant, using interpreters, after the court hearings.[660]

630 Her Honour found that Mr Newell routinely used interpreters to communicate with clients for whom English is their second language.[661] Frater J stated that:[662]

> I do not believe it was necessary, as Mr Gardiner [counsel for the appellant] submitted, for Mr Newell to go through every piece of evidence with the appellant or that it all be translated. The critical evidence was that of the complainant and the critical issue was whether he was detained against his will.

631 Her Honour found that Mr Newell had done all that was required of him,[663] and dismissed the appeal against conviction.[664]

632 Frater J also dismissed the appeal against his sentence.[665] It is interesting to note that the District Court Judge had allowed some discount for the fact that the appellant's inability to speak English would make his time in custody particularly hard.[666] This is also seen in a number of the cases below, under *Sentencing Decisions*.

633 *Chao Ma v Police* concerned a defendant from Shanghai, PRC who had pleaded guilty to a charge of assault, and was sentenced to 80 hours community work and ordered to pay $250 in reparation. The defendant appealed his sentence on the ground that his poor understanding of English had led to a misunderstanding between himself and his counsel, resulting in him entering a guilty plea without understanding that a conviction would follow or what it meant. He said he was told he might merely have to pay a lump sum. Therefore he was not accorded his right to a trial.[667]

634 The defendant argued that his plea was entered on a fundamental misunderstanding of his counsel's advice, and he had no intention of admitting guilt. The defendant's counsel had

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656 At [5].
657 At [22].
658 At [29].
659 At [30].
660 At [30].
661 At [32].
662 At [33].
663 At [35].
664 At [40].
665 At [56].
666 At [41].
667 *Chao Ma v Police* HC Auckland CRI-2005-404-396, 24 October 2006 at [2].

difficultly recalling having acted for him, but said that she was confident that the defendant could speak English and understood what she was saying. The defendant's counsel had acted on the defendant's instructions provided to her in writing that he wanted to enter a guilty plea.

635 Keane J noted that the circumstances of the case left him in "a state of disquiet":[668]

> Even though [the defendant] has lived in New Zealand since the end of 2002, English is not his first language, and his command of the language and the concepts inherent in it is not to be assumed. This, moreover, was his first appearance before any Court, certainly any Court in New Zealand, and our system of justice must be assumed to be one with which he is not in any intimate sense familiar. Nor can the options as to plea his counsel then put to him have been easy to assimilate…
>
> I cannot escape the conclusion that [the defendant's] counsel, speaking easily of choices with which she was familiar, and [the defendant], struggling to come to terms with choices with which he was not, may well have misunderstood each other. I accept then his evidence that he did not understand the significance of his plea to the charge as it was, or the consequences of conviction, until he spoke to the interpreter afterwards.

636 Accordingly, Keane J allowed the appeal and granted leave for the defendant to vacate his guilty plea and substitute a plea of not guilty, remitting the case to the District Court for rehearing.[669]

Low English language capability of parties resulting in court action against them

637 Some cases demonstrate how the low English language capability of some people of Chinese ethnicity in New Zealand can result in them finding themselves before the Court, both as a criminal defendant but also in civil proceedings.

638 *Liu v Police* concerned a defendant from PRC who pleaded guilty to a charge of trespassing on the Waikato University Campus. He applied for a discharge without conviction which was declined by the District Court.[670]

639 The defendant had been served with a trespass order one year before the offending in question. The offending occurred after he had noticed an irregularity with his bank account and was unable to get a satisfactory response over the phone, due to his English language difficulties. He had previously dealt with a Mandarin speaking officer at the campus branch of the bank and unsuccessfully attempted to contact that officer by phone. The defendant then attempted unsuccessfully to contact the Police officer who he had dealt with regarding the trespass matter. He then went to the campus branch of the bank to speak with the Mandarin speaking officer. On his return, he was recognised by two students whom he had had a previous disagreement with, resulting in a fight and the defendant calling the Police. When the Police arrived, the defendant was arrested for trespass.[671]

640 The defendant argued that a conviction would impede his application for a work permit and work visa with Immigration New Zealand, and his future plans to apply to join the New Zealand Police. However, Lang J held that the conviction would not be likely to disqualify the defendant from either of these, and declined to grant a discharge without conviction.[672]

641 In *Chang v Police*, the Taiwanese appellant had pleaded guilty to a careless use of a motor vehicle charge but defended a charge of driving while incapacitated.[673] She was convicted in the District Court,[674] and appealed the conviction.[675]

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668 At [26]–[29].
669 At [30].
670 *Liu v Police* HC Auckland CRI-2008-404-00032, 3 June 2008 at [2].
671 At [6]–[14].
672 At [30].
673 *Chang v Police* HC Christchurch CRI-2011-409-000106, 13 December 2011 at [2].
674 At [3].
675 At [4].

642 The appellant had driven into a stationary vehicle at a Police checkpoint. The Police officer at the scene said that the appellant was unsteady, had slurred speech, lacked co-ordination and both her and her car smelt strongly of alcohol.[676] He had to get a Chinese speaking officer as the appellant appeared unable to understand.The appellant was sick on the side of the road, and was released into her friend's care.[677] The appellant's friend told the original officer that the appellant had consumed a whole bottle of wine.[678] The appellant also told the Police officer this when he visited her workplace later on.[679] They both denied saying this.[680] The appellant was unwell for days after the incident. Her doctor said she presented with a contusion on her head and her symptoms were likely from a concussion.[681]

643 The defence argued in the High Court was that Ms Chang's observed demeanour on the night was not the result of alcohol impairment, but of concussion. The appellant and her friend stated that she had consumed only one glass of wine and not one bottle of wine. French J did not accept that defence evidence and stated that there were issues of credibility. She preferred the evidence of another witness (the driver of the stationary car that the appellant's car collided with) and the Police officer at the scene.

644 In *Shen v Ossyanin and Anor*,[682] Whata J speaks about the difficulties that language barriers can cause parties in the civil jurisdiction:[683]

> This case is about misrepresentation and mistake. Mr Shen purchased an architecturally designed home from Mr Ossyanin. Mr Shen's first language is Mandarin. Mr Ossyanin's first language is Russian. They do not speak English. Immediately prior to purchase, Mr Shen and Mr Ossyanin met. Mr Shen was assisted by Ms Chen. She cannot speak Russian, but she speaks English. Mr Ossyanin was assisted by Mr Naoumov. He cannot speak Mandarin, but he speaks English. Mr Shen was asked whether the house was leaking or had any problems. He said that he was told "no". Mr Ossyanin denies there was any question about "leaks". The house leaks (though it is not a leaky home as that term is usually understood.)

645 *In Department of Internal Affairs v Qian Duoduo Ltd*, a case concerning a defendant's breaches of the Anti–Money Laundering and Countering Financing of Terrorism Act 2009, the Court held that the defendant's "limited command of English" made it "unlikely [the defendant] could have complied with the AML Act regime without assistance", and having received incorrect assistance was a factor that substantially reduced the defendant's culpability.[684]

Police interviews

646 The cases below demonstrate the concerns noted by lawyers in the *Lawyers' Perspectives* section regarding low English language capability affecting Chinese accused in their dealings with Police.

647 In *Zhao v Police*, Mr Zhao appealed a drink driving conviction from the District Court.[685] One ground of appeal was whether Mr Zhao understood his legal rights with respect to breath testing. Mr Zhao's appeal was successful on another ground, and so Lang J did not have to reach a firm conclusion on this ground of appeal.[686] Nevertheless, Lang J stated:[687]

> Like the Judge, I consider it significant that Constable Chueh also speaks Mandarin, and he dealt with Mr Zhao for a considerable period of time during the evening in question, at no stage did he consider it necessary to resort to Mandarin in order to ensure Mr Zhao understood what he was saying… the issues

676 At [8].
677 At [9].
678 At [10].
679 At [13].
680 At [14] and [17].
681 At [15].
682 *Shen v Ossyanin* [2019] NZHC 135.
683 At [1].
684 *Department of Internal Affairs v Qian Duoduo Ltd* [2018] NZHC 1887.
685 *Zhao v Police* [2017] NZHC 195.
686 At [25].
687 At [26]–[27].

> raised under this ground of appeal nevertheless highlight the need for the police to take care when dealing with persons for whom English is a second language. During the hearing in the District Court, Mr Laubscher put to Constable Chueh a printed form produced by the police setting out advice in Mandarin about the evidential testing procedures and the rights of a suspect who is required to undergo those procedures. Constable Chueh confirmed that he did not provide this form to Mr Zhao, presumably because he was satisfied that Mr Zhao understood the advice he was giving in English. With the benefit of hindsight, however, it may have been safer for the Constable also to have provided Mr Zhao with a copy of the form.

648 In *Yang v R*, the appellant, Mr Yang, was a Korean national who spoke limited English.[688] He had been convicted of sexual violation by rape in the District Court, and was sentenced to five years of imprisonment.[689] He appealed against this conviction.[690]

649 Prior to his arrest, the appellant had been interviewed by the Police and this was video recorded. A Korean interpreter interpreted the questions and answers given in this interview and the transcript was produced at the trial. The appellant claimed that the translation was deficient. Both the appellant and the Crown engaged their own translators to re-translate the interview. The appellant claimed that the re-translation showed the shortcomings in the original transcript and that the Judge therefore erred in his assessment of the evidence, based on the original translation, resulting in a miscarriage of justice.[691]

650 Lang J found that some of the claimed deficient translations in the version produced by the defence had the same overall meaning as those in the original translation.[692] He found some of the other contested passages were worded differently to the versions by the defence translator, but that the differences were not material as they did not undermine the defence provided at trial.[693]

651 Lang J identified that three of the challenged passages caused concern.[694] With regards to transcripts of video evidence he stated:[695]

> The Crown also reminds me that the Court of Appeal has recently stressed that errors in the transcript of an evidential videotaped interview will only be significant where they go to the heart of the defence case.

652 Lang J found that the Judge was more focussed on the complainant's evidence than the version of events given by Mr Yang in the videotaped interview.[696] Nevertheless, he stated that the parts of the videotaped interview referred to by the Judge were not challenged as inaccurate.[697] Thus, Lang J said he did not consider there to be a real risk that the errors in the translation influenced the Judge's decision.[698]

653 Lang J also addressed another issue in support of the appeal, that the interpreter did not advise the appellant that he could obtain a lawyer in private and at no cost, under the New Zealand Bill of Rights Act (NZBORA).[699] Lang J said this may have been material if Mr Yang claimed that he could not afford to pay for a lawyer and therefore would waive his right to one, or if he had said he did not want to receive advice from a lawyer in the presence of a Police officer.[700] However, it only arose when his counsel noticed that he was not advised of this when he saw the translation. Therefore the Judge said he would not consider it as it had no bearing on whether there had been a miscarriage of justice.[701] The appeal was dismissed.[702]

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688 *Yang v R* [2016] NZHC 1165 at [1] and [5].
689 At [1].
690 At [2].
691 At [5]–[6].
692 At [20].
693 At [21].
694 At [22].
695 At [22]; and *A (CA171/2013) v R* [2015] NZCA 375 at [86].
696 *Yang v R* [2016] NZHC 1165 at [34].
697 At [35].
698 At [35].
699 At [29].
700 At [29]–[30].
701 At [30].
702 At [40].

654 *R v Guo* concerned a defendant from Fuzhou, PRC, who was convicted in the District Court of importing pseudoephedrine in the form of ContacNT capsules hidden in containers disguised to look like slabs of granite (the defendant was a stonemason). At trial, the defendant argued that the granite containers had been shipped to him by a man called Ah Ming, and that he had innocently thought the containers contained Chinese cigarettes only.[703]

655 In the Court of Appeal, the defendant argued that the trial judge had erred in dealing with evidence of an earlier importation in his summing up of the facts, and by failing to give a lies direction towards a piece of evidence. In dismissing the appeal, William Young P examined the whole of the evidence, including the fact that the defendant had given a Police statement with the assistance of a Mandarin interpreter, despite the fact that his native tongue was the Fuzhou dialect. His Honour also noted the fact that he had given evidence at trial through the use of a Mandarin interpreter, but no complaints arose as to the accuracy of the interpretation at trial.[704]

656 The defendant had argued at trial that translation errors in the Police interview had led to him making admissions about his own activities, when really he had had intended to describe the activities of Ah Ming. In assessing whether a lies direction should have been made in regards to this evidence, William Young P said:[705]

> Given that he was making his statement through an interpreter, some element of confusion in what he said or meant is possible. So it is possible that what he actually intended to say was not recorded with complete accuracy.

657 However his Honour considered that "there were distinctly more serious difficulties with the Ah Ming defence than the alleged lie", and held there was no miscarriage of justice, at [71].

Interpreters

658 Language barrier issues can be mitigated by the use of an interpreter, if the interpretation is of a requisite quality so it is accurate. In *Abdula v R*, the Supreme Court held that inadequate standard of interpretation services would breach a defendant's rights under NZBORA if "as a result of its poor quality, an accused is unable sufficiently to understand the trial process or any part of the trial that affect the accused interests, to the extent that there was a real risk of an impediment to the conduct of the defence".[706]

659 In *Choi v Kim*, the Court dismissed an application for an interim injunction in favour of the Korean plaintiff, holding that there was a serious question to be tried regarding the Korean defendant's limited ability to speak English and his reliance on interpreters to understand a contract document. The Judge also expressed doubts about the defendant's ultimate likelihood of success at trial.[707]

660 Although inadequate standard of interpretation at trial is a common ground of appeal, historically it has a very low chance of success.

661 In *Chow v R*, the Chinese appellant, a murder accused from PRC, complained that the interpretation assistance provided to him at trial was insufficient to enable him to properly understand and follow the evidence given. The appellant complained that his first interpreter used a "very formal" form of Cantonese and a different dialect. He complained that his second interpreter had not translated everything to him, and that he had not asked her to translate what she missed for cultural reasons (he said he was a "low class" person who did not want to interrupt). The Court of Appeal dismissed the appeal, as the Court considered that the appellant was familiar with legal

703 *R v Guo* [2009] NZCA 612.
704 At [34].
705 At [71].
706 *Abdula v R* [2011] NZSC 130, [2012] 1 NZLR 534 at [43].
707 *Choi v Kim* [2018] NZHC 2579 at [30].

process, the issues at trial were not complex, he had the case adequately explained to him (in English) by his counsel, and interpretation issues were not raised at the time.[708]

662 In *Deng v R*, on application for recall, a Chinese defendant convicted of possession of methamphetamine for sale, complained that he had not been given appropriate interpretation assistance at trial. The applicant said that his interpreter at trial was a 68 year old man, who appeared to close his eyes and sleep during the trial, needing to be shaken awake by the applicant. The applicant said that the interpreter had told him that the courtroom was too big and so he could not hear what was happening, and that the interpreter normally worked at the hospital and did not understand the legal terms and issues.[709] However, the Court of Appeal held that none of the matters raised by the applicant gave rise to a miscarriage of justice, as the conduct of his defence was not affected by the interpretation issues and he had not raised the issues at trial with his senior counsel (although he purported to have raised these concerns with his junior counsel).[710]

663 *R v L* concerned contempt of court and name suppression proceedings of an interpreter.[711] The interpreter had assisted a Crown witness in a significant criminal trial lasting 10 weeks.[712] Moore J was informed by two jurors that the interpreter had said to them that she thought the defendant was telling the truth.[713] Reconvening the Court, Moore J spoke with both counsel, who informed him that the interpreter had spoken with each of them about her perception of the defendant's guilt as well.[714] Moore J committed the interpreter for contempt, and remanded her on bail at the end of the hearing day.[715]

664 Trying the interpreter for contempt of court, Moore J accepted medical evidence that the interpreter had acted in contempt of court because of a psychotic episode. Moore J noted that the interpreter was experienced, and had acted as a court interpreter for four years without incident.[716] Finding the interpreter in contempt, Moore J discharged the interpreter without penalty and granted her name suppression subject to the condition that the Central Processing Unit of the Ministry of Justice was provided with a copy of his judgment.[717] Moore J took into account that the interpreter's family would face significant hardship, as she was the sole breadwinner of her family and her son suffered from Down's syndrome and lung disease.[718]

665 *Yip v Police* concerned a defendant from PRC who was convicted of one charge of failing to stop when directed by a Police officer, and ordered to pay a fine of $2000. The defendant appealed to the High Court on the ground that there had been a miscarriage of justice, due to the incompetence of the Cantonese interpreter provided to the defendant at trial.[719]

666 The defendant did not provide an affidavit asserting flaws in the interpretation, nor did the defence produce expert evidence that the interpretation was wrong. Instead, defence counsel submitted that it was clear from the transcript of the trial that the interpreter was incompetent and inaccurate.[720]

667 Upon examination of the examples of misunderstandings and misinterpretations referred to by the defence, Asher J was unable to determine whether the irregularities in the transcript were actually said by the defendant, or were interpretation/transcription errors. Asher J said "an examination of the transcript as a whole indicates that [the defendant] was an alert, intelligent witness who stuck

708 *Chow v R* [2013] NZCA 360.
709 *Deng v R* [2012] NZCA 597.
710 At [22].
711 *R v L* [2019] NZHC 308. Please note due to suppression orders, we are unsure if the interpreter was Asian.
712 *R v Taimo* [2019] NZHC 234.
713 *R v L* [2019] NZHC 308 at [5]–[10].
714 At [11].
715 At [16].
716 At [28].
717 At [42].
718 At [39].
719 *Yip v Police* HC Auckland CRI-2011-463-000058, 1 December 2011.
720 At [11].

firmly to his story. The essential points of his defence evidence… were absolutely clear".[721] As such, Asher J held that a failure to meet the required standard of interpreting had not been made out by the defence.[722]

668 Similarly, his Honour did not consider that the fine of $2,000 was manifestly excessive, having regard to the maximum penalty available.

669 In *Hoang v New Zealand Police*,[723] Mr Hoang of Vietnamese ethnicity appealed a decision of the District Court to refuse bail.[724]

670 Lang J said that the appeal was able to be resolved by consent and that the appellant would be granted bail with certain conditions, including it being "…conditional upon arrangements being made for the above bail conditions to be explained to Mr Hoang by an interpreter before Mr Hoang is released from custody."[725]

671 In *Deng v New Zealand Police*, the appellant was facing nine charges relating to the possession of methamphetamine and firearms.[726] The appellant was denied bail in the District Court.[727]

672 When the appellant was initially denied bail in the District Court, the Judge had said that although there was "no specific indication" that he was a flight risk, his length of time in the country indicated that his connection to New Zealand was more tenuous than he claimed. The Judge also said that although he had a child in New Zealand, it seemed that he had been separated from the child's mother for years.[728]

673 On appeal, Stevens J noted that since the District Court decision, new information had come to light, being a letter obtained by the Police in the course of another operation. The letter had been translated.[729] The author of the letter was in prison at the same time as the appellant. The Crown contended that this letter referred to the offending the appellant was involved in. The Crown placed reliance on the part of the letter that said "planning to get bail and abscond" and "he did Indonesian passport business in Hong Kong, promising total safety, charging a price of four thousand RMB yuan."[730]

674 His Honour found that the appellant had not shown that the Judge failed to take into account all of the relevant matters, made an error of principle, was plainly wrong, or took into account irrelevant matters.[731] He said that since then the Crown had put before the Court further material that confirmed a flight risk:[732]

> ….the Crown has been able to put further material before the Court confirming the existence of a flight risk in respect of the appellant. In this regard, I have had regard to the travel schedule for the appellant which shows he has spent a considerable amount of time away from New Zealand in China between late 2002 and May 2006. I also have regard to the content of the letter…

675 With regards to the letter, Stevens J noted some "…minor differences between the translation of the official Court translator and that provided earlier from Constable Li." Stevens J noted the Constable's translation of the paragraph regarding the appellant's plans to abscond.[733] Although

721 At [21].
722 At [22].
723 *Hoang v New Zealand Police* HC Auckland CRI-2008-404-0144, 27 May 2008.
723 At [1].
725 At [2]–[3].
726 *Deng v New Zealand Police* CRI-2006-404-000318, 19 October 2006 at [2].
727 At [1].
728 At [19].
729 At [20].
730 The letter's author was referring to "Ribs Wei", the alias of the appellant in *Deng*: at [34]–[35].
731 At [45].
732 At [45].
733 At [45].

His Honour did not expressly say, it appears he was suggesting that the key information in each of the two translations concerning that point was the same.[734] The appeal was dismissed.

676 *Lin v R* concerned a defendant from PRC who was convicted on multiple charges including robbery and various assaults. The defendant appealed on the grounds that guilty verdicts were against the weight of the evidence, that the prosecutor had acted improperly, that the Judge erred in her summing up, that the jury were guilty of misconduct, and counsel for the defendant's co-defendant introduced inadmissible evidence.[735]

677 Panckhurst J rejected all of the grounds, dismissed the appeal, and made the following comments about the trial and the jury:[736]

> It is apparent that the trial was not without difficulty. A number of important witnesses gave evidence with the assistance of an interpreter. Jurors were concerned about careless pronunciation of certain of the Chinese names and this excited one of the written communications to the trial Judge. It is also apparent that the trial was characterised by numerous interruptions in relation to rulings and related issues, which required the absence of the jury from the courtroom.

678 However, the behaviour of the jury was not considered unusual for a jury trial, and not a basis on which the defence could succeed.

679 In *R v Takiguchi*, the Japanese defendants, Mr and Mrs Takiguchi, pleaded guilty and were convicted of two counts of importing a class A controlled drug, methamphetamine, and one count of conspiracy to import a class A controlled drug, methamphetamine.[737]

680 The defendants had been recruited to take a consignment of methamphetamine from Indonesia to New Zealand. The first time they cleared Customs.[738] About three months later they attempted a second importation. However, Customs found methamphetamine in the lining of their suitcases.[739] After their first importation the defendants had also recruited two other Japanese nationals to bring methamphetamine into New Zealand. They arrived two days after the defendants' second importation and were arrested at Auckland Airport.[740]

681 In sentencing, Duffy J in the High Court noticed that the parole officer appeared to misunderstand Mrs Takiguchi, even though an interpreter was at the interview. Her Honour stated that the while the probation officer said that Mrs Takiguchi had no guilt or remorse, he had also noted that she had told him that she felt the "weight of [her] sin", and that "every day I [Mrs Takiguchi] regret having done this". Her Honour commented:[741]

> The comments are at odds with each other. It is unsatisfactory that such conflicting comments have been made. I propose to give you the benefit of the doubt and to treat you as being remorseful, Mrs Takiguchi.

682 In deciding upon a final sentence, Duffy J stated that a discount was allowed due to the difficulties the defendants would experience in prison due to being foreign nationals:[742]

> Both the Crown and your counsel have suggested here that I deduct one year's imprisonment to reflect the absence of previous offending, and the difficulties you will both experience in serving a sentence of imprisonment in New Zealand. That a sentence of imprisonment is additionally severe on foreign nationals was recognised by the Court of Appeal in *R v Chan* [2009] NZCA 528.

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734 At [45].
735 *Lin v R* CA467/05, 19 October 2006 at [6]-[11].
736 At [74].
737 *R v Takiguchi* HC Auckland CRI-2010-004-004084, 16 November 2010 at [1]–[2].
738 At [4].
739 At [5].
740 At [6]–[7].
741 At [10].
742 At [33].

683 Taking this discount and other discounts made into account, the final imprisonment sentence was seven years and six months each, with a minimum penalty of three years and nine months imprisonment.[743]

Cultural barriers

684 Distinct from language issues, cultural issues may also create a barrier between Chinese litigants and effective access to justice. Our interviews showed that several aspects of Chinese culture that differ markedly from the western adversarial system and the western way of doing business can cause Chinese parties to behave in a manner that is difficult for judges and New Zealand European lawyers to understand. Cultural features of a defendant have also been taken into account in sentencing as per the principles of sentencing in section 8(i) of the Sentencing Act 2002.

685 *R v Huang* concerned a defendant from PRC accused of money laundering. The trial had already been adjourned once, due to the defendant's need to instruct new counsel and seek accounting advice. The defendant's new counsel sent a memorandum to the Court, advising the Judge that he was withdrawing as counsel for the defendant, as the defendant had refused to accept his advice on multiple occasions and intimated a change of counsel to various people on at least two occasions, and applied for an adjournment on behalf of the defendant.[744]

686 Cooper J allowed the adjournment holding that, despite the delays, proceeding with trial would be contrary to the interests of justice, as the defendant would be unrepresented and his defence would not be adequately prepared. In doing so, Cooper J noted:[745]

> In the present case [the defendant] in addition to considerations that might otherwise apply does not speak English and relies on the services of a Cantonese interpreter who has been present at the hearing today. That additional dimension of the circumstances makes an adjournment inevitable.

687 *Li v R* concerned a defendant from PRC who was convicted in the District Court of one charge of obtaining by deception an NZQA-issued New Zealand Diploma in Business. The defendant had been contacted by another Chinese person who, unbeknown to him, was working on a television documentary about illegally purchased tertiary qualifications. Following contact, a diploma and fake academic transcript were sold to the other Chinese person for $12,000. Then over the course of two years, false entries were made in the computer system of the New Zealand Academy of Studies and transmitted to NZQA. This led to a certificate being issued from NZQA to the documentary filmmakers.[746]

688 The defendant appealed to the Court of Appeal on the grounds that the elements of the offence had not been made out. In particular, the defendant argued that the Crown had not proven that he, in submitting the false information, did so with intent to deceive and without claim of right. Gilbert J held that the defendant had known his conduct was unlawful, saying:[747]

> That Mr Li knew that what was being proposed was unlawful is also supported by the fact that he told Mr Chen that he could not assist his associate, Tony Wall, who was also involved in the television programme, to obtain a tertiary qualification because he was a "foreigner" and had "a different way of thinking from Chinese" which could lead to trouble.

689 *Zhu v R* concerned a defendant from PRC who was convicted of supplying and possessing images of child sexual abuse, and sentenced to three and a half years imprisonment. The defendant appealed to the Court of Appeal on the ground that his sentence was manifestly excessive.[748]

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743 At [42]–[44].
744 *R v Huang* HC Auckland CRI-2006-404-000184, 1 November 2006 at [4].
745 At [8].
746 *Li v R* [2016] NZCA 237.
747 At [44].
748 *Zhu v R* CA347/07, 30 October 2007.

690 On appeal, the defendant argued that the circumstances of offending and the defendant's personal circumstances warranted a lesser sentence. Ronald Young J rejected these arguments, noting that a modest reduction for the guilty plea was all that could be expected. With regard to the defendant's personal and cultural circumstances, his Honour said:[749]

> The Judge acknowledged the fact that there had been, shortly before the offending, an increase in penalty, and that this type of offending may be treated less seriously in China. In our view, these factors are hardly in mitigation. Nor was the fact that appellant would be deported at the end of his sentence.

691 Accordingly, the Court of Appeal dismissed the appeal.

692 *R v Lin* concerned a defendant from PRC who was convicted of rape and wounding with intent to cause grievous bodily harm. The defendant had broken into his ex-girlfriend's house, assaulted and raped her, and then attacked her new boyfriend with a knife. At sentencing, Cooper J took into account the serious aggravating factors of the offending: that it had involved an invasion into the victim's home, the use of a weapon, the physical harm to the victim, and the defendant's lack of remorse, and sentenced the defendant to a combined term of nine years imprisonment.[750]

693 Cooper J addressed cultural issues related to the severe impact the offending had on the victim emotionally, noting:[751]

> She says when she see [sic] your friends in the Chinese community in Auckland, that reminds her of the events that occurred on the night. She also feels ashamed of what happened to her and refers to cultural difficulties that that causes for women of your race.

694 However, cultural factors were also taken into account as mitigating factors, Cooper J saying:[752]

> Mr Mansfield… referred to the hardship that you will experience serving a prison sentence in New Zealand given your very limited ability to speak English. I agree with him on those matters.

695 *Yang v Ministry of Business, Innovation and Employment* concerned a defendant from PRC who was convicted of holding herself out as a person providing immigration advice, and providing immigration advice, when she was not a licensed immigration advisor. In the District Court, the Judge dismissed the defendant's application for discharge without conviction and permanent name suppression.[753]

696 In the High Court, the defendant argued that cultural consequences for her as a member of the Chinese community would occur as a result of conviction. Downs J dealt with this issue as follows:[754]

> I accept some loss of face may arise from the fact of conviction, but context is likely to dilute this consequence. The Chinese community in which the appellant mixes will likely know or soon learn the appellant believed she was acting lawfully and the Judge accepted as much. The regulatory nature of the offending also diminishes this aspect.

697 Accordingly, Downs J did not consider that the defendant would face consequences out of proportion to her offending necessary for a discharge without conviction, or face extreme hardship necessary for name suppression.[755]

698 *IRD v Song* concerned a defendant from PRC who was convicted of offering to accept a bribe. The defendant was an investigator with Inland Revenue, and had offered to a Chinese woman who he was investigating, that he would destroy documents and evidence if she paid $120,000 into

749 At [23].
750 *R v Lin* [2013] NZHC 2837.
751 At [10].
752 At [28].
753 *Yang v Ministry of Business, Innovation and Employment* [2017] NZHC 1673.
754 At [27].
755 At [34]–[35].

his Chinese bank account. The woman would possibly have been required to return to PRC as a result of the investigation. The defendant was sentenced to three months community detention and 200 hours community work. The IRD, as the "informant" and with the consent of the Solicitor-General, appealed against the sentence to the High Court on the ground that it was manifestly inadequate.[756]

699 The IRD argued that the primary principle of sentencing which should have been taken into account was general deterrence and not the defendant's personal circumstances.[757] Mallon J agreed that the sentence was inadequate, however she did not consider it appropriate to alter the defendant's sentence, having regard to the fact that it was already completed, and that the defendant had continued volunteering after his community service was complete.[758]

Lack of Contemporaneous Documentation

700 A notable theme of the interviews with lawyers who act for Chinese clients is the tendency of Chinese litigants to conduct business on a non-documented "handshake" basis. *Li v Chen* concerned loans between a Chinese appellant and respondent totalling $58,880. The loans were provided on oral terms; there was no formal written record of the loans and the trial Judge found the written material surrounding the loans to be unreliable. Consequently, the appeal failed.[759]

701 In *Mao v Green Land Investment Limited*, the defendant sought three orders, one of which was that the plaintiff, Liansen Mao, be disbarred from the proceedings as a result of his ongoing failure to provide an affidavit of documents.[760] The case demonstrates the challenges faced by judges in assessing and ruling on cases where the evidence is presented in a less conventional way than might ordinarily be the case for a dispute between two New Zealand European clients.

702 Mr Mao was a businessman who resided in PRC, and the defendant, a company, represented by a QC, argued that "the time has come for the Court to say 'enough is enough' and not let Mr Mao proceed further with his claim."[761] However, Powell J "reviewed the proceedings carefully" and held that it was not appropriate for the claim to be struck out or disbarred at the time.[762] His Honour found that the "changing focus of the proceedings, aggravated by the fact that Mr Mao was unrepresented for a considerable period, while clearly frustrating for Green Land, does not fit comfortably" with the relevant High Court Rule.[763] Powell J held that the application filed by Green Land was "both opportunistic and premature."[764]

703 Mr Mao was at times self-represented, and had filed documents that were not compliant with the High Court Rules.[765] Powell J's close analysis of the evidence before him enabled him to comprehend and assess Mr Mao's arguments, despite exhortations to come to a different decision by the other party's QC.

704 *Liu v Jiang* concerned a relationship property dispute between a husband and wife regarding a property legally owned by the defendant, the husband's father, with the plaintiff arguing that her husband had a beneficial interest in the property by virtue of a constructive or resulting trust.[766] The plaintiff had filed for a caveat over the property in question, which was opposed by the defendant.[767] Justice Powell utilised WeChat messages provided by the plaintiff, where the

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756 *Inland Revenue Department v Song* HC Wellington CRI-2008-485-158, 10 February 2009.
757 At [26].
758 At [35].
759 *Li v Chen* [2018] NZHC 2843.
760 *Mao v Green Land Investment Limited* [2018] NZHC 1348 at [1].
761 At [5].
762 At [6].
763 At [8].
764 At [10].
765 At [5].
766 *Liu v Jiang* [2018] NZHC 1897 at [3].
767 At [4].

husband had referred to the property as his 'own,' to find that the intention was that the property was to be beneficially owned by her husband.[768] After reviewing the evidence, Powell J held:[769]

> I am satisfied that Kitty [the plaintiff] has provided sufficient detail to establish an arguable case that [the property] is in fact beneficially owned by Michael [the defendant], and therefore relationship property in which Kitty can claim an interest.

705 Powell J held that the claim should be explored in more detail in substantive proceedings.[770]

706 In *Zhang v King David Investments Ltd*, a Chinese couple from Taiwan, one of whom was a lawyer, agreed to, and signed, a sale and purchase agreement selling a house to the plaintiff, which they subsequently attempted to rescind from. In the High Court at first instance, the parties agreed to settle, with consent orders being made by the Court. The Chinese couple subsequently applied to overrule the consent orders but were unsuccessful. The couple then sold the house to a third party, in breach of the consent orders.[771]

707 The plaintiff then applied to the High Court for orders holding the couple in contempt. At trial, the couple argued that they understood the consent orders as "pending", similar to a patent application in the Taiwanese Patent Office; and they had not properly read and understood the settlement when they signed it. The High Court said that, "Based on their own accounts, I consider Ms Ying and Mr Young's actions in entering into the settlement agreement and requesting orders from the Court were casual to the point of recklessness", and their theory that the consent orders were pending was "extraordinary and irrational".[772] The High Court held Ms Ying in contempt, and referred the judgment to the Law Society for disciplinary action against the lawyer Mr Young.[773]

708 The lawyer, Mr Young, was found guilty by the New Zealand Law Society Disciplinary Tribunal of three charges of misconduct, pursuant to section 7 of the Lawyers and Conveyancers Act 2006, and one charge of negligence, pursuant to section 241 of the Act. He was suspended from practice for 15 months and ordered to pay a substantial sum for costs. He sought and was granted leave to appeal in respect of one charge, namely that he had sworn a false affidavit of documents. He also appealed against penalty and costs.

709 The appeal was heard by Whata J[774] who considered, among other things, the utility of purported Chinese culture expert evidence that the Chinese lawyer appellant, Mr Young, sought to produce, and also the cultural dimension to Mr Young's conduct which highlighted the need for practical training and education about the norms that practitioners of the law in New Zealand must adhere to.

710 Mr Young sought to produce a brief of evidence by his wife and a Ms Liu, who purported to be an expert on Chinese culture. The evidence from Ms Liu was to the effect that Chinese commerce is marred by corruption. This was based on her experience of commercial dealings with Chinese in PRC. Mr Young refers to her as "a democratic supporter from China" and that "she can help the judge know how communist culture (where Mr D and the purchaser Ms Z grew up) tolerates or even encourages deceiving your enemies."[775] However, Whata J declined to grant leave to adduce the proposed evidence. In respect of Ms Liu, Whata J said that he did not consider that her "evidence is admissible or cogent expert evidence on Chinese commerce. Her personal experience in commercial dealings in China lacks the requisite independence to qualify as admissible expert evidence. In addition, Ms Liu's evidence is not substantially helpful to me on the key issues on appeal."[776]

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768 At [8].
769 At [12].
770 At [13].
771 *Zhang v King David Investments Ltd* [2016] NZHC 3018.
772 At [37] and [44].
773 At [54].
774 *Young v National Standards Committee* [2019] NZHC 2268.
775 At [19].
776 At [21].

711 Whata J concluded that by omitting relevant documents, Mr Young failed to meet the standards expected of a competent lawyer and dismissed the appeal against conviction. However, in then considering the appeal against penalty and costs, Whata J considered the cultural dimension to Mr Young's conduct. He observed that the Tribunal stated that the suspension period would give Mr Young "the opportunity of reflecting on his conduct and of undertaking further training and legal education," but did not specifically order further training.[777] He noted that Mr Young was a very inexperienced litigation practitioner embroiled in litigation of great personal significance to him, and that while these factors did not diminish the seriousness of Mr Young's misconduct, they provided an explanation for it and "a clear target for re-education and future management".[778] In this regard, he noted:[779]

> Relevantly, also, there is an evident cultural dimension to Mr Young's conduct with which I think many lawyers in New Zealand will be unfamiliar. It appears to me Mr Young brought to the underlying litigation his life experience in commercial dealings in China, which influenced his dealings not only with Mrs Z but with Mr D. While this provides no justification for his conduct in the litigation or subsequently, it helps inform our response to it and where we might target further practical training and education about, among other things, the norms that must be adhered to as practitioners of the law in New Zealand. I also note that Mr Young admitted some of his technical shortcomings, which suggests he is at least open to retraining on these matters. A clear direction from the Tribunal as to the type of training and education needed in this context would then have assisted both Mr Young and the PAC, in terms of his fitness to practice at the end of the period of suspension.

712 He also observed that Mr Young's readmission "will remain difficult while his training and educational needs are not met".[780]

713 On balance, however, Whata J was not satisfied that that the penalty or costs were excessive or wrong and dismissed the appeals.

714 *Song v Jiang* was an application to the High Court by Ms Song for an extension of temporary freezing orders granted by the Family Court over Mr Jiang's property, in the context of a relationship property dispute.[781] The couple, both from PRC, had purchased a property that was that was intended to be used as the marital home. The property was in Mr Jiang's name as Ms Song was not a permanent resident in New Zealand. Both parties alleged that they had contributed $1.2 million toward the purchase of the property (the balance of the purchase price was financed by mortgage).[782] There did not appear to be any documentary evidence demonstrating which party contributed to the amount. However, Ms Song provided screenshots of WeChat messages from Mr Jiang which Palmer J stated "appear to acknowledge her contribution" of the amount.[783]

715 Palmer J held that Ms Song had an arguable case, and that the freezing orders should be allowed to continue with respect to some of Mr Jiang's assets.[784]

716 *Hemu Trade Company Limited v Le* concerned the beneficial ownership of a property in Avondale.[785] The first plaintiff purchased the property, with the second plaintiff and the defendant the registered proprietors, as tenants in common.[786] The first plaintiff argued that the funds were not advanced as a gift or a loan, and that it was therefore the beneficial owner of the property by way of a resulting trust.[787] The defendant, Mr Le, denied this, and said that it was his and his brother's (the

777 At [84].
778 At [94].
779 At [99].
780 At [101].
781 *Song v Jiang* [2018] NZHC 2321.
782 At [2].
783 At [3].
784 At [16].
785 *Hemu Trade Company Limited v Le* [2018] NZHC 982.
786 At [2].
787 At [2].

third plaintiff) intention to jointly purchase and own the property, and that he contributed half of the purchase price of the property.[788] The third plaintiff was unable to give evidence at the hearing, as he was hospitalised in PRC.[789]

717 Fitzgerald J said:[790]

> For his reason, much of the evidence adduced by the plaintiff's comprised witnesses' understandings or beliefs as to what had happened in and around 1996 based on what they say the third plaintiff had told them. Putting aside strict issues as to admissibility, I do not find this evidence compelling or reliable in any event, given the witnesses' lack of personal involvement in the events in question. I have therefore formed my views based on evidence of events in which witnesses did have personal involvement, together with the (unfortunately limited) contemporaneous documentary evidence.

718 The Court of Appeal recently dismissed an appeal by the defendant, Mr Le, but allowed a cross-appeal in part, and held that Mr Le held his 50 per cent share of the property on trust for the first respondent (the first defendant in the High Court case).[791]

719 In an interim judgment in *Bei v Wang*, Associate Judge Smith considered an application by the defendants for discovery of documents that were alleged to be in the control of the plaintiff that were not been disclosed in his list of documents.[792] Of relevance is the application for WeChat messages between the various parties in the dispute, as it demonstrates consideration by the parties and the Court of less traditional evidence.[793] The plaintiff argued that the WeChat messages were not accessible as all the parties who had exchanged messages had changed cell phones in the intervening period.[794] Associate Judge Smith held that this was not sufficient to discharge the plaintiff of his discovery obligations, and that Mr Bei would have to file and serve a further affidavit within 15 days, detailing the date the new phone was purchased, whether the contents were transferred to the new phone and whether the old phone was available for inspection.[795] Mr Bei was also required to identify the steps he had taken to ascertain that the old messages were not recoverable.[796]

720 *Li v 110 Formosa (NZ) Limited* concerned the ownership of a golf course in Auckland. The Judge had to consider who was the beneficial owner of $4.8 million paid by the plaintiff, Mr Li, towards the acquisition of the land on which the Formosa Golf Course is located.[797] Mr Li argued that he was the beneficial owner, as he had borrowed the money from his mother to support an investment in an alleged joint venture to purchase the property. The second defendant Mr Wang, disputed Mr Li's allegation, and said that the $4.8 million belonged or originated from Mr Wang's family, and was paid towards the purchase of the property using Mr Li as a "conduit" and that beneficial ownership was vested in himself.[798] Fitzgerald J noted:[799]

> Despite Mr Li's claims turning largely on the single issue outlined above, the proceedings were anything but straightforward. In addition to the many causes of action and forms of relief advanced, a large amount of documentary and oral evidence was adduced at trial, much of which was not relevant to the core issues requiring determination. Some of the evidence, including on quite key issues, was also in an unsatisfactory form, not meeting the requirements of the Evidence Act 2006 or the relevant High Court Rules. The pleadings were also subject to several last-minute additions and amendments, including during the trial itself. These matters have added to the difficulty in untangling the competing claims to the $4.8 million.

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788 At [3].
789 At [5].
790 At [6].
791 *Le v Hemu Trade Co Limited* [2019] NZCA 476.
792 *Bei v Wang* [2019] NZHC 223.
793 At [49].
794 At [66].
795 At [79].
796 At [79].
797 *Li v 110 Formosa (NZ) Limited* [2018] NZHC 3418 at [1].
798 At [4].
799 At [8].

721 After considering Mr Li's eight causes of action against multiple defendants, Fitzgerald J held that Mr Li's third cause of action (resulting trust) was made out, and that Mr Wang "holds that proportion of his shareholding in 110 Formosa which represents an original contribution of $4.8 million, on resulting trust for Mr Li," and that Mr Li's breach of contract claim was made out, ordering Mr Wang to pay damages of $4.8 million.[800] Fitzgerald J held that Mr Li was to confirm his election between the two remedies within 20 working days.[801] Mr Li's remaining causes of action were dismissed.

722 In *Tian v Zhang & Ors*, the plaintiff, Ms Tian, alleged that the first defendant, Mr Zhang, her ex-fiancé had gifted her sums of money by way of deposits towards properties in Auckland, as a dowry in anticipation for their upcoming marriage.[802] There was little documentary evidence to support either party's arguments, with Toogood J noting "Ms Tian, Ms Gu and Mr Zhang did not set out the terms of their property and financial arrangements in any helpful record."[803]

723 Four properties were purchased. Ms Tian and Mr Zhang both contributed toward the deposits for the properties. Before the purchases settled, Mr Zhang revealed to Ms Tian that he was in financial difficulty. Ms Tian therefore arranged finance to complete the purchase of the four properties. Two properties were purchased in Ms Tian's name and two were purchased in her mother, Ms Gu's name. Ms Tian argued that she subsequently paid for loan repayments, maintenance, rates and other such payments, for all four properties.[804] Mr Zhang denied Ms Tian's allegations, and argued that the purchase of the properties was to plan for the couple's future as a family, and that the couple agreed that they would contribute equally to the deposits. Mr Zhang also submits that he contributed payments toward the mortgage repayments where required to "top up" the money received from renting the properties.[805]

724 Ms Tian argued that Mr Zhang had no beneficial interest in the properties and that caveats filed under section 142 of the Land Transfer Act 2017 by Mr Zhang be removed. In the alternative, Ms Tian argued that if the sums of money were not found to be gifts, then the Court should declare that she and Mr Zhang were co-owners of the properties in shares proportionate to their contributions to the purchase price.

725 The plaintiff's argument that Mr Zhang gifted the money rested on the contention that in PRC, the use of dowries was common. However, they were not able to produce any evidence to support this. Mr Zhang argued that there was no dowry culture in PRC, and that the couple did not discuss a dowry at the time of their engagement.[806] Toogood J noted:[807]

> Although Mr Tian and Ms Gu maintained throughout that Mr Zhang undertook to provide a dowry in return for Ms Tian's agreement to the marriage, with her mother's approval, they provided no independent evidence that there was any customary practice in Chinese culture for the payment of a dowry by an intended husband to his intended wife or her family. Ms Gu gave evidence that her family had paid a dowry on behalf of her son in respect of his marriage, but Mr Zhang denies the existence of custom that would make it more likely than not that his contributions to the purchase price of the properties was in the form of a gift by way of a dowry. Moreover, no evidence was led to explain whether, if a dowry payment was made according to custom, the payment would be refundable if the couple did not marry. The dispute about the existence of such a custom as is alleged might have been easily resolved by evidence from an independent expert, but there was none. Ms Tian suggested in evidence that evidence of the custom would be found on the internet, but the Court is not disposed to "Google" its way past the inadequacies of the plaintiff's proof to find the answer.

800 At [267].
801 At [268].
802 *Tian v Zhang* [2019] NZHC 2231 at [14].
803 At [1].
804 At [8]–[10].
805 At [49].
806 At [45].
807 At [56].

726 Toogood J held "in the absence of evidence that Mr Zhang had a clearly expressed intention to gift the deposit payments to Ms Tian or, in respect of the properties owned by Ms Gu and the Trust, to those parties, the law requires that the funds be regarded as having been held by the beneficiaries of the payments by way of a resulting trust."[808]

727 In *Wang v Ma*, Ms Wang appealed against the decision of the District Court to decline her application for leave to commence proceedings under the Property (Relationships) Act 1976 outside the 12-month limitation period to bring such proceedings.[809] Ms Wang argued five grounds of appeal, including that the Judge was biased against Ms Wang because of her previous specialist practice as counsel for the child.[810] The District Court Judge held on the evidence before her she was not satisfied that the separation of property may have been unjust.[811] Relationship property in dispute included a furniture business in PRC and other properties in PRC, but there was "no corroborative or supporting evidence for either of the parties' statements", and "[i]n the end the Judge was left only with three documents evidencing the parties' separation and divorce and the separation of their property with all the couple's assets in China belonging to Ms Wang and all the couple's assets in New Zealand belonging to Mr Ma."[812] The appeal was dismissed by Woolford J.[813]

Credibility issues

728 *In Ming Shan Holdings Ltd v Ma & Ors* (cited above), Lang J noted that desperation had led the Chinese respondent to adduce false documents:[814]

> Tai Yuan Ma has the most to gain, and also the most to lose, from the outcome of this proceeding. That might explain why, as I shall describe later, he has allowed documents to be introduced into evidence that he must have known were not authentic. That action is not fatal to his case, but it is obviously a very serious matter, and it means I must be extremely cautious before giving weight to his uncorroborated evidence…

729 *Zhang & Anor v Yu* concerned a claim in deceit followed by a protest to jurisdiction and an application to recall the original judgment. The claim was brought by two Chinese immigrants from PRC against a Chinese agent from PRC, who they alleged had convinced them to invest in a New Zealand company called Honest Deal. The claim was not defended by the Chinese agent who, it later became apparent, had been detained by the Chinese authorities. In his original decision, van Bohemen J held that New Zealand was the appropriate forum because key representations on which the plaintiffs had relied, and which the Judge held to have been deceitful, had been made in New Zealand. However on application for recall, van Bohemen J found the factual situation as it had been decided in the first trial was incorrect. New evidence filed by the defendant which was not disputed in substance by the plaintiffs, showed that none of the alleged misrepresentations had actually occurred in New Zealand. The plaintiffs had also failed to disclose certain details to the Court, including their knowledge of the defendant's whereabouts. van Bohemen J granted the request to recall the judgment, holding that New Zealand was not the appropriate forum.[815]

730 In *Guo v Bourke & Anor*, concerning a dispute over a driveway easement, Duffy J said:[816]

> The overall impression I formed of Ms Guo was that she was an obdurate witness who took untenable positions when it came to her account of the relevant events… Ms Guo struck me as someone who, when faced with assertions of events which were not favourable to either her view of those events or her case, simply denied their existence. In this regard she did not help herself.

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808 At [62].
809 *Wang v Ma* [2019] NZHC 1821 at [1].
810 At [8].
811 At [27].
812 At [28]–[29].
813 At [43].
814 *Ming Shan Holdings Ltd v Ma* HC Auckland CIV-2000-404-1597, 31 July 2008 at [40].
815 *Zhang v Yu* [2019] NZHC 29.
816 *Guo v Bourke* [2016] NZHC 2240 at [34].

731 Similarly, in *Wong v Chang*, concerning an appeal against a temporary protection order, Hinton J formed the opinion that the appellant was dishonest. In this case, the Chinese appellant had contested a protection order on the ground that he had been unfairly treated as he had not received the respondent's affidavit. Justice Hinton found that the appellant "quite plainly knew" of the respondent's affidavit and "has found it helpful to continue to claim ignorance of it".[817] Furthermore, Hinton J noted:[818]

> …Mr Wong is obviously able when it suits him to understand or function well enough in the English language. He has lived in New Zealand since 1987, when he was 18. He is now about 49… My impression was that he understood English. It would seem that, as with claiming he had not received Ms Chang's affidavit and that he does not understand the system so that he does not comply with directions, Mr Wong uses or attempts to use his claimed lack of facility with English to try to defeat the system.

732 A set of cases that also demonstrate credibility issues are the *Ping An* cases. Ping An Finance (Group) New Zealand Company Limited (Ping An) provided money remittance and foreign currency services.[819] Ping An was a 'reporting entity' under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (the Act).[820] The sole director of Ping An, Mr Xiao, was a New Zealand citizen born in Beijing, PRC. He had been the sole shareholder of Ping An since May 2015. Prior to that he had been a co-shareholder with various people.[821] The Department of Internal Affairs (the DIA) brought an application to impose pecuniary penalties for civil liability acts which was founded on alleged failures of Ping An to comply with the Act.[822] It also sought injunctions restraining Ping An and Mr Xiao from carrying out financial activities.[823] Ping An and Mr Xiao did not appear at the hearing.

733 Toogood J noted that Ping An failed to keep appropriate records for 1,588 transactions (which totalled $105,413,026.44), the establishment and continuation of 122 business relationships, and the identity and verification of 362 customers. It was found that 173 transactions contained indications of suspicious transactions.[824]

734 Throughout the course of the judgment, Toogood J noted that Ping An disregarded its obligations under the Act and that it and Mr Xiao had misled the investigators.[825] He found that the purported justifications put forth by Ping An were implausible and were not supported by evidence.[826]

735 Toogood J stated that Mr Xiao "misled the Department in the course of its investigation and demonstrated a complete disregard for the Act's requirements, if not a wilful intention to flout them."[827]

736 His Honour found that it was not difficult to infer "…that the company's non-compliance amounted to a calculated and contemptuous disregard for the AML/CFT requirements, and that non-compliance was a cultural norm within the business."[828]

737 He noted that a serious aggravating factor of the offending was the fact that Ping An had prepared documents about AML/CFT and their risk assessment. This led Toogood J to infer that its "…non-compliance amounted to a calculated and contemptuous disregard for the AML/CFT requirements."[829]

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817 *Wong v Chang* [2018] NZHC 3093 at [19].
818 At [24].
819 *Department of Internal Affairs v Ping An Finance (Group) New Zealand Co Ltd* [2017] NZHC 2363 at [4].
820 At [1]–[2].
821 At [4].
822 At [3].
823 At [3].
824 At [6].
825 At [39]–[40].
826 At [40].
827 At [6].
828 At [6].
829 At [106].

738 In assessing the personal aggravating or mitigating factors, Toogood J noted that Ping An had not taken responsibility for its breaches or co-operated in rectifying those breaches. He considered the absence of such responsibility or cooperation to be an absence of mitigating factors, as opposed to aggravating factors.[830] However, his Honour went on to say that Ping An and Mr Xiao did not only fail to co-operate, but they provided the DIA with misleading information:[831]

> During the Department's investigation of the activities of Ping An and Mr Xiao, Mr Xiao advised the Department on at least six occasions that Ping An would cease financial activities and said that it done so had by 1 April 2015, seemingly in an effort to prevent further investigation into Ping An's business. The Department's enquiries indicate that Ping An, and probably Mr Xiao personally, continued to carry out money remittance activities after the end of March 2015.

739 Toogood J found the DIA had made out its five cases of action.[832] Ping An was ordered to pay pecuniary penalties totalling $5.29 million.[833]

740 Toogood J also granted injunctions against Ping An and Mr Xiao, in order to prevent them from working in the financial sector. He found that both parties were likely to contravene and/or fail to meet their obligations under the Act.[834]

741 In a separate case, Mr Xiao applied to the High Court to have the hearing set aside by an order under the High Court Rules 2016 on the basis that there had been a miscarriage of justice.[835]

742 Toogood J noted that the DIA had initially sought leave to bring the proceeding by way of an originating application but this was declined. It then filed a statement of claim. Neither Mr Xiao nor Ping An took any step in the reconstituted proceeding. A formal proof hearing was set for the matter. The DIA's counsel provided further submissions and Toogood J issued the judgment.[836]

743 Mr Xiao's argument was that he had attended court hearings with regards to the failed originating application. He contended that he received the notice of proceeding supporting the statement of claim, but said he had not received any further correspondence.[837] He said that, during the court hearings regarding the originating application, he had made it clear that he had little ability to meet legal costs and had difficulties with English. He claimed that as a result of this, he was not accorded a fair opportunity to give a prepared response. He also contended that the DIA did not contact him even though his contact details were available.[838]

744 Toogood J found that Mr Xiao had a sufficient grasp of English to understand what would happen if he did not file a defence:[839]

> My impression of Mr Xiao is that he is an intelligent and capable man and that, although he made proper use of an interpreter's services at the hearing before me, he has sufficient grasp of English to have understood the true position. I do not believe that he misunderstood the consequences of not filing a defence. At the time of the originating application, Mr Xiao said that the company was no longer in business and I think it is probable that he took the view that there would be no seriously adverse consequences if he simply ignored the Department's claims.

745 His Honour found that it was clear Mr Xiao was contactable on a certain email address as he had used this address in email exchanges with the DIA's counsel regarding the originating application.[840] The email address was also on his application to set aside the judgment and the

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830 At [122].
831 At [123].
832 At [80].
833 At [138].
834 At [144]–[135].
835 At [1].
836 At [6].
837 At [9].
838 At [10].
839 *Zhou v Lou* [2016] NZHC 1865 at [22].
840 At [14].

related affidavits.[841] Toogood J was wholly satisfied that Mr Xiao received the email notifying him that the DIA had applied to the Court to obtain judgment.[842] Toogood J also found that Mr Xiao had deleted the email and printed false received messages with the intention of deceiving the Court.[843]

746 His Honour also found that Mr Xiao tried to mislead the Court in saying that he was only interviewed by one person from the DIA during the investigation.[844]

747 Toogood J said there was not an obligation to even notify Mr Xiao or Ping An of the request of a formal proof hearing, and he would have deemed it irrelevant even if he had accepted that Mr Xiao had not received the email.[845] The application was dismissed.[846]

748 Mr Xiao appealed this decision to the Court of Appeal.[847] He appeared in person in support of his appeal. He had filed written submissions which he supplemented orally with the assistance of an interpreter. One Mr Hunter appeared as counsel assisting the Court.

749 For the Court, Courtney J noted that since Mr Hunter dealt in detail with the central legal issues, their Honours' references to submissions made by or on behalf of Mr Xiao included those made by Mr Hunter. In this regard the Court of Appeal case is of interest in pointing out the benefit to the CALD party of having counsel assisting the court taking the lead on arguing the central legal issues before the Court.

750 Mr Xiao did not challenge the finding of liability.[848] His appeal rested primarily on the assertion that he should have been notified of the date of the formal proof hearing and served with the documents relied on to support the claim so that he and Ping An were apprised of the basis on which pecuniary penalties were being sought, and given an opportunity to be heard.

751 Mr Xiao's case on appeal was that pecuniary penalties are properly viewed as akin to a criminal sanction as their potential effects are punitive in substance. Mr Xiao and counsel assisting the court argued that therefore, natural justice requires greater protection than that afforded by civil procedure rights. Specifically, defendants should be notified of the formal proof hearing date and served with the material that is relied to set the penalty in order to give them the opportunity to be heard on penalty.[849]

752 Mr Xiao argued that alternatively, both Ping An and himself should have had such a notification, in the particular circumstances of the case. The finding of misconduct by Mr Xiao that resulted in uplift in the penalty was based on conduct that had not been signalled in the DIA's pleadings, but was instead based on evidence that had not been provided to Mr Xiao or on counsel's submissions. He asserted that since he did not have the opportunity to be heard, the judgment should be regarded as being irregularly obtained and be set aside as of right.[850]

753 Although Mr Xiao had advanced his application to set aside the default judgment on the basis that he should have been advised of the formal proof hearing date, the Court observed that the more sophisticated arguments now being advanced, by counsel assisting the court, were not put to the Judge.

754 The Court accepted that pecuniary penalties may be punitive in substance, but that this does not mean that there should be different procedural rules to other types of civil proceedings.[851]

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841 At [16].
842 At [20].
843 At [21].
844 At [21].
845 At [22].
846 At [26].
847 *Xiao v Department of Internal Affairs* [2019] NZCA 326.
848 At [3].
849 At [31].
850 At [32].
851 At [41].

755 Their Honours noted that a defendant who does not take steps to defend a proceeding would have been served with a statement of claim, showing the causes of action, the facts being relied upon and the relief being sought.[852] They also would have been served with a notice of proceeding which would have stated the consequences of not filing a statement of defence. From this, defendants are aware that a judgment can be obtained by default without receiving further notice. The Court referenced rule 15.9(4) of the High Court Rules in stating that at the formal proof hearing, a judge must be satisfied by affidavit evidence of each cause of action relied on and there must be sufficient information to calculate and fix damages.[853] The position can be rectified by an application to set aside or vary under rule 15.10 if there is prejudice which means that a miscarriage of justice occurs or is likely to occur.[854] The Court noted that these rules provide a procedure which fairly caters for both parties interests.[855]

756 The Court found that the judgment was not irregularly obtained because a plaintiff is not required to plead that a certain penalty should be imposed, and there was no basis for finding that certain affidavits should have been served before the formal proof hearing.[856]

757 The Court said that ultimately the appeal must turn on whether Mr Xiao could show that there had been a miscarriage of justice as a result of the judgment being entered. In order to do so, he would have to demonstrate that if he had been given the opportunity to be heard at the formal proof hearing, the outcome would have likely been different. However, as counsel assisting acknowledged, Mr Xiao made no attempt to explain what evidence or submissions he could have provided that could have resulted in a different outcome.[857]

758 The Court said that nothing had been advanced on which it could conclude that, even if Mr Xiao had been present at the formal proof hearing, the outcome would have been any different. As a result, the Court concluded that Mr Xiao could not show either a miscarriage of justice or the risk thereof. Therefore, the appeal was dismissed.[858]

759 *Jiang v Huang* concerned the parties' respective interests in a property purchased in 2006.[859] The property was purchased with the intention that it would be owned equally, but it was registered in the defendant's name only.[860] At least initially, the intention was that the defendant held a half share in the property on trust for the plaintiff.[861] The plaintiff was claiming an interest in the property, relative to the (at the time of the case) unequal contributions of the parties. The defendant said she had purchased the property in 2010, and also submitted a number of counterclaims related to various loans and advances made to the plaintiff.

760 Fitzgerald J said:[862]

> Unfortunately, I do not find either the plaintiff or the defendant to be particularly reliable or credible witnesses. At times, their evidence was confused, internally inconsistent and in parts, simply not credible. Findings in relation to credibility were hampered by the fact that the evidence was being given through a translator. Nevertheless, I formed the clear impression at the time each of the plaintiff and defendant gave evidence that some aspects of their oral evidence was formulated in order to respond to particular questions being put to them in cross-examination. Because of this, I have placed more reliance on the contemporaneous documentary evidence. Unfortunately, this was limited, and also in parts confusing and inconsistent. Nevertheless, evidence that I consider reliable and credible, together with the documentary

852 At [42].
853 At [43].
854 At [43].
855 At [44].
856 At [49]–[50].
857 At [52].
858 At [57].
859 *Jiang v Huang* [2017] NZHC 2340.
860 At [1].
861 At [1].
862 At [23] and [24].

> evidence has enabled me to reach clear conclusions in relation to the plaintiff's claim and the defendant's counterclaims.

761 Fitzgerald J ultimately held that the defendant held the plaintiff's share of the property on trust for him.[863]

762 In *Commissioner of Police v Yim*, the Commissioner sought civil forfeiture orders against Mr Yim and Ms Yu in respect of an extensive list of assets on the basis that the assets were acquired or derived from significant criminal activity.[864] The "significant criminal activity" relied on was the couple's alleged involvement in the importation and sale of methamphetamine, money laundering and tax offences.[865] The couple were both naturalised New Zealand citizens after moving to New Zealand in Mr Yim's case from Hong Kong and in Ms Wu's case from Taiwan, in the 1990s.[866] Ms Wu argued that she had not engaged in drug offending, and that she was not aware that the money her husband brought in resulted from drug offending.[867] Of interest are the Court's comments as to Ms Wu's credibility as a witness. At [21] and [23], the Court states:

> More generally, Ms Wu was not a credible witness. Ms Wu has lived in New Zealand since she was fifteen years old. She spent three years at secondary school in New Zealand and holds a Bachelor of Arts degree from the Auckland University of Technology. Her affidavits were presented directly in English language; her oral evidence in Chinese language, through translators. It is plain at least her second affidavit was a work of advocacy prepared by another, the most graphic example being the affidavit's use of automotive technology terms derived from English-language publicity material provided by Ms Wu to her lawyers, not able orally to be explained by Ms Wu. The best Ms Wu could say of the affidavit was she understood "most of it". That falls a long way short of the requirement in s 83(3) of the Evidence Act 2006 the affidavit be Ms Wu's "personal statement", and risked its exclusion…
>
> … No records were kept. No evidence is tendered from her family, friends or clients. Ms Wu sought to provide indeterminately authored or executed letters in corroboration of some of her endeavours, and other documents falling well short of establishing the point for which they were proffered (such as an undated sale and purchase agreement for materially less than the sum of money it was tendered to evidence as source). Her blindness to Mr Yim's large deposits into their joint back accounts, and to items connected to his offending in plain sight in their home, literally is incredible. Although Mr Bonnar cautions me against taking a "New Zealand Eurocentric" view of her contended lack of knowledge of Mr Yim's financial arrangements, I prefer to consider Ms Wu's conduct with regard to her compliance with New Zealand law, in which 'wilful blindness' can establish liability.

763 The Court allowed the Commissioner's application, stating that both Mr Yim and Ms Wu had benefited from criminal activity and that both of them had interests in property.[868]

Issues with rule of law culture

764 Another notable theme from the interviews with Chinese lawyers was the different legal culture in PRC, set out in the introductory section *Chinese people in New Zealand and its courts*. The rule of law culture in PRC is examined by the New Zealand Court of Appeal in *Kim v Minister of Justice of New Zealand & Anor*, discussed in detail in *Appendix 3*.

765 *In Department of Internal Affairs v Qian Duoduo Ltd*, referenced above, the defence adduced expert evidence from a Chinese Professor of Psychology at Massey University, Professor James Hou-Fu Liu, that the differences in legal culture between PRC and New Zealand meant that the Chinese defendant from PRC had misapprehended her legal position upon being investigated by the

863 At [110].
864 *Commissioner of Police v Yim* [2019] NZHC 1681.
865 At [9].
866 At [4].
867 At [17].
868 At [51].

Department of Internal Affairs, and therefore failed to properly comply with her legal obligations:[869]

> The law in China is not an impartial code, but rather is used by authorities as an instrument to cultivate compliance with policy. On this point, it is relevant that Ms Hua left China quite some time ago when this would have been even more the case than it remains today. Ms Hua's conduct would have ensured equitable treatment by authorities in China, and she expresses indignation that it is instead being used in a punitive manner here.

"Face saving" behaviours

766 *Zhou v Lou* concerned an application for interim relief, pending resolution of an application for interim relief. The application arose as part of a business dispute between the parties. The plaintiff and the defendant were both Chinese with family connections in PRC. The plaintiff was represented by a Chinese solicitor and a New Zealand European barrister, while the defendant was represented by a New Zealand European solicitor. The plaintiff and the defendant were joint owners of a wholesale fruit and vegetable business in Auckland. Both parties had fallen out and the defendant had initiated proceedings to liquidate the business. Both parties accused each other of mismanaging and harming the business, and intimidating the other.

767 However, in a display of "face–saving" behaviour, neither party was willing to agree with the other as to how the situation would be resolved. Despite both parties offering to buy or sell the business to the other, neither could agree on the price. And at trial, despite Palmer J warning that "neither may like the result of court imposed orders", both parties were unwilling to agree on the terms of the interim orders.[870]

768 Ultimately, the Court held that the dysfunctional relationship of the parties was impinging directly on the operation of the business and made orders against both parties and an alternate director appointed by the defendant, under sections 164 and 170 of the Companies Act 1993. In doing so, Palmer J commented that he had "also considered whether to make more extreme orders".[871]

769 In *Song v Police*, the appellant pleaded not guilty to a charge of assaulting his partner. He was interviewed by the police in the early hours of the morning after the night of the alleged offence, and this was recorded.[872]

770 The appellant had made a pre-trial application on the basis that he did not understand his right to consult and instruct a lawyer, and had not been adequately informed of that.[873] It was said that the circumstances of the breach were that he had limited ability to understand English and was intoxicated at the time of the interview. He also contended that he was self-conscious in the presence of authority figures given his upbringing in PRC and because of this was likely to give whatever answer he thought was required.[874] The District Court Judge found that he was not fearful of the Police, was comfortable communicating in English and that on the balance of probabilities, the appellant understood the advice. Therefore, it was held that the interview was admissible as evidence.[875] On appeal, the appellant challenged some of the Judge's factual findings.[876]

771 The appellant submitted that the Judge ought to have taken judicial notice of the aspects of the communist regime in PRC, "and what is said to be its requirement for unquestioning compliance with officials such as the Police". However, Paul Davison J did not accept the appellant's submission and stated that:[877]

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869 *Department of Internal Affairs v Qian Duoduo Ltd* [2018] NZHC 1887.
870 At [22].
871 At [29].
872 *Song v Police* [2016] NZHC 1301 at [1].
873 At [10].
874 At [10].
875 At [11]–[13].
876 At [22].
877 At [27].

> First, in these circumstances, I do not see that issue is of any relevance here. Secondly, there was no evidence before the Court that Mr Song was conducting himself by reference to any such considerations.

772 His Honour also said that he did not agree with the submission that the Judge mistakenly took judicial notice of the appellant's ability to pronounce English words as equating to an understanding of the words being pronounced. He said that the Judge had assessed the appellant's conduct and circumstances and found on the balance of probabilities that he understood his rights.[878]

773 When addressing whether there were special circumstances that should have required care on the part of the Constable when dealing with the appellant, the appellant said there were special circumstances in that he was drunk, fearful of authority, and had little understanding of English. The District Court Judge rejected those claims and made factual findings to the contrary.[879] On appeal, His Honour agreed with the District Court that the Constable was entitled to accept the appellant's answers that he understood his rights at face value.[880]

774 Interestingly, His Honour contended that the appellant's admission that he was pretending to be able to speak English meant that he had misled the Police and therefore could not complain that more could have been done.[881]

775 His Honour rejected the point that the appellant could not have understood his rights as he responded to the question "do you just want to explain to me what they mean to you?" with "Yes I understand." He said on the whole "…it is clear that Mr Song [the appellant] was willingly and actively engaged in what was obviously a meaningful conversation."[882]

776 The application for leave to appeal was dismissed.

777 *R v Yang* concerned a young defendant from PRC convicted of importing methamphetamine and possession of methamphetamine for supply. The defendant had been caught at Auckland Airport carrying a pot containing 485 grams of methamphetamine hidden under a layer of hair cream. The defendant had carried fake identification which recorded him as a 15 year old South African citizen.[883]

778 Before trial, the Police sought to have photos showing the defendant's tattoos admitted as evidence. The Police sought to admit expert evidence from "an experienced interpreter who over a long time has dealt with a large number of Chinese Nationals of varying ages between 10 and 60" that it was very unusual to see tattoos on a 15 year old Chinese youth. The defence argued that the photos were prejudicial as the jury would have an adverse reaction to people with tattoos. Asher J held that the photos were not prejudicial and admitted them as evidence.[884]

779 At sentencing, Asher J noted that the personal circumstances of the defendant were a mystery, due to the false identification. Asher J noted:[885]

> Your counsel says you do not wish to provide details about your background for fear of embarrassing your Chinese family. This assertion does not sit well with the fact that you have already been in custody for 18 months. If you were from a close family you would have had to have communicated the fact of your incarceration to them or presented at least some explanation for your absence. You can only be contacted in a New Zealand prison.

780 As such, Asher J considered that the defendant could not claim to be of good character, however he considered that the defendant's youth, expressions of remorse, and the fact that he would be

878 At [28].
879 At [37].
880 At [38].
881 At [39].
882 At [40].
883 *R v Yang* HC Auckland CRI-2005-204-519, 29 May 2007.
884 *R v Yang* HC Auckland CRI-2005-204-519, 12 March 2007.
885 *R v Yang* HC Auckland CRI-2005-204-519, 29 May 2007 at [16].

imprisoned in New Zealand away from his family and those he knew well, entitled him to a one third discount. Asher J therefore sentenced him to eight years and nine months imprisonment.[886]

Relevance of culture in mitigation of offence

781 Although it is not a defence in New Zealand that illegal conduct is acceptable in a person's culture, cultural considerations have sometimes been taken into account as mitigating factors in sentencing. An offender may also request the court to hear a report on their cultural background under section 27 of the Sentencing Act. Civil parties can also call expert evidence on culture.[887]

782 In *R v Xu & Ors*, three Chinese defendants from PRC were sentenced for participation in a large scale mortgage fraud scheme. One of the defendants, the wife of the "mastermind" behind the scheme, Ms Xu, provided a cultural report to the Court from a senior law lecturer at the University of Waikato, Dr Leo Liao. The report stated that:[888]

> …in traditional Chinese culture the husband is the master of the household, with extensive responsibilities, but also extensive power over other family members who are expected to be obedient to the head of the household. The wife's role is subservient to that of her husband. Divorce carries a significant stigma for women in particular. Family is the most fundamental unit of society. Dr Liao suggests that it would likely have been extremely difficult for you to act contrary to your cultural norms by refusing to follow your husband's orders or instructions, even if you knew or suspected that his activities were illegal.

783 The Court held that Ms Xu's culpability was significantly lower than that of her co-defendants, and reduced her starting point from six years, to two years and nine months, ultimately granting her a sentence of home detention for 12 months. In doing so, Katz J noted that the Court had "given significant weight, however, to the fact that [Ms Xu was] subservient to [her husband], and largely acting on his direction".[889]

784 Section 27 reports do not apply in civil cases, but expert witnesses on Chinese culture can be called to explain the defendant's behaviour. For example, *Department of Internal Affairs v Qian Duoduo Ltd*, which oncerned a determination of the appropriate penalty to be applied for breaches of the Anti-Money Laundering and Countering Financing of Terrorism Act 2009. The defendant argued that language and cultural difficulties meant that she had to rely on Starfish Consulting to meet her anti-money laundering obligations and this reduced the company's culpability when Starfish got it wrong. The defendant's counsel adduced expert evidence from a Chinese Professor as to the defendant's limited English speaking capacity; and how the defendant's Chinese cultural beliefs and expectations meant she did not understand but only gave an appearance of understanding, and did not view regulator intervention as serious. Although the Court ultimately held that these considerations were not relevant in the circumstances of the civil liability acts, given that the Court already assessed the defendant's culpability at the lowest level, the Court did acknowledge that the respondent's "limited command of English" made it "unlikely [the defendant] could have complied with the AML-CFT Act regime without assistance", and that assistance having been wrong was a factor that substantially reduced the defendant's culpability.[890]

785 In *Xu v Liu*, a dispute between two couples from PRC regarding money loaned from the plaintiffs to the defendants, both parties utilised expert legal witnesses. When considering whether the application should be dismissed or stayed on *forum non conveniens* grounds, as the loans were made in PRC, Katz J considered the evidence of expert witnesses and stated:[891]

> In light of the (at times conflicting) expert evidence, the most that can be said for certain is that the

886 At [20]–[23].
887 *R v Alexander* [2018] NZHC 1584 at [7].
888 *R v Xu* [2018] NZHC 1971 at [44].
889 At [52]. See also Mindy Chen-Wishart "Legal Transplant and Undue Influence: Lost in Translation or a Working Misunderstanding?" (2013) 62 International and Comparative Law Quarterly 1 at 7–9; 14–15 and 20.
890 *Department of Internal Affairs v Qian Duoduo Ltd* [2018] NZHC 1887.
891 *Xu v Liu* [2017] NZNC 1689 at [40].

> Hangzhou Court *might* be an available forum… the defendants have therefore failed to discharge the onus on them of establishing that the Hangzhou court is an available forum.

786 In *Zhou v R*, the Chinese appellant had been charged with the murder of his wife. The appellant admitted to having done so and sought to rely on a partial defence of provocation.[892] He sought a ruling that there was a credible narrative that was sufficient to put provocation to the jury; he would not be giving the evidence himself and instead two expert psychiatric witnesses would do so.[893] One expert, Dr Pillai, had provided an opinion that it was likely that the appellant was in a state of morbid or pathological jealously at the time. Following a *voir dire* where Dr Pillai gave evidence, the Judge found that provocation could not go to the jury on the evidence that was then before the Court. The Judge indicated she would re-assess that if the appellant gave evidence.[894] The appellant did not give evidence and was convicted of murder. He appealed his conviction on the basis that provocation should have gone to the jury.[895] The appellant appeared in the Court of Appeal before Robertson, Arnold and Ellen France JJ.

787 The Court noted that Dr Pillai contended that the appellant had an increased risk to morbid jealously because of his background:[896]

> Dr Pillai said that the morbid jealousy had arisen over a period of two to three weeks before the murder, but that the appellant faced an increased risk of this condition because of his background - which, based on what he had said, was that he was a loner and distrustful and had been unable to adapt to New Zealand society, to remain in employment or even to acquire basic competence in English.

788 The Court found that the Judge was right in excluding the evidence of Dr Pillai on the basis that the necessary supporting factual information was not before the Court.[897]

789 In *Jeon v R*, the South Korean appellant had been charged with a number of assault charges. The complainant was his former partner.[898] The appellant had been previously granted electronically monitored bail (EM bail) to a Wellington address.[899] The complainant was living in Auckland. The appellant's application to vary his electronic monitored bail address to one in Auckland was refused by Judge Field.[900]

790 On appeal, counsel for the appellant argued that Judge Field was "plainly wrong" in finding that the risk of the appellant re-offending and interfering with witnesses could not be met by EM conditions. Counsel said that there was nothing to suggest the appellant has ever tried to interfere with evidence or witnesses, and that he did not know where the complainant was living. The complainant had contacted the appellant via text and said she wished to withdraw the protection order, and the appellant did not reply but informed the EM Bail team and Police that the complainant had been in contact. Counsel said that the appellant had not offended previously on bail.[901]

791 Wylie J had regard to the fact that the Korean community in Auckland was small and said:[902]

> The complainant does not have a support network in New Zealand. The alleged offending has left her isolated not only from her family and career, but also from the Korean community in Auckland. As a result, she is particularly vulnerable and at risk of interference that Mr Jeon poses.
>
> I acknowledge that Mr Jeon [the appellant] does not currently know where the complainant is residing.

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892 *Zhou v R* [2007] NZCA 104 at [1].
893 At [2].
894 At [5] and [3].
895 At [4].
896 At [32].
897 At [39].
898 *Jeon v R* [2018] NZHC 3348 at [1].
899 At [1].
900 At [1].
901 At [16].
902 At [24].

> Nevertheless, she is rightly concerned because the Korean community in Auckland is relatively small. She believes that it would not be difficult for Mr Jeon to discover her whereabouts.

792 His Honour dismissed the appeal, stating that the appellant being in Wellington allowed for physical separation between him and the complainant which provided a measure of protection against the risk that he would reoffend.[903]

793 In *Xie v R*, Ms Xie was found guilty by a jury on a charge of wounding her husband with intent to cause grievous bodily harm.[904] Ms Xie appealed the sentence of four years imprisonment to the Court of Appeal.[905] Ms Xie grew up in PRC, and met her husband in Shanghai in 2010. He was living in New Zealand at the time, but travelled to PRC multiple times a year. Ms Xie arrived in New Zealand in 2013, and married her husband later that year.

794 Judge Garland sentenced Ms Xie to four years imprisonment, and applied discounts for Ms Xie's lack of previous offending, and for the fact that "Ms Xie is likely to find the sentence of imprisonment more difficult to serve as a foreign national whose family resides in China."[906] On appeal, Mr Hall QC argued that the starting point of five years imprisonment "failed to give sufficient weight to the provocative conduct of Mr Xie's husband."[907] Ms Xie had argued at the trial that she had been provoked by her husband viewing photographs on his mobile phone sent from another woman earlier that day.[908] The Court of Appeal ruled that the High Court had given sufficient weight to this provocation.[909]

795 Another relevant ground of appeal was that Mr Hall sought leave to admit an affidavit from Ms Xie's husband in which the husband says that he has forgiven Ms Xie for the offending and that she feels remorse for the offending. The Court said:[910]

> We decline to admit this affidavit which is essentially asking us to re-sentence Ms Xie on a different basis to that in the District Court. It is also noteworthy that Ms Xie has not chosen to place any evidence of remorse on the record herself. In our view, the Judge was correct not to apply a discount on account of remorse.

796 In *Xu v R*, Ms Xu appealed her conviction by a jury in the High Court on four charges related to "benefit fraud" to the Court of Appeal.[911] The Crown's case was that Ms Xu had failed to disclose her relationship with Mr Xia and had therefore fraudulently received the benefit, and Ms Xu appealed on the grounds of alleged counsel error and on alleged error in the Judge's summing up.[912] However, of interest to our research was Ms Xu's argument in the High Court related to "saving face."

797 The Crown had a large amount of circumstantial evidence demonstrating that Ms Xu and Mr Xia were in a relationship akin to marriage, including the operation of a joint bank account, the conception of two children and a separation agreement in 2016.[913] Ms Xu argued that the relationship was intimate initially, but that they broke up in 2013. Further, Ms Xu argued:

> That all subsequent representations that she was in a relationship with Mr Xia, representations that they were engaged or that he was her husband, and the image she projected on Facebook were all attempts by her to "save face" and present herself as in a happy and stable relationship for consumption by family, friends and others. She emphasised shame within her culture from being a single woman with two children.

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903 At [30].
904 *Xie v R* [2019] NZCA 218 at [1].
905 At [1].
906 At [17].
907 At [18].
908 At [18].
909 At [21].
910 At [26].
911 *Xu v R* [2019] NZCA 356.
912 At [3].
913 At [8].

798 The appeal was dismissed.[914]

Issues with self-represented litigants

799 The differences between the Chinese and New Zealand legal systems could lead to misapprehensions by a Chinese litigant about their legal position, which is often compounded by a lack of language skills, raising serious issues for Chinese parties representing themselves. *Kevdu Properties Ltd v Ko* concerned an interlocutory application by a plaintiff for an injunction requiring the Chinese defendant, Mr Ko, to sign documents replacing cross lease titles with freehold titles. In granting the application, Williams J made obiter comments by way of postscript that Mr Ko had "significant limitations" on his ability to speak English, and had refused to instruct a lawyer, resulting in significant difficulties for the Court in explaining the legal position to him, which Mr Ko had significant misapprehensions about.[915]

800 *Qu v Police* concerned a Chinese bus driver, Mr Qu, who had attempted to make a left hand turn which caused him to cross into a cycle lane, bringing him into the path of a cyclist, and causing the cyclist injury. In the District Court, Mr Qu was convicted of careless driving and sentenced to 6 months' disqualification and ordered to pay reparation of $5,590.[916]

801 Mr Qu appealed to the High Court, representing himself. Asher J noted that:[917]

> Mr Qu's written submissions were in English, and showed competence and an understanding of the issues. The use of English was of a high standard. A Court interpreter has been made available who is fluent in Mandarin. He has translated Mr Qu's oral submissions, and translated for him through the appeal. Mr Qu does have some reasonable ability in the English language, but understandably did not feel sufficiently fluent to conduct the appeal himself.

802 Mr Qu submitted that the District Court Judge had misinterpreted the facts and wrongly concluded that his driving had been careless. He submitted that the accident was the fault of Mr Jones, the victim.

803 This case is an example of the difficulties that arise where the self-represented Chinese appellant believed that the District Court Judge (and the High Court Judge on appeal) would take an inquisitorial approach to determine what had happened rather than prefer one version of events based on the evidence of the most "impressive witness".[918] The High Court found that there was no basis in its appellate jurisdiction to say the District Court Judge was wrong in preferring some evidence over other evidence. The Court held that there was no doubt that it was open to the District Court Judge to have made the conclusion that he did.

804 The District Court Judge had considered the evidence of a number of eye witnesses. He favoured the evidence of one particular witness, Ms Parry, who viewed the accident from behind Mr Qu's bus, and clearly placed Mr Qu at fault. He concluded that he was satisfied beyond reasonable doubt that the prosecution had proved all elements of the charge. Mr Qu, supported by other witnesses, gave evidence of a different situation, asserting that the bike was in a blind spot behind traffic as it approached and he could not see the bike coming towards him even though he looked.

805 However, the Court held that none of the arguments advanced by Mr Qu showed that the trial Judge had made an error, and in fact, the trial Judge had made a "considerable act of leniency" in imposing a sentence of only six months disqualification on Mr Qu.[919]

806 In *Jia v Auckland Council*, the appellants were a Chinese man and his Chinese ex wife who appealed against conviction and sentence for offences against the Resource Management Act

914 At [60].
915 *Kevdu Properties Ltd v Ko* HC Auckland CIV-2007-404-1006, 29 March 2007.
916 *Qu v Police* HC Auckland CRI-2006-404-000222, 10 November 2006.
917 At [5].
918 At [7].
919 At [27].

1991. The appellants were self-represented at the appeal. Moore J noted that it was apparent that the appellants had several misapprehensions about their legal position and the correct court procedure. The Court noted that many of the points in their notice of appeal did not make sense, and the evidence filed was hard to follow and was not filed in the correct form. Furthermore, the appellants were under the impression that the one day hearing set down for the trial was allocated to their submissions only, and the respondent would be heard on the following day. Moore J in his judgment stated:[920]

> Mr Jia addressed me from 10:00am until shortly before 1:00pm at which point I interrupted him to inquire how much longer he expected his submissions would take. He indicated that he would require a further three hours. I pointed out that the hearing had been set down for one day and that Mr Watts, for the respondent, was also entitled to be heard. Through the (Mandarin) interpreter, Mr Jia advised that he had understood that the one day allocated was for his submissions only, and that the respondent would be heard the following day. I pointed out to Mr Jia that due to my commitments I was not available the following day. I advised Mr Jia the Court would resume at 2:15pm and that he would need to spend the luncheon adjournment reformulating his argument so that the balance of his submissions could be dealt with in the one hour and 15 minutes available before 3:30.

807 The Court held that none of the appellants' extensive submissions were tenable, and dismissed the appeal on all grounds.

808 Ms Zhang and Mr Jia appealed this decision to the Court of Appeal.[921] The Court summarised the appellant's grounds of appeal as follows:[922]

> The applicants were each separately represented before us. Both are now in receipt of legal aid. It is their contention that the hearings below miscarried because in the District Court and again in the High Court they were self-represented and no one had drawn to their attention the availability of legal aid. They invoke this Court's judgment in *Fahey v R*, in which it was held that a trial Court must explain to a defendant the rights to legal representation and to legal aid, and must satisfy itself that the defendant understands those rights, and must provide an opportunity to exercise those rights. They emphasise that neither of them is familiar with New Zealand legal process. Neither is fluent in English. However, the hearings below proceeded with the aid of a Mandarin interpreter. They submit that the District Court and the High Court should have considered whether amicus curiae or standby counsel were required. The case is said to raise important issues about the extent of a court's duty to a self-represented defendant.

809 The Court declined leave to appeal.[923] It held that the appellants had, in fact, been represented at some of their hearings, and that Ms Zhang had advised the District Court Judge that they had chosen to represent themselves.[924] It also held that the appellants were provided with documents at various stages (such as in the summons documents) containing advice about legal aid, duty lawyers and legal aid.[925] The Court said, "these documents were in English, but we are not prepared to infer that the applicants were either unable to read them or failed to appreciate that they contained information that required interpreting."[926]

810 In a separate set of proceedings related to the admissibility of evidence obtained under a search warrant, Ms Zhang and Mr Jia appealed the decision of the District Court Judge to the High Court and then the Court of Appeal.[927] The appeal to the Court of Appeal had nine grounds, and the Court of Appeal held that none of these met the test for a second appeal of pre-trial admissibility found in section 223 of the Criminal Procedure Act 2011.[928]

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920 *Jia v Auckland Council* [2018] NZHC 1133 at [37].
921 *Zhang v Auckland Council* [2019] NZCA 114.
922 At [8] (citations omitted).
923 At [13].
924 At [9].
925 At [10].
926 At [10].
927 *Zhang v Auckland Council* [2016] NZCA 332.
928 At [12].

811 Kós P noted that two grounds of appeal related to the actions of the Council investigator Mr Fryer were "opaque."[929] Kós P stated, "the suggestion that Mr Fryer has made false accusations and acted unlawfully is not elaborated upon in written submissions. Nor was it raised in the Courts below."[930]

812 The Appellant's final ground of appeal was that the High Court erred "by holding a framed case as a [biased] foundation to judge the situation."[931] Kós P held:[932]

> This may be an attempt to argue the High Court should not have approached the case by reference to the District Court judgment. The applicants may well mean "biased" rather than "based". Assuming that is what is intended, this does not meet the test for granting leave.

813 *Kim v Police* concerned a self-represented Korean defendant who was accused of pushing an elderly Korean woman, causing her to fall over. He was convicted of one charge of male assaults female at the District Court. The defendant appealed to the High Court on the basis that the trial Judge erred in his assessment of the evidence, did not provide him enough time to cross-examine witnesses and did not understand the cultural background.[933]

814 Moore J found that the trial Judge had not erred in his assessment of the evidence, nor had he failed to give Mr Kim enough time to cross examine witnesses. Regarding the trial Judge's understanding of culture, at trial the defendant had produced evidence that before the assault, the victim had made offensive comments about the defendant's education and parents which were "deeply insulting in Korean culture". The defendant had replied to the victim by saying she had caused the death of her husband which was also said to be "particularly insulting" in Korean culture.[934] Moore J considered that the "unusual cultural aspects" of the case had been dealt with adequately by the trial Judge,[935] and that ultimately the nature of the offensive remarks was not particularly relevant to the offending itself.[936] The appeal was dismissed.

815 However, another unusual aspect of this case was the defendant's behaviour during the trial. The defendant emitted loud sighs during the prosecution witnesses' evidence and giggled audibly when the interpreter translated to him something he disagreed with, requiring intervention from the trial Judge.[937] On many occasions the defendant broke the rules of evidence during cross examination, and Moore J noted that the trial Judge had "extended to [the defendant] a remarkable degree of tolerance and latitude" in order to ensure the defendant was able to fully explore the issues and present his defence as fast as he could.[938] The defendant had refused to apply for a discharge without conviction, despite being told at trial and at appeal that it was open to him.

816 In *Worldwide Holidays Ltd v Wang*, the Plaintiff claimed that Ms Wang, the first defendant had misappropriated money from Worldwide, her employer, in breach of her fiduciary and contractual duties.[939] Prior to the trial commencing, counsel for Ms Wang advised the court that she did not intend to appear at the trial or file evidence, and that she would abide by the decision of the Court. Subsequently, Ms Wang's counsel advised that he had received instructions to cease acting.[940] Counsel for the fourth defendant, Ms Jun (Ms Wang's mother and guarantor), also advised the court prior to the trial commencing that she would not be appearing at the trial or filing evidence.[941] Leave was granted by van Boheman J, excusing both counsels' attendance at the trial.[942]

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929 At [18].
930 At [18].
931 At [19].
932 At [19].
933 *Kim v Police* [2015] NZHC 2543 at [45].
934 At [13].
935 At [87].
936 At [71].
937 At [23]–[30].
938 At [23].
939 *Worldwide Holidays Ltd v Wang* [2019] NZHC 2218 at [6].
940 At [2].
941 At [5].
942 At [2] and [5].

817 Ms Wang had received large amounts of money from customers while working at Worldwide, by directing customers to make payments into her personal bank account. In 2017, after the misappropriation came to light, Ms Wang met with the director of Worldwide, Mr Yu, in Beijing. In the High Court Mr Yu gave evidence that at this meeting Ms Wang admitted the theft, including signing an Acknowledgement of Debt, and that Ms Jun said that the family would try their best to pay all of the money back, as Ms Wang had spent it all at the SkyCity Casino.[943] Ms Wang later admitted that she had signed an acknowledgement of debt, but said that it was signed "under duress".[944] Gault J noted:[945]

> This was not technically pleaded as an affirmative defence, but I would have allowed an amendment given it was raised in her defence and was pleaded as an affirmative defence by Ms Jun. However, as duress is an affirmative defence, the defendant bears the onus. Ms Wang did not appear at the trial to advance any evidence in support of her pleaded allegation. Nor did Ms Jun. Therefore, the affirmative defence of duress was not made out.

818 The second defendant, Ms Lin, who had been in receipt of large sums of money from Ms Wang, through various transfers related to spending at SkyCity Casino (usually these payments were short term loans), was also self-represented. Gault J notes:[946]

> [Ms Lin] understood she was entitled to an interpreter but due to her financial hardship she could not arrange one. I made it clear that if she did not understand, we could pause and she could ask a question and that she could change her mind about an interpreter during the course of the hearing. In the event, Ms Lin was able to make submissions, cross-examine and give her own evidence sufficiently articulately in English.

819 Gault J held that the plaintiff was entitled to judgment against Ms Wang for $1,310,729 (on the first and second causes of action) and $1,435,708.95 plus interest (on the third cause of action). Gault J also held that Worldwide was entitled to judgment against the second and fourth defendants, Ms Lin and Ms Jun.[947] The awards were subject to a maximum total recovery of $1,435,708.95, which was the total amount claimed by Worldwide.

Sentencing decisions

Cases related to pseudoephedrine

820 There were a number of cases involving Asian defendants being sentenced for drug-related offences. The majority of these were related to pseudoephedrine, in the form of ContacNT tablets. Since 2011, in New Zealand, pseudoephedrine has been a class B drug that can only be accessed through a prescription.[948] However, in PRC, it can be accessed over the counter. This appears to have contributed to the large numbers of cases involving pseudoephedrine as set out below.

821 The following are a selection of sentencing notes for defendants sentenced on drug related charges related to pseudoephedrine. The cases cover different legislative schemes and the reference to the type of drug and charge is therefore different throughout.

822 In *R v Wang*, two Chinese defendants from PRC, Mr Wang and Ms Gao, had pleaded guilty in the District Court to a charge of conspiring to supply pseudoephedrine.[949] The Internal Mail Centre intercepted two packages addressed to Mr Wang (on different dates) from PRC containing ContacNT capsules.[950] The next month another package addressed to Ms Gao was intercepted by Customs, also containing ContacNT capsules.[951] Both of the defendants admitted that the packages were

943 At [14].
944 At [60].
945 At [60].
946 At [67].
947 At [109].
948 Pseudoephedrine is a class B drug under Schedule 2 of the Misuse of Drugs Act 1975.
949 *R v Wang* HC Auckland CRI-2004-092-008789, 22 February 2005 at [1].
950 At [3].
951 At [4].

sent to them by their families in PRC and the defendants were to pass these to a third person who had recruited them. They also admitted that they knew the drugs would be used in the production of methamphetamine.[952] They appeared for sentencing in the High Court before Harrison J.

823 The defendants were a couple in their early 20s. They were born and raised in PRC and had attended secondary schools in Auckland before attending Massey University in Palmerston North.[953]

824 Harrison J stated that he did not accept that the defendants were unaware that they were committing a crime against the laws of New Zealand.[954] His Honour addressed the fact that due to the local supplies of precursors having dried up, local gangs had been importing pseudoephedrine based products from countries in which they are legally and easily available, like PRC, and that over the past year or so it had become the "principal source of overseas supply of precursors into New Zealand".[955]

825 In attempting to understand why the defendants engaged in these crimes, his Honour said that "I accept that you succumbed to the temptation of easy money when you are away from the traditional support structures which would be available in China".[956]

826 His Honour found that there were two mitigating factors, being the guilty pleas and the provision of assistance to the Police. However, with regards to the difficulties of being in a New Zealand prison, he said this is a risk which offenders take:[957]

> I appreciate that serving a term of imprisonment in a New Zealand jail, in an alien environment, away from family and friends, will pose special difficulties for you. However, that is the risk always run by those who breach the privileges offered to them as visitors in a foreign country.

827 The final sentence was a two and a half year term of imprisonment.[958]

828 In some cases, defendants have argued that they lacked an awareness that pseudoephedrine was illegal in New Zealand or that the capsules were intended to be used in the manufacture of methamphetamine. In others, judges have acknowledged that the defendants lack an understanding of the seriousness of the offending.

829 In *R v Lu*, one of the two defendants, Mr Lu, had been charged for importing the class C drug pseudoephedrine, for which he had accepted responsibility.[959] A container from Hong Kong containing a consignment of a sofa and chairs had arrived in Auckland, and Customs officers had found pseudoephedrine capsules in the sofa.[960] The consignment was delivered to an unoccupied Balmoral Road address. Mr Lu and the other defendant signed for this and then loaded it into a truck which they drove off in, changing vehicles soon after.[961] They were both apprehended. Mr Lu's co-defendant was found to have the pseudoephedrine in his possession.[962]

830 When sentencing Mr Lu, Keane J noted that he was a 26 year old from PRC and had been in New Zealand since 2000 on a student visa.[963] He stated that as a result of the offending, Mr Lu was now subject to a removal order and would leave New Zealand at the conclusion of his sentence.[964] Keane J noted that he was sceptical about Mr Lu's position that he did not know that the capsules were to make methamphetamine but rather believed that profit would be made from selling cheap flu medicine in New Zealand.[965]

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952 At [6].
953 At [18].
954 At [7].
955 At [9].
956 At [19].
957 At [22].
958 At [23].
959 *R v Lu* HC Auckland CRI-2005-004-018884, 9 February 2007 at [1] and [3].
960 At [4].
961 At [6]–[8].
962 At [8].
963 At [13].
964 At [13].
965 At [15].

831 Counsel for Mr Lu accepted that the aggravating features of the offence, being that it was premeditated and of a significant scale, could not be denied. She did emphasise four factors, one being that the removal order in itself would be a significant penalty.[966] In sentencing Mr Lu to three and a half years imprisonment, Keane J said that as well as the credit for Mr Lu's plea, he had also taken some account of the factors put forth by Mr Lu's counsel, including that Mr Lu will have to leave New Zealand immediately after his sentence is served.[967]

832 *R v Xie* [968] concerned the sentencing of Mr Xie, who had been part of a scheme to smuggle large quantities of ContacNT into New Zealand.[969]

833 Priestley J noted that Mr Xie was born in PRC and had lived in New Zealand for four and a half years, and was a permanent resident. He took the view that the brevity of the pre-sentence report was probably due to the difficulties of having an in-depth interview with a prisoner through an interpreter. Priestley J said that it was difficult to assess Mr Xie's ability to change given his cultural background, his inability to speak English, his lack of integration into New Zealand society and his greedy behaviour.[970] The Judge also noted that Mr Xie would almost certainly be deported to PRC at the end of his sentence and would probably lose his New Zealand residency.[971]

834 Priestley J stated that he had:[972]

> ...no hesitation in treating you, Mr Xie, as an instigator and mastermind of a carefully planned and deceptive scheme to import large and successive quantities of pseudoephedrine based pharmaceuticals into New Zealand in the manner which has been described.

835 Priestley J gave Mr Xie the maximum starting point of eight years, with a discount of 20 per cent for his early guilty pleas, making the sentence six years and four months.[973]

836 In *R v Yu*, Mr Yu, pleaded guilty to one charge of importing a class C controlled drug, pseudoephedrine.[974] Mr Yu had come to New Zealand in 2002 as a student and in August 2006 had obtained a work permit. At the time of sentencing he was 23 years' old.[975]

837 Courtney J noted that although Mr Yu carried out the offending with a profit motive, he was motivated by a desire to help his ill mother who required money for medical treatment. However, she did state that personal circumstances such as this carry little weight for the Court in cases of drug offences.[976] Courtney J said:[977]

> I accept that you probably did not realise the seriousness with which this country views this type of offending, although the level of publicity these days about this kind of offending makes it difficult to see how anyone could not realise the way the Courts view this type of offending now.

838 Courtney J gave a starting point of four and a half years and reduced this to two years, nine months. In doing so, Courtney J took into account a number of factors: Mr Yu's immediate acknowledgement of guilt, his deep regret and that he possibly did not realise how serious the consequences would be. The unlikelihood he would re-offend and his wish to go back to PRC in order to be with his family, given his mother's illness, was also taken into account.[978]

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966 At [19].
967 At [2].
968 *R v Xie* HC Auckland CRI-2005-404-000243, 16 September 2005.
969 At [4].
970 At [8].
971 At [9].
972 At [16].
973 At [26]–[27].
974 *R v Yu* HC Auckland CRI-2007-004-15768, 27 August 2007 at [1].
975 At [3].
976 At [7].
977 At [7].
978 At [9].

839 *R v Zhai* concerned a 26 year old Chinese defendant from PRC who had been in New Zealand on a student visa for four years prior to his arrest.[979] He pleaded guilty to having imported the class C controlled drug, pseudoephedrine, into New Zealand and also to breaching his bail.[980] The defendant had travelled from Shanghai to New Zealand. Tea boxes and cylinders containing ContacNT granules were found in his luggage.[981] He had also breached his bail, which required him to remain in New Zealand, by purchasing tickets which would have enabled him to fly to Shanghai.[982]

840 Cooper J stated:[983]

> …you were a genuine student in New Zealand and although you have offended now against our laws, that was not your primary purpose in coming to this country.

841 The Department of Corrections report identified that the defendant showed remorse but that he claimed he did not realise what he was doing was illegal. He lacked insight into the offending and had a moderate risk of re-offending and a low-level of motivation to address the offending.[984] However Cooper J noted:[985]

> Some of these considerations are not very significant for today's purpose having regard to the fact that you have now been served with a removal order with the consequence that when you leave prison you will be deported back to PRC.

842 In sentencing the defendant, Cooper J said that it would not be appropriate to give him home detention, one of the reasons being that he had been served with a removal order.[986]

843 In *R v Xiao*, the Chinese defendant in this case had pleaded guilty to one charge of importing the class C controlled drug, pseudoephedrine. He also had one charge of possession of the class C controlled drug pseudoephedrine for supply.[987] Customs had found Contact NT capsules containing pseudoephedrine in a package that was imported into New Zealand from PRC.[988] A controlled delivery was carried out and the defendant signed and accepted the package. A search warrant was then executed.[989]

844 In appearing in the High Court for sentencing, Stevens J noted that the defendant was 25 years old and had grown up in PRC. He had initially been in New Zealand on a student visa. However, in 2003 this had expired and he became an illegal over-stayer.[990] With regards to the offending, the defendant said that a friend from PRC had contacted him and asked him to retrieve some parcels and to give these to contacts in New Zealand.[991]

845 His Honour did not mention the fact that the defendant was a foreign national when setting the final sentence, which was two years and nine months imprisonment for the charge of importing the class C controlled drug pseudoephedrine, and another two years' imprisonment for the charge of possessing the same. These were to be served concurrently.[992]

846 In concluding his sentencing, Stevens J noted that:[993]

> …I understand as soon as your sentence of imprisonment is served to the satisfaction of the Department

979 *R v Zhai* HC Auckland CRI-2007-404-021682, 22 July 2008 at [5].
980 At [1].
981 At [2].
982 At [4].
983 At [5].
984 At [8].
985 At [8].
986 At [12].
987 *R v Xiao* HC Auckland CRI-2009-004-013501, 21 July 2009 at [1].
988 At [3]–[4].
989 At [5].
990 At [7].
991 At [8].
992 At [24].
993 At [25].

> of Corrections you will be deported from New Zealand. When you return to your native China I hope that you will tell those who contacted you about importing drugs into New Zealand, that New Zealand is not a country which welcomes any form of controlled drugs.

847 In *R v Tan*, the Chinese defendant pleaded guilty in the District Court to charges of kidnapping, aggravated robbery, possession of pseudoephedrine for purpose of supply and possession of methamphetamine.[994] When the defendant appeared in the High Court for sentencing, Rodney Hansen J noted that the defendant was 23 years old and had come to New Zealand as a student five years previously.[995]

848 The kidnapping and aggravated robbery charges arose when the defendant, his co-offender and a group of associates kidnapped a couple and demanded cash from them.[996] The drug offences arose when the defendant, who was on bail at the time, was stopped at a Police checkpoint and was found to have methamphetamine in his car.[997] Following this, the Police found pseudoephedrine capsules at the defendant's home address.[998]

849 Rodney Hansen J reduced the starting point of the sentence of kidnapping and aggravated robbery, to a final sentence of three and a half years. One of the factors his Honour took into account was the fact that "…a prison sentence in New Zealand away from your family will be harder for you [the defendant]." His Honour also took this into account when considering the final sentence for the drug offences, as he stated that he made as much allowance appropriate for a number of factors, including "….the fact that you [the defendant] are going to suffer the additional hardship of having to serve this sentence of imprisonment away from your home country."[999]

850 In formally imposing the defendant's sentence, Rodney Hansen J stated:[1000]

> As you acknowledge, away from the discipline of your home country, you have fallen prey to financial pressures, bad company and the lure of easy money. I am, however, impressed by the insight you have into your offending and I accept your expressions of remorse are genuine. They will give you the foundation to rebuild your life following your release from prison and your return to China.

851 In *R v Huang*, Courtney J stated that "I also suspect that you may have been under some pressure to assist the main instigator. I recognise that you were probably in a vulnerable position, living in New Zealand with limited family support."[1001]

852 Courtney J expressed that the importation of pseudoephedrine has been a problem for Customs and New Zealand Police. She stated that:[1002]

> Nearly all of the pseudoephedrine coming into New Zealand appears to come from China and the Courts regularly see young Chinese people like yourself drawn into this trade. Sadly, I suspect many find themselves in this position because of inadequate supervision and support here.

853 In decreasing the starting point of a sentence of six years imprisonment to five and a half years of imprisonment, for the lead charge of possession of methamphetamine for supply, Courtney J took account of certain factors, including that the defendant would "find prison more difficult than most" due to her language and lack of family support in New Zealand.[1003]

854 *Chen v R* concerned a defendant convicted in the District Court of possessing pseudoephedrine capsules smuggled into New Zealand by the defendant's parents. The defendant appealed against

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994 *R v Tan* HC Auckland CRI-2006-004-6665, 1 May 2007 at [1].
995 At [7].
996 At [3].
997 At [4].
998 At [5].
999 At [21].
1000 At [22].
1001 *R v Huang* HC Auckland CRI-2005-0078418, 20 November 2007 at [5].
1002 At [6].
1003 At [11].

sentence to the Court of Appeal, arguing that insufficient credit was given by the trial Judge for the appellant's late guilty plea, as "because of cultural and language aspects the [defendant] could not fully comprehend the strength of the Crown case until it ended".[1004]

855 Gendall J set out the defendant's argument as follows:[1005]

> Counsel submitted that he felt cultural pressure to maintain face with his parents, or correspondingly to aid his parents, which delayed the acknowledgement of guilt. Counsel said it was not until the appellant understood the full impact of [the evidence] that he appreciated the strength of the Crown case.

856 However, Gendall and Harrison JJ did not "find those submissions persuasive".[1006] As the appellant had pleaded guilty only at the conclusion of the Crown case, the Court of Appeal held that "allowance for such a plea could be minimal at best", and dismissed the appeal.[1007]

857 *R v Jiang* concerned a defendant from PRC who plead guilty to possessing and supplying pseudoephedrine. In sentencing, Courtney J took into account the sophisticated nature of the drug importing operation that the defendant was involved in, and the defendant's level of involvement, as aggravating factors in setting a starting point of four years' imprisonment.[1008] However, Courtney J also took the defendant's personal factors into account, including his guilty pleas, lack of previous convictions and the Judge's acceptance that the defendant was remorseful and had sought to show it in a tangible way.[1009]

858 In considering the defence counsel's submission for home detention, Courtney J said:[1010]

> You are 32 years old. Well qualified, with a Bachelors Degree in Information Technology. You have lived in New Zealand for many years. You speak good English. You should not have found yourself in the position and I am told that you found yourself in this position through gambling, becoming addicted to gambling, incurring gambling debts and I suspect a good deal of that, judging from the presentence report, was a feeling of social isolation and the casino was a good place to hang out with other Chinese speaking people and you felt more at home. Well, that is a great pity because you could do a lot better in this country.
>
> I am going to grant you home detention. In your case it is quite a privilege and I hope that in the future you will make up for the bad choices that have brought you to this place today.

859 Accordingly, Courtney J sentenced the defendant to 12 months home detention.

860 In *R v Zhao*, the defendant was in New Zealand as a student.[1011] He had pleaded guilty to one charge of the importation of class C controlled drug, pseudoephedrine, as a representative charge.[1012] In the High Court, Heath J assessed Mr Zhao's culpability with regards to the two importations that occurred after pseudoephedrine was classified as a class C drug.[1013]

861 Heath J noted that, "[t]he ability to make a significant profit arises from the low cost of obtaining pseudoephedrine in PRC compared to the much higher price for sale in New Zealand."[1014]

862 Heath J stated that "ordinarily, the fact that you will be deported from New Zealand after serving a sentence would mean that leave to apply for home detention would not be granted."[1015] However, in this case, he granted leave to apply for home detention as he found that there might be a

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1004 *Chen v R* CA476/05, 28 June 2006 at [5].
1005 At [9].
1006 At [9].
1007 At [10].
1008 *R v Jiang* [2016] NZHC 1091 at [5]–[8].
1009 At [10].
1010 At [11].
1011 *R v Zhao* HC Auckland CRI 2006-404-2922, 27 June 2006 at [1] and [8].
1012 At [1].
1013 At [1] and [3].
1014 At [10].
1015 At [17].

countervailing circumstance requiring consideration, being the difficulties the defendant was having in prison due the co-accused's associates.[1016]

863 In *R v Teh* the Singaporean defendant appeared for sentencing following a guilty plea to one charge of importing a class A drug and to one charge of possessing a class A drug for supply.[1017] She had been apprehended by Customs officers in Auckland after arrival on a flight from Hong Kong.[1018]

864 In sentencing her, Harrison J took into account that imprisonment in New Zealand would be "particularly harsh" on her as she had no family or friends in the country, and no support network. She was sentenced to eight years of imprisonment for each charge.[1019] Harrison J did not set a minimum term of non-parole.[1020] At the end of his sentencing, Harrison J stated:[1021]

> …you have committed a terrible crime against the people of New Zealand. You must pay the price. I acknowledge the hardship you will suffer in separation from your parents and in serving imprisonment in a very different culture.

865 *R v Yin* concerned a defendant from PRC. The defendant had picked up a quantity of pseudoephedrine from another Chinese national, who had been identified as a smuggler and followed by Customs agents. This resulted in Police officers visiting the defendant's address and finding the pills.

866 In the High Court, the defendant gave evidence in his own defence and argued that he believed the pills were Chinese medicine which would be sold to the Chinese community at profit. The jury rejected this argument, and the defendant was convicted of possession of pseudoephedrine for the purpose of supply, and sentenced to two and a half years imprisonment.[1022] The defendant appealed against sentence to the Court of Appeal on the grounds that the Judge erred in concluding that a sentence of home detention was not an available option.[1023]

867 The Court of Appeal held that the High Court Judge erred in saying that home detention was not available as a matter of jurisdiction.[1024] But it was open to the Judge to assess whether a sentence of home detention was appropriate.[1025] The Court of Appeal held that home detention was not an appropriate penalty given the underlying seriousness of the criminal conduct and that it was open to the High Court Judge to impose a sentence of two and a half years.[1026] Panckhurst J noted that the High Court Judge had taken into account "the consideration that a prison sentence for a young man from a different culture was a more significant penalty than for a citizen of this country",[1027] and that evidence had been provided at trial that the defendant was "naïve, not streetwise and probably susceptible to the influence of others."[1028]

868 In *R v Lee*, the Chinese defendant pleaded guilty to importing pseudoephedrine.[1029] In appearing in the High Court for sentencing, Asher J noted that the defendant was 50 years old, born in PRC and brought up in Hong Kong. He had a pregnant wife who was living in PRC. He was approached in PRC by a man who offered him a job to courier ContacNT to New Zealand.[1030] He took a flight from Hong Kong to Auckland, where he was found to have ContacNT on him.[1031]

1016 At [17].
1017 *R v Teh* HC Auckland CRI-2008-004-010768, 12 December 2008 at [1].
1018 At [5].
1019 At [11]–[12].
1020 At [14].
1021 At [15].
1022 *R v Yin* [2008] NZCA 257 at [9].
1023 At [13].
1024 At [16].
1025 At [17].
1026 At [27].
1027 At [12].
1028 At [18].
1029 *R v Lee* HC Auckland CRI-2009-092-12866, 30 March 2010 at [1].
1030 At [2].
1031 At [3].

869 Asher J noted that he had had a similar case just that morning:[1032]

> I have received submissions on a number of relevant cases, many of which feature similarities to this sentencing. As I noted this morning in relation to a similar sentence of a man recruited in Hong Kong and sent to New Zealand, there appears to be something of a pattern developing of men in China and Hong Kong being recruited to take drugs into New Zealand. They are generally in a financial situation where any reward will be most welcome, and they agree to act at the bidding of the drug dealers who are higher up the chain who have approached them. There is the distressing possibility that a period in a New Zealand prison is one of the risks accepted, to obtain the limited rewards that may be available.

870 His Honour stated that:[1033]

> I do not consider the fact that you face deportation at the conclusion of your sentence as a mitigating factor, given your lack of any connection with New Zealand. Nor given the relatively limited time you will spend in prison, do I consider the fact that you are serving the sentence of imprisonment away from your home to be a mitigating factor.

871 Asher J sentenced the defendant to two years and nine months imprisonment.[1034]

Sentencing of Chinese defendants on methamphetamine charges

872 In *R v Chan*, the 33 year old defendant from Hong Kong pleaded guilty to a charge of importing methamphetamine.[1035] The defendant and his co-offender were searched by Customs after arriving at Auckland International Airport on a flight from Hong Kong. They were each found to have five packages of methamphetamine on them.[1036] The defendant appeared for sentencing in the High Court in front of Priestley J.

873 Priestley J referred to the importance of denunciation and deterrence in drug importation cases, particularly with regard to cases such as the current one:[1037]

> In any drug importation case denunciation and deterrence are dominant for sentencing purposes. This is particularly the case with importations such as your own. You have no connection with New Zealand. You saw importing methamphetamine into New Zealand for financial gain as a solution to the financial problems you have incurred in Hong Kong. You deliberately took the risk for personal financial reward.

874 His Honour set a starting point of 12 years imprisonment. The defendant's main mitigating factor was his early guilty plea. However, Priestley J also stated that:[1038]

> I intend, however, to extend a small degree of leniency to you to reflect the fact that you have responsibilities as a parent towards a young child; that you are friendless in New Zealand; and that imprisonment in an alien culture, surrounded by a strange language, will make imprisonment a more severe a penalty for you than for many. I will also give you some small credit for the co-operation you gave to the police two weeks ago.

875 The final sentence was a term of eight years imprisonment with no minimum term.[1039]

876 This case, when placed alongside others, allows for the inference to be drawn that, in some situations, Judges will decrease the length of a defendant's sentence because of the fact that the defendant may experience difficulty in a New Zealand prison due to a lack of support, and the linguistic and cultural differences.

1032 At [8]. The case his Honour referred to as having heard earlier that morning was *R v Wan Yung Lee* HC Auckland CRI-2009-004-17942, 30 March 2010.
1033 *R v Lee* HC Auckland CRI-2009-092-12866, 30 March 2010 at [17].
1034 At [17].
1035 *R v Chan* HC Auckland CRI-2008-092-11192, 5 May 2009 at [1].
1036 At [3].
1037 At [14].
1038 At [20].
1039 At [22]–[23].

877 Mr Chan appealed the sentence to the Court of Appeal.[1040] The Court of Appeal upheld the sentence imposed by Priestly J, however, it did confirm that Mr Chan's personal circumstances as a foreign national were relevant mitigating factors in sentencing.[1041]

878 *R v Lot* concerned Vietnamese and Cambodian defendants convicted of supplying, dealing and possessing methamphetamine. The first defendant, Nhi Nguyen (Vietnamese) pleaded guilty, and his co–defendant Cam Cau Lot (Cambodian), pleaded not guilty but was found guilty at trial.[1042]

879 In sentencing the first defendant, Hansen J noted that he had been a refugee from Vietnam who had fled to Malaysia, spending 11 years in a refugee camp before being accepted for residence in New Zealand. His Honour noted that the first defendant had felt "the sense of alienation and isolation" which resulted in him working in a plastics recycling factory which was a cover for the methamphetamine operation.[1043] His Honour also considered that fact that "language difficulties coupled with several changes of counsel earlier in the year undoubtedly delayed the entry of a guilty plea" and allowed a 20 per cent discount, despite the fact the defendant entered a late guilty plea.[1044] Accordingly, the first defendant was sentenced to seven years and six months imprisonment.[1045]

880 In sentencing the second defendant, Hansen J noted that he "cannot write in English but … can read a little bit".[1046] However, he considered that none of the second defendant's personal and cultural factors were substantial enough to warrant a discount, saying:[1047]

> Unlike Mr Nguyen, you have family support in New Zealand. It cannot be said that you have not had a fair opportunity to advance yourself by legal means. In those circumstances, Mr Lot, there is no basis on which I could apply any discount to your sentence.

881 Accordingly, the second defendant was sentenced to 12 years imprisonment with a minimum period of five years on the charge of dealing, and three months imprisonment to be served concurrently, on the charge of possession.[1048]

882 In *R v Lin*, the Chinese defendant had pleaded guilty to one charge of possession of the Class A drug, methamphetamine, for the purposes of supply.[1049] Upon searching the defendant's home, the Police found scales, methamphetamine, mobile phones, SIM cards and cash.[1050] A considerable amount of ContacNT was found but the Police were content with just the methamphetamine charge.[1051] More cash was found in a security box and at the defendant's girlfriend's house. The defendant had also purchased a BMW for $70,460.[1052]

883 His Honour noted that the defendant was 21 years old, spoke good English and did not require an interpreter. He came to New Zealand when he was 16 years old on a student visa and initially attended college before he was expelled. Upon the expiry of his visas he stayed in New Zealand.[1053]

884 Asher J set the starting point at four years imprisonment. In considering the effect of the defendant being an over-stayer would have on him in prison, the Judge stated:[1054]

> I accept that you appear to have no relatives in New Zealand, and are unlikely to have visitors when you

1040 *R v Chan* [2009] NZCA 528.
1041 At [8].
1042 *R v Lot* HC Auckland CRI-2008-004-18323, 17 September 2010.
1043 At [16].
1044 At [17].
1045 At [19].
1046 At [50].
1047 At [52].
1048 At [56].
1049 *R v Lin* HC Auckland CRI-2006-004-25948, 30 March 2007 at [1].
1050 At [2].
1051 At [3].
1052 At [4].
1053 At [5].
1054 At [16].

> are in prison. However, I do note that you have lived in New Zealand now for seven years and speak good English, so your plight will not be as acute as some overstayers who find themselves in prison for lengthy periods.

885 A particularly interesting point is that Asher J considered how the defendant coming to New Zealand at a young age with no parental supervision might have impacted him:[1055]

> I do have a sense that you drifted into a criminal way of life because it was the easy thing to do and because you lacked the guidance of parents or other role models in New Zealand when you were still effectively a child. There is, however, a limit to just how far I can take such factors relating to you personally given the scourge that methamphetamine is in our society, and the damage it causes.

886 Due to a number of mitigating factors, including his remorse and co-operation, the defendant's final sentence was two years and eight months imprisonment.[1056] In his concluding remarks, Asher J stated:[1057]

> ….I do not sense that you are really a criminal type. It is very unfortunate that you were left alone in New Zealand as a 16-year-old and that you have allowed your life to go so very badly off the rails. You will, when you have completed your imprisonment, return to China. It seems to me that you have a good prospect of picking up the pieces of your life….

887 In *R v Choy*, the two Chinese defendants, Mr Choy and Mr Chen, had pleaded guilty to manufacturing methamphetamine.[1058] They appeared in the High Court in front of Harrison J for sentencing.

888 Police officers had arrived at an address, and a Mr Tattoo Yang, the defendants and one other person were present at the property.[1059] The Police found three laboratories for making methamphetamine. There was also a range of material, equipment and precursor substances.[1060] His Honour noted that Mr Yang was the main offender and that the defendants had lesser roles.[1061]

889 In discussing the defendants personal circumstances, Harrison J stated:[1062]

> …both of you are of good character. Each of you is still a young man. You have much to give your own societies when you return to China. Mr Choy is at least supported by his family. Both of you came to New Zealand for good reasons to study and improve your English. It is very sad indeed that each of you fell into bad company and brought your promising careers in New Zealand to a poor end. Now you will have to serve terms for imprisonment and then you will be deported back to China.

890 Mr Choy received two years and ten months imprisonment and Mr Chen received two years and eight months imprisonment.[1063] In concluding, Harrison J stated:[1064]

> Before you stand down, each of you has committed serious crimes against New Zealand society. But you have acted honourably and responsibly in pleading guilty. I trust that after you serve your terms of imprisonment that you will return to China and live law abiding and constructive lives.

891 In *R v Yung*, the defendant pleaded guilty to a charge of importing methamphetamine into New Zealand.[1065] He appeared in front of Lang J in the High Court for sentencing.

892 Lang J noted that with serious drug offending, personal circumstances count for less than in other criminal law areas.[1066] When taking into account mitigating factors, His Honour took seven months

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1055 At [18].
1056 At [20].
1057 At [22].
1058 *R v Choy* HC Auckland CRI-2006-004-15149, 29 April 2008 at [1].
1059 At [3].
1060 At [2].
1061 At [9].
1062 At [12].
1063 At [15].
1064 At [16].
1065 *R v Yung* [2017] NZHC 895 at [1].
1066 At [5].

off the starting sentence due to the difficulties the defendant would face in a foreign prison:[1067]

> Another mitigating factor is that you will be obliged to spend several years in a New Zealand prison environment. This means that a prison sentence will be more difficult for you than it would be in the case of a prisoner born and raised in New Zealand. You do not speak the English language and you are not familiar with New Zealand food, customs or culture. For that reason you will be somewhat isolated in the prison environment and will find it more difficult to serve your sentence. I make an allowance of seven months to reflect that factor.

893 Taking into account all of the mitigating factors, Lang J decreased the starting point from 14 and a half years to 10 years and six months.[1068] He also imposed a minimum term of imprisonment of four years and one month.[1069]

894 In *R v Chen*, there were four appellants appealing their convictions which were primarily related to the class A drug methamphetamine, and their resulting sentences. The fifth appellant was applying for leave to appeal out of time against sentence. The Solicitor-General also applied for leave to appeal out of time against aspects of two of the appellants' sentences.[1070] The convictions related to six consignments from PRC concealed in shipping containers. Four of the consignments were methamphetamine and two were of its precursor substance, pseudoephedrine.[1071]

895 On appeal, Mr Chen submitted that his sentence was manifestly excessive for a number of reasons, including that it failed to "take into account that he is not a New Zealander and that his family are overseas."[1072]

896 The Court said that the Judge "explicitly considered whether the fact that Mr Chen would be serving a sentence far away from home and family, in a country where he does not speak the language, would amount to circumstances rendering an otherwise appropriate sentence disproportionately severe."[1073] The Court held:[1074]

> Those who come to this country for the purposes of criminal offending on this scale take the risk that they will be caught and imprisoned far from their families. Deterrence will not be achieved if those who choose to target this country in that way are shown leniency when the risk they willingly undertake becomes reality. Your offending is of such gravity that I am not persuaded that the penalty I intend to impose is disproportionately severe.

897 The Court found that the life sentence for Mr Chen was justified due to his culpability and the seriousness of the importations, having regards to *R v Fatu* and the purposes and principles of the Sentencing Act.[1075]

898 The appeal against this life sentence was dismissed.[1076]

899 In *R v Lee*, a defendant from Taiwan was charged with possession of methamphetamine for supply. The defendant was not fluent in English and gave evidence through a Mandarin interpreter.[1077] The defendant pleaded guilty. However, while giving evidence at his sentencing, Heath J became concerned that the defendant did not understand the implications of his guilty plea – i.e. admitting that he had committed all of the elements of the offence. He granted the defendant leave to

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1067 At [6].
1068 At [3] and [10].
1069 At [11].
1070 *R v Chen* [2009] NZCA 445 at [1].
1071 At [8].
1072 At [171].
1073 At [174].
1074 At [174].
1075 At [179]. In *R v Fatu* [2006] NZLR 72 (CA), the Court of Appeal set out sentencing bands for cases involving the importation of methamphetamine.
1076 *R v Chen* [2009] NZCA 445 at [179].
1077 *R v Lee* [2015] NZHC 1978 at [5].

vacate his guilty plea. Subsequently, counsel for the defendant indicated that he did not wish to vacate his plea, and sentencing proceeded on 20 August 2015.[1078]

900 Heath J considered that the starting point given in an earlier sentence indication of 14 years imprisonment was appropriate.[1079] However, Heath J also considered that the fact that the defendant was not fluent in English, and would be away from his family in Taiwan for some time, meant that imprisonment in New Zealand would be more harsh for him than others; and, giving credit for the defendant's guilty plea, resulted in an end sentence of nine years and 4 months imprisonment.[1080]

901 *R v Chan* concerned the sentencing of a young Hong Kong man charged with importing, supplying, attempting to apply and possessing methamphetamine.[1081] Mr Chan had arrived in New Zealand from Hong Kong as a 12 year old, and lived with a homestay family while his parents remained in Hong Kong. Mr Chan was approached by Ho Mak in 2013, at the Sky City Casino in Auckland and became involved in a Hong Kong syndicate that arranged for consignments of methamphetamine to be imported into New Zealand.[1082]

902 Brewer J adopted a starting point of 23 years. He noted that Mr Chan had a lesser role in the offending than his co-accused, which warranted a lower starting point than the 25 years received by the other two offenders, who were sentenced separately.[1083] Brewer J allowed discounts for Mr Chan's age, time spent on electronic monitored bail and also noted that he had taken account of some 52 references of good character that Mr Chan had provided.[1084] The end sentence was one of 19 years and 3 months imprisonment, with a minimum non-parole period of seven years and eight months.[1085]

903 Mr Chan appealed the decision to the Court of Appeal on the grounds that the sentence was manifestly excessive.[1086] The Court allowed the appeal, and substituted the sentence for 15 years and three months imprisonment, with no minimum period of imprisonment.[1087] The Court held that Brewer J erred in making "inadequate adjustment to the starting point" to reflect Mr Chan's role in the offending.[1088]

904 However, of most relevance was the Court's consideration of Brewer J's assessment of Mr Chan's personal mitigating factors. It held:

a) That a greater discount should have been given for Mr Chan's youth, taking into account the length of the sentence when compared to Mr Chan's age, and the importance of not imposing sentences that would have a "crushing effect" and "become a barrier to rehabilitation." It found that a discount of 15 percent for Mr Chan's age was appropriate;[1089] and

b) That some allowance ought to have been made for the "particular hardship that Mr Chan will face in prison and for his good character." It held that Mr Chan was not someone who had come to New Zealand solely for commercial gain, and that his home is New Zealand. It also found that Mr Chan would find prison difficult in New Zealand due to a lack of a local support networks.[1090]

1078 At [6].
1079 At [21].
1080 At [26].
1081 *R v Chan* [2016] NZHC 2376.
1082 At [3].
1083 At [23].
1084 At [28] and [33].
1085 At [39].
1086 *Chan v R* [2018] NZCA 148 at [2].
1087 At [43]–[44].
1088 At [27].
1089 At [31].
1090 At [32].

905 In *R v Phuan*, the Malaysian defendant had pleaded guilty to two charges of possessing methamphetamine for supply, a representative charge of supplying methamphetamine and a charge for possessing ecstasy for supply.[1091] The Police had executed a search warrant at the defendant's address, where they found bags containing methamphetamine. They also found keys to another flat which the defendant was renting and upon searching that property discovered that it had been set up to as a place to store and pack methamphetamine. Ecstasy tablets and more methamphetamine were found at that property.[1092]

906 At sentencing Williams J noted that defendant had arrived in New Zealand on a visitor's permit but had been staying in the country illegally since 2004.[1093] On his arrest he had been served a removal order, and he would be deported at the conclusion of his sentence.[1094]

907 Williams J also noted that Counsel for the defendant had pointed out the difficulties that the defendant would face in prison as a non-English speaking inmate. However, Williams J stated that "…doubtless [Counsel for the defendant] has also told you that personal circumstances play little part in drug sentencing."[1095]

908 Overall, the defendant was sentenced to a maximum of nine-and-a-half-years of imprisonment.[1096] Williams J decided not to impose a minimum period because:[1097]

> …you [the defendant] are going to be deported the moment you are released from prison and I can see no purpose in prolonging or postponing that date.

909 In *R v Xia*, the Chinese defendant had pleaded guilty to a charge of possessing the class A controlled drug methamphetamine for supply and to a charge of possessing a precursor substance for the purpose of manufacturing methamphetamine.[1098] Police and Customs had executed a search of the property in which the defendant lived with the other accused. They found ContacNT capsules and methamphetamine in the room the defendant shared with his girlfriend, who was one of his co-offenders.[1099]

910 In sentencing the defendant, Stevens J noted that the defendant was 25 years old and had come to New Zealand in 2004 to study for a business diploma. He also stated that when the defendant was remanded in prison he ended contact with his parents in PRC as he was too ashamed to inform them of his predicament.[1100] His New Zealand visa was revoked and it was expected that he would be deported at the conclusion of his sentence.[1101]

911 His Honour considered the sentence that Courtney J had arrived at for the defendant's girlfriend. In doing so he stated:[1102]

> I do not take into account something that was taken into account by Courtney J, the possibility that you might find prison more difficult because of your language and lack of family support in New Zealand. A recent Court of Appeal decision in *R v Ogaz* CA180/06 6 March 2007 held that the fact an offender is a foreign national, who does not reside in New Zealand and is not a native speaker, will not normally justify a greater than normal discount.

912 Therefore, the defendant did not receive a discount on his sentence to reflect the possibility that he might find prison more difficult due to his language and lack of family support.

1091 *R v Phuan* HC Auckland CRI-2006-004-013431, 17 July 2007 at [1]–[3].
1092 At [7].
1093 At [10].
1094 At [10].
1095 At [16].
1096 At [25].
1097 At [19].
1098 *R v Xia* HC Auckland CRI-2006-092-009456, 12 August 2008 at [1].
1099 At [3]–[5].
1100 At [6].
1101 At [9].
1102 At [31].

913 In *R v Tang*, the Chinese defendant had pleaded guilty to importing the Class A drug methamphetamine.[1103] The defendant was 51 years old and had lived in Hong Kong for most of his life.[1104] He had been stopped by Customs at Auckland International Airport after flying in from Hong Kong. Two packages containing methamphetamine were found on his person.[1105] The defendant's girlfriend was sentenced in *R v Huang*.[1106] Priestley J determined that the defendant was a courier, rather than a master mind or supplier.[1107]

914 In considering whether there were any mitigating factors relevant to the defendant, Priestley J stated that as well as the early guilty plea:[1108]

> I also intend to give you some small credit to reflect the fact that a lengthy term of imprisonment will be hard on you. You are being imprisoned in a foreign country. You have no family support here. However, foreigners who courier drugs into New Zealand can expect little sympathy in that regard. If courts were to be too lenient, so far as this factor is concerned, there would be an incentive for drug traffickers to use foreigners in an attempt to keep penalties lower than they would otherwise deserve.

915 Priestley J decreased the starting point of seven-and-a-half years by a third to reflect the defendant's "early guilty plea and the isolation which imprisonment in a foreign country will represent."[1109]

916 *R v Fung* concerned a defendant from Hong Kong who pleaded guilty to one charge of importing methamphetamine. The defendant had set up a dummy company in New Zealand, which was used as a front to import 95 kilograms of crystal methamphetamine. In sentencing the defendant, Stevens J held that the sheer quantity of methamphetamine made the defendant's offending very serious, and that he had been a crucial player in the drug importing operation.[1110] Stevens J also took into account the defendant's early guilty plea as a mitigating factor.[1111]

917 Stevens J also had regard to a pre–sentence report provided by a Probation Officer:[1112]

> You [the defendant] are a 41 year old citizen of Hong Kong, where you were born and raised. You have a wife resident there. English is a second language for you, and the Probation Officer suggests that your oral understanding on English is somewhat limited. The authorities have noted a tendency for you to agree, sometimes, when you do not understand what is being said.

918 Bearing the aggravating and mitigating factors, identified above, in mind, Stevens J sentenced the defendant to 15 years imprisonment with a minimum term of 7 years 6 months.[1113]

919 In *R v Peh*, there were two defendants, Mr Peh and Mr Abdullah. They had both pleaded guilty to importing a Class A controlled drug, methamphetamine, into New Zealand.[1114] The defendants had arrived at Auckland International Airport on a flight from Penang, Malaysia. In a search by Customs Officers they were found to have packages of methamphetamine strapped to them.[1115]

920 Before beginning her sentencing, Ellen France J noted the following:[1116]

> I record first, that sentencing today is proceeding without an interpreter for Mr Peh. Mr Peh has asked that the sentencing proceed anyway. If you have any trouble, Mr Peh, in understanding you can ask me to stop, just put your hand up, and as discussed with your lawyer - Mr Abdullah can help you. So for that reason you can both stay seated until I get towards the end, that will make it easier for you.

1103 *R v Tang* HC Auckland CRI-2007-092-018889, 3 June 2008 at [1].
1104 At [4].
1105 At [2].
1106 *R v Huang* HC Auckland CRI-2005-092-0078418, 20 November 2007 at [5].
1107 At [12].
1108 At [7].
1109 At [12].
1110 *R v Fung* HC Auckland CRI–2006–004–010504, 20 September 2006 at [38]–[43].
1111 At [44].
1112 At [17].
1113 At [52].
1114 *R v Peh* HC Auckland CRI-2005-092-007733, 16 December 2005 at [2].
1115 At [3]–[7].
1116 At [1].

921 Her Honour noted that Mr Peh had spent most of his life in Penang, spoke little English and was interviewed with an interpreter. He did not have a right of residency in New Zealand and was subject to a deportation order.[1117] With regards to Mr Abdullah, Ellen France J noted that he was a Malaysian citizen of Chinese origin, and had a good understanding of the English language.[1118]

922 In considering the features of the offending, Ellen France J stated:[1119]

> …I also take into account the fact that you will both be serving your terms of imprisonment in New Zealand but this is an area where personal circumstances do not carry much weight.

923 The starting point was eleven years imprisonment, but due to the mitigating factors it was reduced to a final sentence of eight years imprisonment for both defendants.[1120] They each received a minimum term of four years. Her Honour imposed this minimum term to "send a message to you, and to others, that this offending will be treated seriously."[1121]

924 In *R v Araki*, the defendant was a Japanese citizen who had pleaded guilty on a charge of importing methamphetamine into New Zealand.[1122] The defendant was apprehended at Auckland Airport after arriving on a flight from Hong Kong with packages of methamphetamine on his person. He co-operated with the Police to help apprehend the person that he was to deliver the methamphetamine to.[1123] The defendant appeared in front of Allan J in the High Court for sentencing.

925 Allan J noted that the defendant lived in Yokohama and had no significant connection with New Zealand. The defendant had been issued a removal order and would be deported at the end of his sentence.[1124]

926 In discussing sentencing principles, his Honour stated:[1125]

> I am ordinarily obliged also to consider how I might assist in re-integrating you [the defendant] into the community, and to facilitate your rehabilitation, but this factor is of little relevance given that you will be returned to Japan at the completion of your sentence.

927 In allowing a six-and-a-half-year discount from the sentence starting point Allan J took into account certain matters including "the fact that a term of imprisonment to be served in this country will have its difficulties. I refer here to issues such as language problems, dietary differences and cultural matters."[1126] The final sentence arrived at by his Honour was six-and-a-half years imprisonment, with no minimum period of imprisonment.[1127]

Non-drug related sentencing

928 The numbers of cases where Chinese defendants are sentenced for non-drug related offences are smaller, however they also provide an insight into the challenges faced when sentencing foreign nationals, particularly Chinese.

929 *R v Jiang* concerned a defendant from PRC accused of blackmailing another Chinese national in order to secure a debt the victim allegedly owed to her brother's immigration company. Courtney J found the defendant guilty of threatening the victim at a Burger King and also conspiring with unknown accomplices in a "sustained campaign of demand accompanied by threats and intimidation."[1128]

1117 At [13]–[14].
1118 At [17].
1119 At [24].
1120 At [28].
1121 At [31].
1122 *R v Araki* HC Auckland CRI-2008-004-2758, 10 June 2008 at [1]–[2].
1123 At [2]–[3].
1124 At [4].
1125 At [6].
1126 At [17].
1127 At [19]–[20].
1128 *R v Jiang* HC Auckland CRI-2005-004-8984, 4 November 2005.

930 In sentencing the Judge took account of the fact that the defendant would face considerable hardship if a term of imprisonment was imposed, as she had no adult family members in New Zealand, and her infant son, for which she had sole care, would be required to live with his grandparents in PRC. The Judge followed the Court of Appeal decision of *R v Harlen* (2001) 18 CRNZ 582, which "makes it clear that family situation, especially where young children are involved, can be taken into account as a factor in sentencing."[1129] The defendant was sentenced to 18 months home detention.

931 In *Liang v R*, the Chinese appellant had been convicted of kidnapping and was sentenced to four years imprisonment.[1130] He appealed this sentence on the basis that it was manifestly unjust taking into account his personal circumstances, the gravity of the overall offending and the circumstances of his culpability.[1131] The appellant and his associates had physically abused the victim and took him to several banks (in a car driven by the appellant) in an attempt to get him to withdraw money from his bank account. The victim was also detained at the appellant's residence.[1132] The appellant's pre-sentence report recommended the appellant be sentenced to reparation and community work, which the Judge at first instance found unrealistic and inappropriate.[1133]

932 Counsel for the appellant submitted that the Judge erred by determining the appellant's starting point on the basis of deterring Chinese group offending as a whole, and failed to clearly identify and take into account all of the appellant's personal circumstances.[1134] These included the impacts of the appellant having been part of a young Chinese immigrant family and being the only child in an immigrant family as well as being vulnerable to being befriended by Chinese boys/groups on study permits.[1135]

933 The Court of Appeal dismissed the appeal. It found that the Judge was clearly entitled, if not obliged, to take the aggravating features of the group into account, even though the appellant did not directly participate in some of the activities.[1136] The Court did not agree that the Judge failed to take into account the appellant's personal circumstances.[1137] It said there was a very large discount from the Judge's starting point and that many of the mitigating factors stated by counsel had been specifically taken into account, with the Judge being aware of the others. The Court stated that in such offending personal circumstances are of limited relevance anyway.[1138]

934 In *Wang v New Zealand Police*, the defendant Mr Wang, from PRC, appealed against the sentence imposed on him in the District Court, having been convicted on four charges of receiving property under the Crimes Act 1961.[1139] He had applied unsuccessfully for discharge without conviction and was sentenced to 250 hours of community work.

935 Counsel argued that the penalty was disproportionate for a number of reasons:

a) That as a result of the conviction the appellant could not renew his student immigration status and therefore could not finish his degree;[1140]

b) That a conviction would mean that the appellant would be unlikely to successfully apply for permanent residency;[1141] and

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1129 At [14].
1130 *Liang v R* CA488/04, 2 June 2005 at [1], per Glazebrook, Hammond and Robertson JJ.
1131 At [16].
1132 At [3]–[6].
1133 At [10].
1134 At [17].
1135 At [19].
1136 At [26].
1137 At [27].
1138 At [27].
1139 *Wang v New Zealand Police* HC Auckland CRI-2008-404-316, 23 March 2009 at [1].
1140 At [4].
1141 At [5].

c) That if the appellant returned to PRC with a conviction he would have great difficultly in finding worthwhile employment.[1142]

936 With regards to the student immigration status, Winkelmann J stated in "the absence of this operating as an automatic and complete bar to the issue of a student visa I consider that the matter of a proportionate response to the offending is best left for the Immigration Department."[1143] Her Honour came to the same conclusion regarding any application for permanent residence.[1144] In terms of the concern around the difficulty of finding employment, her Honour stated that "[e]very conviction for criminal offending carries with it potential impact on the offender's future employment prospects."[1145]

937 The appeal against the sentence was dismissed. Her Honour also referred to the lack of a guilty plea or any approved expressions of remorse before the District Court Judge.

938 *R v Liu* concerned a defendant from PRC who pleaded guilty to a charge of blackmail.[1146] The defendant had become involved in a dispute with members of the Mongrel Mob attempting to recover money from him. The defendant suggested to the gang members that their debt could be recovered from money owed to him by his employer, and became involved with the gang members in blackmailing his employer, eventually resulting in the employer's business closing.

939 In sentencing the defendant, Hansen J took into account that a sentence of imprisonment would be difficult for the defendant, being a Chinese national. Hansen J further said:[1147]

> I also accept that this offending has caused you serious loss of face, and, more importantly, in cultural terms for you, it will have cause tremendous loss of face for your family back in China. I also accept that you are now remorseful, and I do accept that you will face serious problems when you return to China…
>
> The presentence report acknowledges that imprisonment is the appropriate course here. You are described as an inexperienced and naïve young man who will likely be disowned on your return to China.

940 Taking into account the seriousness of the blackmail, the defendant's early guilty plea and the unique cultural consequences faced by the defendant, Hansen J sentenced him to 18 months imprisonment, cumulative on another sentence he was currently serving.[1148]

941 In *R v Yuen*, the defendant was a fifty eight year old Hong Kong Chinese national.[1149] He pleaded guilty to three methamphetamine charges.[1150]

942 Customs officers at Auckland Airport had found methamphetamine in a shipment of queue barriers from PRC.[1151] The next month Mr Yuen and his wife arrived in New Zealand claiming that they were on holiday.[1152] Mr Yuen received shipment, took out what he believed to be the methamphetamine (now mostly replaced with a placebo), re-packaged it into bags and the next day provided a man with one of these bags.[1219] The Police found the remaining bags at a property rented by Mr Yeun.[1153]

943 While sentencing the defendant, Courtney J noted mitigating factors, including that he spoke little English and that there was an interpreter in the Court to assist with Mr Yuen's understanding. [1221] Courtney J stated:[1154]

1142 At [6].
1143 At [17].
1144 At [18].
1145 At [16].
1146 *R v Liu* HC Christchurch CRI-2004-009-7449, 12 October 2004.
1147 At [5] and [9].
1148 At [15].
1149 *R v Yuen* [2016] NZHC 571 at [3].
1150 At [1].
1151 At [2].
1152 At [3].
1153 At [5].
1154 At [6].

> In this country Judges have frequently emphasised that the personal circumstances of a drug offender are of limited relevance because of the seriousness of this kind of offending and the harm that it does to our communities. Moreover, although a person in your situation will find prison life in a foreign country difficult, more difficult than a local person, it is important to send a message to those contemplating offending here is the risk they take, of being imprisoned far from home.

944 Despite this, Courtney J accepted the fact that since Mr Yuen spoke little English, prison life would be particularly hard for him.[1155] She also accepted the effect the offending would have on his family who would have to fend for themselves.[1156] Courtney J further noted that if his wife was convicted she would find prison very hard and if acquitted "….she worries what life will be like in Hong Kong for a poor, old woman."[1157]

945 The defendant received a final sentence of 15 years and seven months. A minimum period of imprisonment was denied, with one of the considerations for this being that he had limited English.[1158]

Court attitudes towards Chinese defendants in bail applications

946 *Huang v Police* concerned a defendant from PRC accused of kidnapping. The defendant's application for bail was declined in the District Court. In the High Court on appeal, the Police argued that because the defendant was Chinese he posed a significant flight risk. Harrison J said:[1159]

> In this case the police oppose bail principally on the grounds that Mr Huang presents a flight risk… They place primary reliance on Mr Huang's Chinese nationality. He is currently in New Zealand on a student visa. While he may surrender his passport, the police are concerned, based on past experience, about the ease with which foreign nationals have been able to leave New Zealand using other passport identities which have been stolen or bought. This concern is appropriate.

947 However, taking into account the fact that appropriate residence and supervision was available, alongside the fact that the defendant had no criminal history and the length of time to trial, Harrison J considered that the flight risk could be addressed with appropriate bail conditions, and granted bail.[1160]

948 *Lee v Police* concerned a defendant from PRC who appealed against a decision of the District Court to decline him bail on charges for drug related offending, as he was not living at his nominated address and was offending while on bail. To explain his absence the defendant said to the court:[1161]

> Mr Lee (the defendant) has since been in custody for five weeks and seeks bail to his parents' address, to which he was bailed initially. He explains that he was not living at that address when apprehended because he was ashamed of the spate of offending for which he is now to be made answerable. His father and mother are from Mainland China. His father is highly traditional and would have strongly disapproved. Moreover, his father had suffered a stroke earlier in the year and he was fearful of causing a second.
>
> During Mr Lee's remand in custody his father has returned to China, as he does for half of each year, and it is now possible for Mr Lee to live with his mother. That, moreover, is imperative. His cousin who has been living with her is returning himself to China. His mother speaks no English and her mental stability is insecure. She needs support. He is confident that he has weaned himself, while on remand, from his dependency.

1155 At [13].
1156 At [14].
1157 At [15].
1158 At [15].
1159 At [15].
1160 At [19].
1161 *Huang v Police* HC Auckland CRI–2004–404–214, 4 June 2004 at [4].

949 Taking the defendant's cultural reasons for breaching bail conditions into account, alongside his mother's cultural dependency on him, Keane J released the defendant on bail on the conditions that he was to live with his mother, was curfewed to that address between 5 pm and 8 am, was to abstain from drugs and was to surrender his passport.[1162]

950 In *Huang v R*, bail was being sought on behalf of the applicant, who had been convicted on a charge of blackmail.[1163] The applicant was a student in New Zealand who had no family in the country. He was in a relationship with his former co-accused, with whom he lived. He needed to sell certain assets and would find it difficult to attend to financial and other affairs if he was remanded in custody pending sentence.[1164] The Crown's opposition to the application was the likelihood of a custodial sentence. Counsel for the Crown acknowledged that the flight risk did not appear high as the Police were holding the applicant's passport, but stated that there is an ever present risk, albeit minimal, where the accused does not have a permanent connection to New Zealand.[1165] Courtney J found that the flight risk was low and granted the applicant bail.[1166]

951 The appellant in *Miao v New Zealand Police*, Mr Miao, was a Chinese citizen who held permanent residency in New Zealand. He was charged with importing approximately 90 kilograms of ephedrine, a class B drug, from PRC in September 2015.[1167] The ephedrine was hidden in a large number of toy kangaroos and a fake Chinese passport was used to apply for a client code for consignment. It is alleged that Mr Miao used the phone number provided for the consignee and requested delivery.[1168] Mr Miao claims that he did not know about the ephedrine and was just helping a friend who could not speak English.[1169]

952 Mr Miao appealed Judge Harvey's decision to not grant electronically monitored bail. The presiding judge in the appeal, Palmer J, noted that the Corrections report advised that Mr Miao was unsuitable for electronically monitored bail due to the risk he may leave New Zealand.[1170]

953 Counsel for Mr Miao stated that the District Court erred in its view that Mr Miao would flee New Zealand, and that it did not take several factors into account, including that Mr Miao had family support and had lived with an aunt and uncle at the address to which he was seeking to be bailed. He also had support from family in PRC and a long-term partner who was employed in New Zealand.[1171]

954 Palmer J denied electronically monitored bail. He noted that the defendant's family support and proposed provision of surety mitigated the flight risk.[1172] However, Palmer J did not consider that the factors sufficiently mitigated the risk, having regard to other considerations. These considerations included the alleged use of a fake Chinese passport, the alleged links of the offending to organised crime, the potential for large proceeds of international drug dealing which would diminish the value of the surety and the serious penalty of the alleged offence. He found that the appellant had an incentive and potentially the means to flee the country.[1173] He considered, accordingly, there was a present risk that the appellant may fail to appear in court and consequently there was just cause for continued detention under the Bail Act 2002.

955 The appellant in *Zheng v New Zealand Police* was a Chinese citizen and a permanent resident in New Zealand.[1174] He was facing a joint charge of supplying methamphetamine, and was on bail

1162 At [6]–[7].
1163 *Lee v Police* HC Auckland CRI-2006-404-527, 8 December 2006 at [2]–[3].
1164 At [8].
1165 *Huang v R* HC Auckland CRI-2005-004-17388, 6 June 2006 at [1].
1166 At [2].
1167 At [3].
1168 At [4].
1169 *Miao v New Zealand Police* [2015] NZHC 2940 at [1].
1170 At [2].
1171 At [3].
1172 At [5]–[6].
1173 At [9].
1174 At [11].

with a condition prohibiting travelling outside of New Zealand. He applied for a variation so that he could visit PRC to attend a wedding celebration for himself and his wife arranged by his parents-in-law, in order to recognise their union in the manner appropriate to Chinese culture. This was denied in the District Court.[1175]

956 Hansen J noted that Mr Zheng had deposed in evidence in the District Court that he had a number of incentives to return to New Zealand. His sister was a New Zealand citizen and his parents and brother were New Zealand residents. He owned a house and restaurant with his mother, and his sister owned a home.[1176] In the District Court, Judge Perkins found that there was a high incentive for Mr Zheng to not return to New Zealand, especially because he would be unable to be extradited from PRC. This is because, if he was convicted, he would almost certainly have a long sentence of imprisonment. Hansen J stated that Judge Perkins had acknowledged:[1177]

> ...the cultural sensitivities involved and the risk of embarrassment if Mr Zheng is not permitted to return, but [Judge Perkins] judged the offending of such a serious nature and the flight risk similarly serious, that it would not be appropriate for the Court to grant the application.

957 Hansen J said he did not see that there was any "real attack" on Judge Perkins' decision that Mr Zheng had a high incentive to not return and presented a real flight risk. Rather, the issue was whether the offer of a surety was adequate to meet the identified concerns.[1178]

958 In reaching his conclusion, Hansen J concluded that he had:[1179]

> ...considerable sympathy for Mr Zhang and his family. Their desire to observe and respect Chinese cultural norms is entirely understandable. But those considerations are insufficient to outweigh the real risk that Mr Zheng will not return to New Zealand, a risk which is insufficiently allayed in my view by the surety that has been offered.

959 *Tan v Police* concerned a Chinese defendant from Malaysia who was accused of 20 drug related charges. He was refused bail at the District Court and appealed to the High Court on the grounds that the Judge took into account irrelevant considerations and did not take into account the following relevant considerations:[1180]

a) The defendant complied with previous court orders;

b) The defendant had not attempted to pervert the course of justice;

c) The defendant had no history of offending on bail;

d) The length of time to trial; and

e) The prejudice to the defence if the defendant was remanding in custody, as he required an interpreter to instruct counsel.

960 The defence also produced evidence that the defendant's wife had recently returned from PRC, had a depressive illness and could not drive, and the defendant's son was on the waiting list for a surgery to correct a birth defect.[1181]

961 In the High Court, Gilbert J did not make a finding on how the defendant's language needs would affect the conduct of his defence. However, he held that the available evidence did not show that the defendant was a flight risk, and released the defendant on bail, allowing the appeal.[1182]

1175 At [14].
1176 *Zheng v New Zealand Police* HC Auckland CRI-2007-404-000395, 21 December 2007, at [2].
1177 At [1].
1178 At [3].
1179 At [4].
1180 At [4].
1181 At [9].
1182 *Tan v Police* [2013] NZHC 3471 at [13].

962 In *Lan v Police*, a Chinese national on a New Zealand student visa, brought an appeal against the refusal of bail.[1183] She had been arrested at the Auckland International Airport when she was about to board a flight to Hong Kong. She was charged with possession of methamphetamine for sale and for permitting a premise to be used, following the execution of a Police search warrant at an apartment that was in her name.[1184]

963 Her bail application was declined by the District Court due to the flight risk; the Judge also noted that the offence was serious due to the substantial quantity of methamphetamine.[1185] She also did not keep her appointment to meet with the Police and had made arrangements to fly out of the country that night.[1186] The appellant contended that she did not have access to the property and did not know anything about what was found there.[1187] She stated that a flatmate of hers had suggested they get the apartment and a flatmate had also provided cash for the transaction. The appellant said she was the only one with a visa and correct identification needed to rent the apartment.[1188]

964 Venning J accepted that the District Court Judge was correct to identify that the flight risk was the principal matter of concern, particularly due to the appellant failing to keep arrangements with the Police.[1189] The issue was on appeal was whether in light of further information, the flight risk had been answered or could be satisfactorily answered with a surety and bail conditions.[1190] Venning J decided that it could not be, stating:[1191]

> On her own evidence the appellant has no connection any more with New Zealand. She has no reason to stay. She in fact was leaving New Zealand when arrested. While she had no obligation to speak to the police she made no attempt to advise the police that she would not keep the appointment that had been made on the day of her arrest. She was only stopped as she was boarding a plane to leave New Zealand.

965 In *Huang v Police*, the Taiwanese applicant was making a fresh application for bail, in order to more comprehensively address his risk of flight.[1192] The applicant had been in custody from December 2006 and it was likely that if he was not granted bail, he would spend two years or possibly more in custody before his trial. He was facing charges under the Misuse of Drugs Act 1975.[1193] He appeared in the High Court in front of Cooper J.

966 The Crown pointed to Lang J's comments from the applicant's previous bail application that it was likely that the applicant would be able to obtain a false passport.[1194] His Honour stated that the applicant would have a strong incentive to abscond:[1195]

> The charges against Mr Huang [the applicant] allege supply of the Class A controlled drug methamphetamine and conspiring with Mr Wei to supply that drug. There are nine informations on the file. The maximum penalty for each of these offences is life imprisonment. Plainly, notwithstanding that he has resided in New Zealand since 2002, and is married to a person who also resides here, there would be a strong incentive for him to try to abscond especially given his connection to persons in Taiwan and PRC and the strength of the Crown case.

967 Cooper J decided to decline the application due to the risk of flight.[1196]

1183 At [17].
1184 At [20]–[21].
1185 *Lan v Police* HC Auckland CRI-2006-404-2006, 1 December 2006 at [1] and [3].
1186 At [2]–[3].
1187 At [3].
1188 At [5]–[6].
1189 At [5]–[6].
1190 At [4].
1191 At [8].
1192 At [9].
1193 At [12]–[13].
1194 *Huang v Police* HC Auckland CRI-2006-404-000454, 26 April 2007 at [1]–[2].
1195 At [1].
1196 At [17]–[18].

968 *Yin v Police* concerned a defendant from PRC who was accused of kidnapping and being an accessory after the fact to murder. In the District Court, the Judge considered the defendant a flight risk, noting that she "did not, in making that observation, tar him with the brush of other people who had departed whilst on bail, but she considered it a matter of reality", and declined the defendant bail.[1197]

969 In the High Court, the defendant argued that the District Court gave undue weight to the flight risk presented by the defendant; the circumstances had varied, as the defendant's mother and cousin had flown to New Zealand to support him; and the defendant's family was willing to offer a surety up to a sum of $20,000.[1198] Potter J held that the risk of flight could be mitigated by appropriate bail conditions, and granted bail.[1199]

970 In *Wang v New Zealand Police*, Ms Wang appealed the District Court's decision to deny her bail.[1200] She had been previously granted bail on charges which included assault with intent to injure and kidnapping. However, she was subsequently charged with other offences as a result of Police investigation under the Misuse of Drugs Act 1975.[1201]

971 When considering whether the appellant was a flight risk, Priestley J stated:[1202]

> It is true that the appellant faces serious charges relating to alleged offending throughout 2006. However, despite her Chinese nationality, she has lived in New Zealand for a number of years as a student, is currently legally in New Zealand, and there is no evidence of which I am aware that necessarily constitutes a flight risk.

972 *Liu v R* concerned a Chinese applicant who had been charged with the murder of his partner.[1203] Having been denied bail by Woolford J, he made a new application claiming that there had been a change in circumstances which had implications on the reasoning relied on by Woolford J in declining the previous application.[1204]

973 In the new application, the applicant put forth affidavits to show the extent of his connection to New Zealand and to distance himself from connections to PRC.[1205] These affidavits showed that his old Chinese passport had been found and could be surrendered. He was not estranged from his son who was a New Zealand citizen, and his sister was moving to New Zealand, which would mean his parents would be his only tie to PRC. They also showed that he was not a Chinese citizen and that he had held a job in New Zealand and also owned two properties.[1206]

974 Cooper J found that:[1207]

> …there remains a risk that the defendant [the applicant] might fail to appear for this trial if granted bail. I accept that over the last 18 years he has developed ties to New Zealand and his links to China have correspondingly weakened. Nevertheless, he lived there until the age of 39, and I infer, if able to secure entry there, could readily adapt to doing so again. In the circumstances, I do not accept Mr Kan's [Council for the Respondent] submission that it is simply the fact that the applicant was born in China that creates the risk of flight.

975 His Honour also stated that:[1208]

> I accept that given the fact that his Chinese passport has expired and his New Zealand passport has been

1197 At [22].
1198 At [26].
1199 *Yin v Police* HC Auckland CRI-2006-404-000188, 23 June 2006 at [5].
1200 At [6]–[8].
1201 At [24].
1202 *Wang v New Zealand Police* HC Auckland CRI-2006-404-000462, 9 January 2007 at [1].
1203 At [3].
1204 At [6].
1205 *Liu v R* [2014] NZHC 1422 at [1].
1206 At [2].
1207 At [9].
1208 At [10]–[12].

> surrendered, it would be difficult for the applicant to enter China. However, the fact that he now faces trial could operate as a powerful incentive for the applicant to leave New Zealand.

976 Cooper J found that there was an "appreciable risk" that the applicant would not appear at his trial if bail was granted.[1209] He also noted other factors under the Bail Act 2000, for example such as the brief period to trial. Taking all these reasons into account he dismissed the application.

977 In *Chin v Police*, the Malaysian appellant had been charged with one count of supplying a Class A drug and a Class B drug. He was denied bail and appealed.[1210]

978 Fogarty J stated that it was apparent that the Judge considered the flight risk of the appellant and that the Judge had taken into account the fact that the appellant had lived in New Zealand since 1993 and that his children and his partner were also living in New Zealand.[1211]

979 Counsel for the appellant submitted that the Judge erred in how he came to the conclusion that there was a flight risk. It was emphasised by counsel that the appellant was living with his wife and children, was working part time and recently had published a paper for the benefit of Chinese speakers in Christchurch.[1212] Fogarty J found that the Judge did have material in front of him to come to the conclusion that there was a flight risk.[1213] He also noted that the circumstances had changed since then which on their face increased that chance of risk.[1214] It appears that Fogarty J was referring to the proposed further charge that had come about since that hearing.[1215] The appeal was dismissed.[1216]

980 *R v Pan* concerned a 35 year old defendant from PRC, who migrated to New Zealand on a student visa in 2014, one year before the offending in question. He was charged with importing ephedrine and denied bail as the District Court considered that he was a flight risk. He appealed to the High Court.[1217]

981 The defence argued that there was no evidence to suggest that the defendant was a flight risk, and that the Crown position was indicative of prejudice towards migrants:[1218]

> [Defence counsel] submitted that the Crown position was based on a "generic assertion" that because Mr Pan is a foreign national "there will be a significant incentive for the applicant to attempt to leave New Zealand either on a false passport or another person's passport". He submits that, when boiled down, Police and Crown opposition to bail in circumstances such as these, is increasingly to simply assert a risk of flight, particularly where there is a foreign national, which lacks "any particular or focused evidential support"…
>
> … He submits that it is of concern that defendants with Chinese heritage are increasingly facing opposition to bail solely because of the perceived incentive to flee, rather than any real and substantive risk of flight.

982 Davidson J agreed that "the Courts must not label a foreign national with the unfair and unreasoned 'perception' of being a flight risk". However, Davidson J held that the circumstances as a whole in this case pointed to a real and significant risk of the defendant absconding, and the appeal was dismissed.[1219]

983 In *R v Lee*, the defendant had pleaded guilty to importing a Class C controlled drug, pseudoephedrine.[1220] He was thirty-two years old and was born and raised in Hong Kong. The

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1209 At [18].
1210 At [21].
1211 At [21].
1212 *Chin v Police* HC Christchurch CRI 2005-409-000235, 15 December 2005 at [1].
1213 At [2].
1214 At [7].
1215 At [8].
1216 At [8].
1217 At [3]–[6].
1218 At [10].
1219 *R v Pan* [2015] NZHC 1738.
1220 At [21]–[23].

facts of the offending were that he was approached in Hong Kong and promised NZ$2,000 and return air fares to New Zealand. In New Zealand he was to answer the door and accept packages.[1221] Customs officers found pseudoephedrine in one of these packages and arranged for its delivery and the defendant accepted and signed for it. A search warrant was then executed and the package was located.[1222] He appeared in the High Court in front of Asher J for sentencing.

984 Interestingly, Asher J noted that:[1223]

> As an aside I record that the pre-sentence report states that you [the defendant] did not know that you were involved in an illegal activity. You have advised your counsel, Mr Newell, that this is not what you said to the interpreter. This is a matter that should be investigated, and I ask the probation officer to follow it up with the interpreter.
>
> Mr Newell is understandably concerned that what might appear to be a refusal to accept responsibility for your actions might work against you when it comes to getting parole at a later date.

985 In this regard, it is noteworthy that Asher J recognised that an apparent error by an interpreter could have a downstream prejudice to the defendant.

986 His Honour also commented on what he contended was a pattern of men from PRC and Hong Kong coming over to New Zealand to participate in importing drugs (by reference to a case also titled *R v Lee* HC Auckland CRI-2009-004-17942, 30 March 2010, discussed earlier in this *Case Review*):[1224]

> I have been presented with a large range of relevant cases many of which have similarities to the events that concerned you. There appears to be something of a pattern developing of men in China and Hong Kong who wish to better themselves financially being recruited and sent to New Zealand on visitor's permits to participate in the importation of drugs. There is the distressing possibility that a period in a New Zealand prison sentence is one of the accepted risks to obtain the limited rewards that may be available.

987 In *Niu v New Zealand Police* Mr Niu, from PRC was applying for a variation of his bail.[1227] He was facing 14 charges of importing, possessing for supply, and supplying pseudoephedrine.[1228] He was on bail with strict conditions. These included him being ordered to surrender his passport (which he did) and a prohibition on him applying for travel documents.[1229]

988 He applied for an order varying these bail terms. He wanted to go to PRC for about a week to see his ailing grandmother.[1230] Counsel for the applicant accepted the reality of a flight risk. A surety was offered by the applicant's family.[1231]

989 Harrison J said that while he appreciated the gesture of the offer of a surety and the applicant's distress with regards to his ill grandmother, he would not make an order of variation. He stated that:[1232]

> The prosecution case against Mr Niu appears strong. He has, I accept, lived in New Zealand for 10 years where he has acquired a tertiary education. He seems to have settled permanently in this country. However, given the strength of the evidence against him, I am not satisfied that the offer of a surety, whether $25,000 or even $100,000 as has been suggested during argument, would be sufficient to meet the risk that Mr Niu will not return to New Zealand if allowed to visit China.

1221 At [50].
1222 *R v Lee* HC Auckland CRI-2009-004-17942, 30 March 2010 at [1].
1223 At [2].
1224 At [3].
1225 At [6].
1226 At [13].
1227 *Niu v New Zealand Police* HC Auckland CRI-2010-404-199, 1 June 2010 at [2].
1228 At [1].
1229 At [1].
1230 At [2].
1231 At [3].
1232 At [4].

990 *Zhang v R* concerned an application for bail with electronic monitoring by a defendant originally from PRC, who faced 35 charges of selling pseudoephedrine (a class B drug) and three charges of importing the same drug. Bail was refused in the District Court and in the High Court, each court considering the defendant a flight risk. A further application was brought to the High Court on the basis that there had been a change in circumstances.[1233]

991 The defence argued that the defendant was a New Zealand citizen with no prior convictions, whose home, family, business and investments were all located in New Zealand. Further, the defendant would face substantial difficulties immigrating to PRC as he was no longer a Chinese citizen, and would have to disclose charges against him. Counsel for the defendant also suggested "that a non Chinese born New Zealand citizen faced with similar charges would not be refused bail on the basis of flight risk".[1234]

992 However, Thomas J considered that the defendant posed a flight risk, not only to PRC, but to other possible destinations both outside and inside New Zealand, and the defendant had criminal contacts both in PRC and New Zealand. Her Honour considered the defendant did pose a flight risk that could not be addressed by bail conditions, and dismissed the application.[1235]

993 The defendant appealed the decision to the Court of Appeal.[1236]

994 The appellant contended that Thomas J did not give sufficient weight to new information regarding the difficulty he would have in obtaining a travel visa for PRC due to his New Zealand citizenship and the charges he was facing. He also contended that she had not given sufficient weight to the additional surety proposed.[1237]

995 The appellant submitted that Thomas J had been wrong to conclude that the flight risk was not addressed by the proposed bail conditions by reference to a range of considerations. For example, that he had lived in New Zealand for 10 years with his family, had a restaurant business and other investments, and the fact there was no evidence that he had travelled outside of the country illegally.[1238]

996 The Court of Appeal said the appellant had obvious connections to PRC and was a principal participant in a major drug importation conspiracy in PRC. The appellant was in PRC when some of the drugs were shipped to New Zealand and shipments of drugs from PRC were addressed to his business in New Zealand.[1239] The Court of Appeal found that in those circumstances it did not consider that Thomas J's assessment of the risk of flight could be seen as plainly wrong.[1240]

1233 *Zhang v R* [2014] NZHC 1095 at [4]–[5].
1234 At [34].
1235 At [40].
1236 *Zhang v R* [2014] NZCA 387 at [1].
1237 At [4].
1238 At [15].
1239 At [18].
1240 At [21].

APPENDICES

Appendix 1: New Zealand Legislation referring to 'multicultural', 'multiracial', 'intercultural', 'cultural', 'diversity' and/ or 'racial', as at 11 November 2019

Adoption Act 1955

Section 16 states that every adoption order must confer an adopted child a surname, and one or more given names. However, under section 16(1B), if the Court is satisfied that it is "contrary to the religious beliefs or cultural traditions of the applicant for an adoption order for the adopted child to bear a given name, the order may confer on the child a surname only".

Arts Council of New Zealand Toi Aotearoa Act 2014

Section 3 states that, to achieve the purpose of the Act, all persons performing functions or exercising functions under the Act must "recognise the cultural diversity of the people of New Zealand", and uphold "principles of excellence of innovation by supporting activities of artistic and cultural significance".

Auckland War Memorial Museum Act 1996

Section 11 states that the Board shall recognise and provide for, in such manner as it considers appropriate, "celebration of the rich cultural diversity of the Auckland region and its people", and the "advancement and promotion of cultural and scientific scholarship and research".

Section 19 states that a good employer recognises the "aims and aspirations and the cultural differences or minority groups".

Bill of Rights Act 1990

Section 19 states that "Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993" and "Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination that is unlawful by virtue of Part 2 of the Human Rights Act 1993 do not constitute discrimination."

Section 20 states that "a person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority".

Births, Deaths, Marriages, and Relationships Registration Act 1995

Section 18 states that the Registrar shall not record a name in the information relating to a person's birth which does not meet the requirement of a given name and a surname, unless the "religious or physical beliefs, or cultural traditions" of the person require the person to bear only one name.

Section 19 states that the person who notifies the registrar must also specify whether the "religious or philosophical beliefs, or cultural traditions" of a parent or guardian requires the child to bear only one name.

Broadcasting Act 1989

Section 21(1)(e)(iv) states that the Authority shall "encourage the development and observance by broadcasters of codes of broadcasting practice appropriate to the type of broadcasting undertaken by such broadcasters, in relation to… safeguards against the portrayal of persons in programmes in a manner that encourages denigration of, or discrimination against, sections of the community on account of sex, race, age, disability, occupational status, or as a consequence of legitimate expression of regligious, cultural or political beliefs".

Section 36 states that the primary function of the Commission is to "to reflect and develop New Zealand identity and culture by… promoting Maori language and Maori culture" and also to "encourage a range of broadcasts that reflects the diverse religious and ethical beliefs of New Zealanders".

Care of Children Act 2004

Section 136 states a party to a proceeding may ask the court to hear a person speak on "the child's cultural background".

Care of Children (Counselling) Regulation 2013

Regulation 6 states that counsellors "must be culturally aware, in particular of Māori values and concepts".

Oranga Tamariki Act 1989 / Children's and Young People's Well-being Act 1989

Section 4 states that one of the objects of the Act is to establish and promote services that are "appropriate having regard to the needs, values, and beliefs of particular cultural and ethnic groups" and are "provided by persons and organisations sensitive to the cultural perspectives and aspirations of different racial groups in the community".

Children's Commissioner Act 2003

Section 11 includes that "the Commissioner should recognise the diversity of children in New Zealand".

Coroners Act 2006

Section 3 states that the Act recognises the "cultural and spiritual needs of the family of, and those in a close relationship to, a person who has died".

Section 7 states that the chief coroner must facilitate the "the provision to coroners of support services and cultural, legal, medical, or other specialist advice".

Section 83 states, "If satisfied that it is desirable to do so, the chief coroner may, on the recommendation of a coroner, appoint a cultural, legal, medical, or other specialist adviser to sit with and help the coroner at an inquest by giving advice".

Corrections Regulations 2005

Regulation 29 states that an eligible prisoner may be released in order "to engage with, take part in, or attend a religious, community, cultural, educational, recreational, service, or sporting group, activity, or event".

Regulation 91 states that a manager may approve visitors to "address the cultural or other specific needs of a prisoner".

Criminal Procedure Act 2011

Section 329 states that the Court may direct that an appeal be determined on the basis of written material, having regard to "any relevant cultural or personal factors", as per s 329(1)(vi).

Crown Entities Act 2004

Section 29 states that the Minister must "take into the account the desirability of promoting diversity in the membership of Crown entities".

Section 89 states that the shareholding Minister must "take into the account the desirability of promoting diversity in the membership of Crown entities".

Section 118 states that to fulfil its obligation to be a good employer, the employer must operate a personnel policy that contains provisions which recognise "the aims, aspirations and employment requirements, and the cultural difference, of ethnic or minority groups".

Defence Act 1990

Section 59 states that, to fulfil its obligation to be a good employer, the employer must operate personnel policy that contains provisions which recognise "the aims, aspirations, and cultural difference, of ethnic or minority groups".

Education Act 1989

Section 1A(3) states that the objectives of the education system are to "instil in each child and young person the appreciation and importance" of "inclusion within society of different people with different personal characteristics", "the diversity of society", "cultural knowledge, identity and different official languages" and "knowledge about the Treaty of Waitangi and Te Reo Māori".

Section 61 states that charters must "reflect New Zealand's cultural diversity".

Section 99 states that every board should "reflect the ethnic and socio-economic diversity of the student body of the school or institution".

Section 145AAA states that its purpose is to "recognise the role of diversity in the provision of schooling, including the provision of Māori medium education".

Sections 171B and 222AD state that appointments to the councils of tertiary institutions and polytechnics should be made with "consideration to the ethnic and socio-economic diversity of the communities served by the institution/polytechnic"

Schedule 6, clause 16, states that a board must take all reasonable steps to "ensure that policies and practices for its school reflect New Zealand's cultural diversity and the unique position of Māori culture".

Employment Relations Act 2000

Sections 104 states that discrimination is ground for a personal grievance.

Section 105 states that the prohibited grounds of discrimination are those stated in s 21(1) of the Human Rights Act 1993, which include "sex, marital status, religious belief, ethical belief, colour, race, ethnic or national origins, disability, age, political opinion, employment status, family status, sexual orientation".

Evidence Act 2006

Section 85 states that a court may have regard to a witness' "cultural background" when deciding what is an "unacceptable question".

Section 95 states that a judge may make an order to prevent personal cross-examination of a witness having regard to "the linguistic or cultural background or religious beliefs of the witness".

Section 103 states that a judge may make a direction that a witness is to give evidence in an alternative way, having regard to s 103(3)(e), "the linguistic or cultural background or religious beliefs of the witness".

Family Court Rules 2002

Rule 416ZI states that a party to proceedings may make a request in writing to the court to "hear a person speak on a child's cultural background".

Family Violence Act 2018

Section 4 states that "responses to family violence should be culturally appropriate" and "responses involving Maori should reflect tikanga Maori".

Gambling Act 2003

Section 317 states that the integrated problem gambling strategy must include "independent scientific research associated with gambling, including (for example) longitudinal research on the social and economic impacts of gambling, particularly the impacts on different cultural groups".

Holidays Act 2003

Section 3 states that the purpose of the Act is to provide employees with minimum entitlements to public holidays for the "observance of days of national, religious or cultural significance".

Section 69 states that, in deciding whether to grant an employee bereavement leave, an employer must have regard to "any cultural responsibilities of the employee in relation to the death".

Health and Disabilities Commissioner Act 1994

Section 10 states that, in recommending a person for appointment as Commissioner, the Minister must have regard to "the person's recognition of social, cultural and religious values of different cultural and ethnic groups in New Zealand".

Section 20 states that the provision of services within the content of the code must "take into account the needs, values and beliefs of different cultural, religious, social and ethnic groups".

Section 30(c) states that one of the functions of an advocate is "having regard to the needs, values, and beliefs of different cultural, religious, social, and ethnic groups, to provide information and assistance to health consumers, disability services consumers, and members of the public".

Health Research Council Act 1990

Section 38 states the Council must include in every annual report, "a discussion of issues of social or cultural importance in relation to health research".

Human Rights Act 1993

Section 5 states that a function of the Commission "to promote racial equality and cultural diversity".

Immigration Act 2009

Section 270 states that "the Tribunal or court may appoint a cultural, medical, intelligence, military, or other special advisor for the purposes of giving advice in any proceedings before it involving classified information".

Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003

Section 13 states that a court or person exercising a power or conducting proceeding regarding a care recipient must exercise "proper respect for the care recipient's cultural and ethnic identity, language, and religious or ethnical beliefs".

Independent Police Conduct Authority Act 1988

Section 23 states that the Authority "may obtain information from such persons as it thinks fit, including, where it considers that cultural matters are a factor relevant to a complaint or investigation".

Law Commission Act 1985

Section 5 states that, in making recommendations, the Commission "shall take into account te ao Māori (the Māori dimension) and shall also give consideration to the multicultural character of New Zealand society".

Local Government Act 2002

Section 10(b) states that the purpose of local government is to "promote the social, economic, environmental, and cultural well-being of communities in the present and for the future."

Section 14 states that when making a decision "a local authority should take account of the diversity of the community, and the community's interests, within its district or region".

Marriage Act 1955

Section 20 states that, in proceedings regarding the marriage of a person 16 to 17 years of age, "a Family Court Judge may obtain a written cultural report".

Section 20(5) specifies that a cultural report means "a report that is about the applicant and that

covers an aspect or aspects of the applicant's cultural background, including the applicant's religious denomination and practice".

Museum of New Zealand Te Papa Tongarewa Act 1992

Section 8 states that the Board shall "have regard to the ethnic and cultural diversity of New Zealand, and the contributions they have made and continue to make to New Zealand's cultural life and the fabric of New Zealand society"; and "endeavour to ensure both that the Museum expresses and recognises the mana and significance of Maori, European, and other major traditions and cultural heritage".

National Civil Defence Emergency Management Plan Order 2015

Section 62 states that, effective welfare service planning under 62(2), should be "based on a good understanding of affected communities, including their cultural and demographic makeup, strengths and vulnerabilities".

Section 132 states that the underlying emergency public information management at a national level must "use a wide range of channels and media to reach as many people as possible, including culturally and linguistically diverse communities and people with disabilities".

Parole Act 2002

Section 111 states that, before recommending a person as a member of the Board, the Attorney-General must be satisfied that the member has the "ability to operate effectively with people from a range of cultures".

Public Safety (Public Protection Orders) Act 2014

Section 38 states that "a resident is entitled to be dealt with in a manner that respects their cultural and ethnic identity, language, and religion or ethical beliefs".

Radio New Zealand Act 1995

Section 8 states that the public radio company should "foster a sense of national identity by contributing to tolerance and understanding, reflecting and promoting ethnic, cultural, and artistic diversity and expression".

Resource Management Act 1991

Section 32 states that an evaluation report must "contain a level of detail that corresponds to the scale and significance of the environmental, economic, social and cultural effects that are anticipated from the implementation of the proposal".

Section 32(2) states that this assessment "must identify and assess the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation".

Sentencing Act 2002

Section 8 states that, in sentencing or otherwise dealing with an offender, the court "must take into account the offender's personal family, whanau, community and cultural background in imposing a sentence…"

Social Security (Childcare Assistance) Regulations 2004

Regulation 27(g) states that, in determining whether an out-of-school programme is properly run, the Chief Executive must consider "the programme's responsiveness to applicable cultural issues".

Substance Addiction (Compulsory Assessment and Treatment) Act 2017

Section 12 states that every person and every court exercising powers under the Act should exercise this power with "proper respect for the patient's cultural and ethnic identity, language and religious or ethical beliefs".

CURRENT BILLS BEFORE PARLIAMENT

Equal Pay Amendment Bill (103-2) - second reading

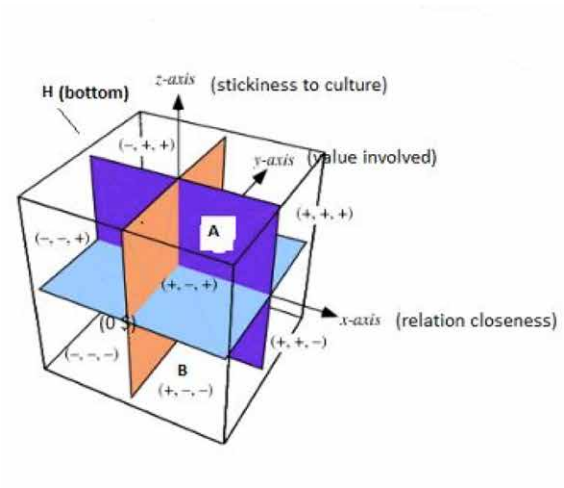
Clause 18 states that, in determining whether any work is or has been undervalued, consideration must be given to "any social, cultural or historical factors".

Privacy Bill (34-2) – committee of the whole house

Clause 18 states that the Commissioner must, in performing any statutory function or duty, and in exercising any statutory power, "take account of cultural perspectives on privacy".

Appendix 2: Dr Zhixiong (Leo) Liao, Senior Lecturer & Director of International Relations (Law), University of Waikato – 3D model

3-D Quandrant — analytical tool?



fn = f(x, y, z)+ r

Fn – nature of the transaction (to be inferred)
X – closeness of connection (blood, friendship …)
Y – value involved
Z – "stickiness" to traditional Chinese culture (time living in nz, "integration" …)
R (4D?) – interference factors (type/cause of transaction, gender, time lapsed, policy, understanding of law, history, pre/post conducts, other relevant circumstances?)

Source: Dr Leo Liao "Chinese Law and Culture in NZ Courtroom: for a More Consistent Approach" (presentation at NZAL Lawyers CPD event, Auckland, 2 September 2019).

Appendix 3: The Court of Appeal's discussion of the Chinese rule of law in *Kim v Minister of Justice*

The following is a more detailed analysis of *Kim v Minster of Justice* referred to above at paragraph [337].

PRC's criminal justice system

997 The Court referred to Ministry of Justice briefings to the Minister and the advice of Professor Fu Hualing from Hong Kong University on the criminal justice system in PRC.[1241] The system is "essentially inquisitorial" but reforms in 1996 and 2012 to its criminal procedure law have resulted in the incorporation of more adversarial elements.[1242] The Court of Appeal found that, prior to these reforms, the law did not provide the right to be presumed innocent until proven guilty, not to be compelled to testify or confess guilt, and to challenge the evidence of witnesses.[1243]

998 The Court of Appeal referred to its understanding of there being three parts to the criminal justice system in PRC, the Police, the Procuracy (or the office of the procurator/prosecutor) and the Court.[1244] The Procuracy is hierarchical, with the highest being the Supreme People's Procuratorate.[1245] The Court referred to the Supreme People's Procuratorate as being responsible to the National People's Congress (NPC) which, according to article 2 of the Constitution, exercises the "unified power of the people". The NPC is the legislature of the PRC and its Standing Committee exercises the role of the NPC when the NPC is not in session (the NPC is only in session once each year for around three weeks in March).[1246] Further, it stated that the Constitution of PRC allows for day-to-day exercise of power to be delegated to the Standing Committee – the "state organ for legal supervision, charged with investigating crimes committed by state functionaries… public prosecutions and supervising the application of enforcement of law by other legal institutions (including the police and the courts)."[1247]

999 The Court of Appeal noted:[1248]

> The Supreme People's Court is also responsible to the NPC and its Standing Committee. Judges are appointed and removed by various committees of the People's Congress. Selection is on the basis of ability and political integrity.

PRC courts are not independent

1000 At [217] the Court held:

> We accept Mr Keith's argument that the evidence before the Minister supported the conclusion that political influence in general, and the role of the Judicial Committee in particular, are pervasive in the PRC's criminal justice system. This political influence prioritises social policy objectives over individual procedural protections. The lack of independence of the judiciary is systematic. It is also structural in the sense that it is how the system is designed to operate, rather than being the consequence of poorly controlled human behaviour undermining the intended operation of the system, which was the issue in Kapri.

1001 The Court found that "We have no doubt that a trial before a tribunal subject to direct political influence by reason of the design of the system within which it operates would amount to a departure from the relevant ICCPR standard, constituting a denial of justice."[1249]

1241 *Kim v Minister of Justice* [2019] NZCA 209 at [188]–[191].
1242 At [188].
1243 At [188].
1244 At [189].
1245 The Procuratorate is a Soviet institution which combines the role of public prosecutor, as well as exercising supervision over the justice system.
1246 *Kim v Minister of Justice* [2019] NZCA 209 at [190].
1247 At [190].
1248 At [191].
1249 At [218].

The right to a fair trial

1002 The Court found that there was a risk of departure from the fair trial standards, justifying refusal of surrender to PRC.[1250] The Court held:[1251]

> We agree that the Minister could place some reliance upon the recording of the interrogations, although that is subject to our comments above in connection with the issue of torture — that those who torture can be expected to be sure that torture and its aftermath is not detected by such monitoring systems as there are, and that the recording of interrogations gives no comfort as to what happens outside the formal interrogation.
>
> But even were the monitoring of the interrogations effective, we do not think that this meets the concern that Mr Kim will be questioned in the absence of counsel. As Professor Fu notes, the questioning could extend over a period of months. And as is common ground, Mr Kim is obliged under the Criminal Procedure Law to answer questions relevant to the inquiry. It may be that although legally obliged to answer he will not face legal consequences for failing to do so, a fact of which he is now aware. But such legal niceties are very likely to be lost sight of within the human dynamic of an interrogation, especially when that interrogation may extend on and off over a period of months.
>
> In our legal system, the right to legal representation is seen as a necessary incident of the right to silence. We accept that it is conceivable that the right not to be compelled to confess guilt can be secured in other ways. But here, given the provisions of art 118, we do not consider that access to a lawyer before and after interrogation, and even the filming of the interrogation, is sufficient for this purpose. We are satisfied that the Minister should require an assurance that Mr Kim has the opportunity to have a legal representative present during interrogation. There is also an issue as to who that legal representative should be, give (sic) the information as to pressures brought to bear upon the legal profession in the PRC. That is another matter the Minister will have to address.

1003 These paragraphs are also relevant to the right not to be compelled to testify or confess guilt, referred to at [244].

1004 The Court of Appeal referred to the evidence of Canadian lawyer Clive Ansley, who said "detained people are not allowed access to a lawyer until the police and prosecutors have completed their investigation, by which time the accused has usually confessed." At [136], the Court held that "there was evidence that lawyers are not free to represent their clients without fear of retribution."[1252]

1005 With regard to the right to disclosure of evidence for defendants, the Court of Appeal said that the Ministry of Foreign Affairs and Trade had noted the "existence of procedural rules allowing the defence to apply for disclosure of evidence held by the prosecution helpful to their case," but also referred to commentator and international human rights lawyer David Matas' view that this right is difficult to exercise, when the defence doesn't know the evidence the prosecution holds and when the decision to grant evidence is discretionary.[1253] It held that there was no evidence as to how the discretion was exercised and that this was a "relevant inquiry given the material just traversed as to the lack of independence in the judiciary."[1254] It found that the Minister could seek assurances regarding the timing and content of disclosure in *Kim's* case, but had not done so.[1255]

1006 The Court found that the Ministry should have undertaken inquiries to determine whether defence counsel are able to "honestly and responsibly represent an accused person without fear of repercussion," and pointed to evidence of the rounding up of lawyers involved in human rights

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1250 At [257].
1251 At [254]–[256].
1252 Biddulph, Nesossi and Trevaskes, above n 282, at 65 note that:
> … the XI regime has launched a concerted attack on those criminal defense lawyers seen by the authorities as willing to provide an overly vigorous defense of their clients, with many subjected to political persecution through detention, arrest, torture, and criminal conviction … lawyers are often limited in what they can do in practice.

1253 *Kim v Minister of Justice* [2019] NZCA 209 at [238].
1254 At [238].
1255 At [238]. Biddulph, Nesossi and Trevaskes, above n 282, at 79 have noted that despite recent reforms, lawyers still have significant difficulty accessing case files and gathering evidence.

cases, and an offence under article 306 of suborning perjury[1256] that applies only to defence lawyers, not to prosecutors. The Court referred to claims by Mr Ansley that this had a "chilling effect on counsel's representation of an accused,"[1257] thereby depriving defendants of the benefit of legal representation.

1007 At [241], the Court referred to evidence from Professor Fu Hualing from Hong Kong University, who assisted the Ministry alongside the Ministry for Foreign Affairs and Trade in drafting the request for assurances that "few witnesses testify in courts in China," and are therefore not available for cross examination. It held "when Mr Kim's case is re-considered by the Minister, we would expect there to be a closer consideration as to how the procedural right to examine witnesses operates in practice, and whether there is in substance a right for the accused to examine witnesses." The Court also said that it expected consideration to be given to whether a specific assurance can be provided to ensure witnesses will be available for cross-examination can be provided.[1258]

1008 The Court concluded at [243] that, "on the material before the Minister it was not open to her to conclude that the assurances met the fair trial concerns in connection with these rights under the ICCPR."

Very high conviction rates in PRC

1009 In making her second decision, the Minister received further advice from officials, which contained advice from Professor Fu. In this advice, Professor Fu said that the high conviction rate in PRC was a combination of legal, political and cultural reasons. He said that PRC does not have a guilty-plea system, and that defendants are found not guilty through a trial. He also said that culturally, non-guilty verdicts are "an open challenge to the prosecutorial and police authority" and are "used with caution." Professor Fu said that where a not-guilty verdict is available, many are withdrawn by the prosecution at trial, and that alternatively, the prosecution may be given "direct or subtle pressure so as to compel a withdrawal."[1259]

1010 The Court quoted Professor Fu's advice:[1260]

> Politically all of the above takes place in a larger circumstance that prioritizes crime control. The objectives of procedural protection of rights in the criminal process, while having received significantly more attention in the recent years, still pales in comparison with the objective of maintaining stability through punishing crime. The court is largely an integral part of this larger system that is geared toward crime control.

1011 At [205], the Court stated:

> Professor Fu agreed with Mr Ellis' contention in the first judicial review that the PRC, along with Japan and Korea, has a conviction rate of over 99 per cent. In comparison, the domestic conviction rate in New Zealand is 82.5 per cent (or 90.7 per cent if you include diversions and discharges without conviction).[1261]

Torture

1012 At [275], the Court of Appeal held that there was "no evidence" that went before the Minister that "went so far as to conclude that murder accused were not at a high risk of torture". The Court held that there was insufficient evidence to support the fact that Mr Kim could be tried in Shanghai, and that the stage of the investigation as well as the strength of the case against him would reduce the risk of torture. Further, it held that the Minister erred in failing to address how the assurances given could protect against torture: when torture is unlawful but persists in PRC, its practice in PRC is concealed; videotaping of interrogations is selective and torture occurs outside the recorded session; evidence obtained by torture is frequently admitted in court; and there are disincentives

1256 *Kim v Minister of Justice* [2019] NZCA 209 at [230].
1257 At [239].
1258 At [242].
1259 At [204].
1260 At [204].
1261 Biddulph, Nesossi and Trevaskes, above n 282, at 77 also refer to the criminal justice system having a conviction rate of "over 99 percent".

for anyone to report the practice of torture.[1262] At [130], the Court referred to "reliable information before the Minister (such as in the Home Office *Operational Guidance Note*) that torture regularly occurs at detention centres." It held that "this suggests that torture occurs when the state says it should not, which raises an obvious question as to the effectiveness of an undertaking by the state that Mr Kim will not be tortured."[1263]

1013 At [215], the Court found that Mr Ansley was more qualified than Professor Fu as he had practised law in PRC, and the Court could not find any evidence in the material before it that Professor Fu had ever worked inside PRC's criminal justice system. At [129], when discussing the risk of torture, the Court said:

> Professor Fu's opinion seems to conflict in this respect with the opinions of international commentators and Mr Ansley. Whilst there is no challenge to the expertise of the international bodies or the expertise of Mr Ansley (rightly so as it seems), it is unclear what qualified Professor Fu to be treated by the Ministry as an expert on how the law is implemented in practice.

Extrajudicial killings

1014 Mr Ansley provided an affidavit in the High Court which contained a report that claimed to provide evidence of unlawful organ extraction from Falun Gong, and Mr Ellis for Mr Kim submitted that on the basis of this evidence, the Minister had before her evidence that between 60,000 and 100,000 political detainees from Falun Dafa have had their organs live-harvested, leading to their death. Mr Ansley's evidence also referred to evidence of Tibetans, Uighurs and house-Christians also being used for organ harvesting.[1264]

1015 Mr Ellis submitted to the Court of Appeal that these "state-sponsored gross violations of human rights ought to have been sufficient for the Minister, and the Judge, to conclude that Mr Kim cannot be extradited," irrespective of any specific assurances related to extra-judicial killing.[1265]

1016 The Court held that the Minister did not assess separate to the risk of torture, the risk of extra-judicial killing.[1266]

1262 *Kim v Minister of Justice* [2019] NZCA 209 at [275(d)–(f)].
1263 Biddulph, Nesossi and Trevaskes, above n 282, at 99, have written that "although torture is somewhat accepted as a reality in the way in which police conduct investigations, it is not officially condoned".
1264 *Kim v Minister of Justice* [2019] NZCA 209 at [159].
1265 At [160].
1266 At [161].

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