LawTalk
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Seeking a just transition

How lawyers can contribute to mitigating the effects of climate change

New Zealand Law Society
Te Kāhui Ture o Aotearoa

Contents

Our priorities for 2021

Tē tōia, tē haumatia
Nothing can be achieved without a plan, a workforce and a way of doing things

As I head into my final year as President, it is evident we are moving forward to a new 'normal' where we will be having to be adaptive and responsive to an uncertain external environment. This whakatauki speaks to the importance of having a plan and the resources to deliver.

Within this context, I am focusing on three important areas of work for the Law Society. These have the potential for significant and long-lasting changes to the profession, and Aotearoa more generally.

The first is changes to the rules that govern the conduct of lawyers; the second is the Independent Review into the future of the statutory framework in which we operate; and, the third is advocating for improvements to access to justice.

We expect changes to the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (RCCC) to come into force in the middle of this year. This follows extensive consultation with the profession. The Rules will include clear definitions of discrimination, bullying, harassment and sexual harassment and other unacceptable conduct, with a threshold for reporting to the Law Society. Each law practice will need to have a process for addressing complaints. In addition, each practice will nominate a designated lawyer who reports on complaints to the Law Society every 12 months. We recognise this is a significant change and we will be providing guidance to the profession in advance of these changes.

The changes to the Rules draw upon the recommendations of the Cartwright Report and the 2018 Legal Workplace Environment Survey. I'm grateful to everyone who has provided valuable feedback and helped shape these important changes.

We all want healthier, more respectful and inclusive work environments. Your engagement gives me confidence that the changes articulate a shared set of expectations to help and support culture change. I know that many of you have been working on changes at your workplace as well. If we all change a little, then the whole profession will change a lot.

The second element of my plan is the Independent Review. The Review is a timely opportunity to consider the optimal organisational and governance arrangements for the Law Society. I met with Minister Faafoi in late February, and he has provided useful feedback on the draft Terms of Reference. The next stage is consultation led by Steering Group Chair, Whaimutu Dewes, on the draft Terms of Reference. Following that an individual or organisation will be appointed to conduct the Review.

The Review is expected to take nine months and will include wide consultation before any recommendations are made.

And finally, I will continue to progress our work towards access to justice this year.

Our access to justice 'stocktake of initiatives' has been very well received by many of the leaders in the justice sector and within our profession. It revealed significant over-lap and repetition. We want to build on this and identify where the Law Society should be partnering with stakeholders and organisations. We also want to identify where we are uniquely placed to have the greatest impact in improving access to justice. We should all be concerned with ensuring the most vulnerable of consumers are protected through a proper functioning legal aid system, and so one area we will be focusing our advocacy is the triennial review.

This is an ambitious plan of action. But as I head into the final leg of the 1000-day marathon of my President run, I think it is a time to be ambitious. We need to keep moving forward. ■

Tiana Epati

Seeking a just transition

BY **EMILY SUTTON**

Welcome to the Autumn 2021 edition of LawTalk and our themed edition focussed on climate change and the law. I'm a passionate advocate for the unique and impactful role lawyers can play in climate activism.

Working at the New Zealand Law Society | Te Kāhui Ture o Aotearoa as a Law Reform and Advocacy Adviser has given me a close up view of the massive amount of volunteer energy and expertise that we have in our Profession for a range of causes.

On a global scale, the International Bar Association last year issued a call to arms on climate action urging lawyers to take on a leading role in "maintaining and strengthening the rule of law and supporting responsible, enlightened governance in an era marked by a climate crisis".

Here in Aotearoa, I've seen first-hand the fearless work of groups like Lawyers for Climate Action NZ Inc. who are leading the charge for Kiwis. As the group's President Jenny Cooper QC notes in our first feature article, "we're all human beings on the same planet and this should be everyone's number one priority to safeguard our future." If you are struggling to figure out how you can get involved in climate action then LCANZI is an excellent place to start.

There's no doubt that climate action is a big and complex issue – so we've made sure a range of different perspectives are reflected in this feature. Lawyers working on climate issues include in-house corporate teams, local authorities, litigators and law firms.

The role of lawyers is only likely to increase as the issue gains traction with more countries making declarations about the threat of climate change. We take a look at the legal enforceability of these declarations at a local and national level. The New Zealand government's declaration of a national climate emergency in December last year alongside the carbon neutral public sector promise by 2025 sends a clear message, but how does New Zealand fare against other countries action on climate issues?

Increasing awareness of climate change has triggered litigation challenging government and industries to act. Dr Sam McGlennon looks at claims being brought around the world and explores how these cases are impacting businesses. We hear from three different lawyers about how they're preparing for mandatory reporting of climate related financial disclosures.

Another significant regulatory change will be the impending Resource Management Act 1991 reforms. We hear how these may impact decision making at a local authority level from the Advocacy and Practice Integration Manager at Marlborough District Council.

Finally, we close our feature with a look at climate change through a te ao Māori perspective. Edmond Carrucan discusses how climate change will impact Māori identities.

In February the Climate Commission released their draft advice which proposes the first three emissions budgets for Aoteoroa, recommendations on our first emissions reductions plan, and finds that our Nationally Determined Contribution is not consistent with NZ's commitment under the Paris Agreement to limit global warming to 1.5C above pre-industrial levels.

However, the Commission is hopeful that if we take strong and decisive action to address climate change we can look forward to a "thriving climate-resilient and low emissions Aotearoa where our children thrive".

I would like to see us create clear pathways for students and young lawyers coming up to work in climate law. Now, more than ever, we need to work collectively and seize this opportunity to safeguard the health of our planet and our people. I'm proud to be a lawyer, and like so many others am seeking to play my part in this great challenge of our time. ■

SEEKING A JUST TRANSITION

The right to a sustainable environment

BY **JAMIE DOBSON**

Lawyers for Climate Action NZ are calling for protection of the environment to be woven into our legal and economic structures. A functioning legal system and economy can only exist within an environment that is capable of supporting human wellbeing. Therefore, our current laws and actions should be directed to reducing the impact of climate change and ensuring a just transition to a carbon neutral society.

When asked why lawyers should back efforts to reduce New Zealand's contribution to global warming, the answer from Jenny Cooper QC, President of Lawyers for Climate Action NZ Incorporated is simple – because everybody should.

"We're all human beings on the same planet and this should be everyone's number one priority to safeguard our future," she says.

"We're also stuck with some of the effects of global warming already, so no matter what we do now, we are going to need to have some adaptation."

LCANZI has begun pursuing the changes needed to ensure action against climate change in New Zealand is as effective as possible. This is to make sure New Zealand not only makes good on its promises in terms of limiting global warming, but also that those promises will achieve the changes needed to keep the consequences of global warming minimal.

A major step has been campaigning to include *the right to a sustainable environment* in the Bill of Rights Act 1993, a change that would have wide implications for New Zealand's lawmaking both retrospectively (in terms of interpretation of existing legislation) and prospectively. The aim being to weave stewardship for the environment into all public decision-making.

That campaign has yet to result in legislative change but LCANZI remains committed to the campaign and is optimistic that it will eventually be successful.

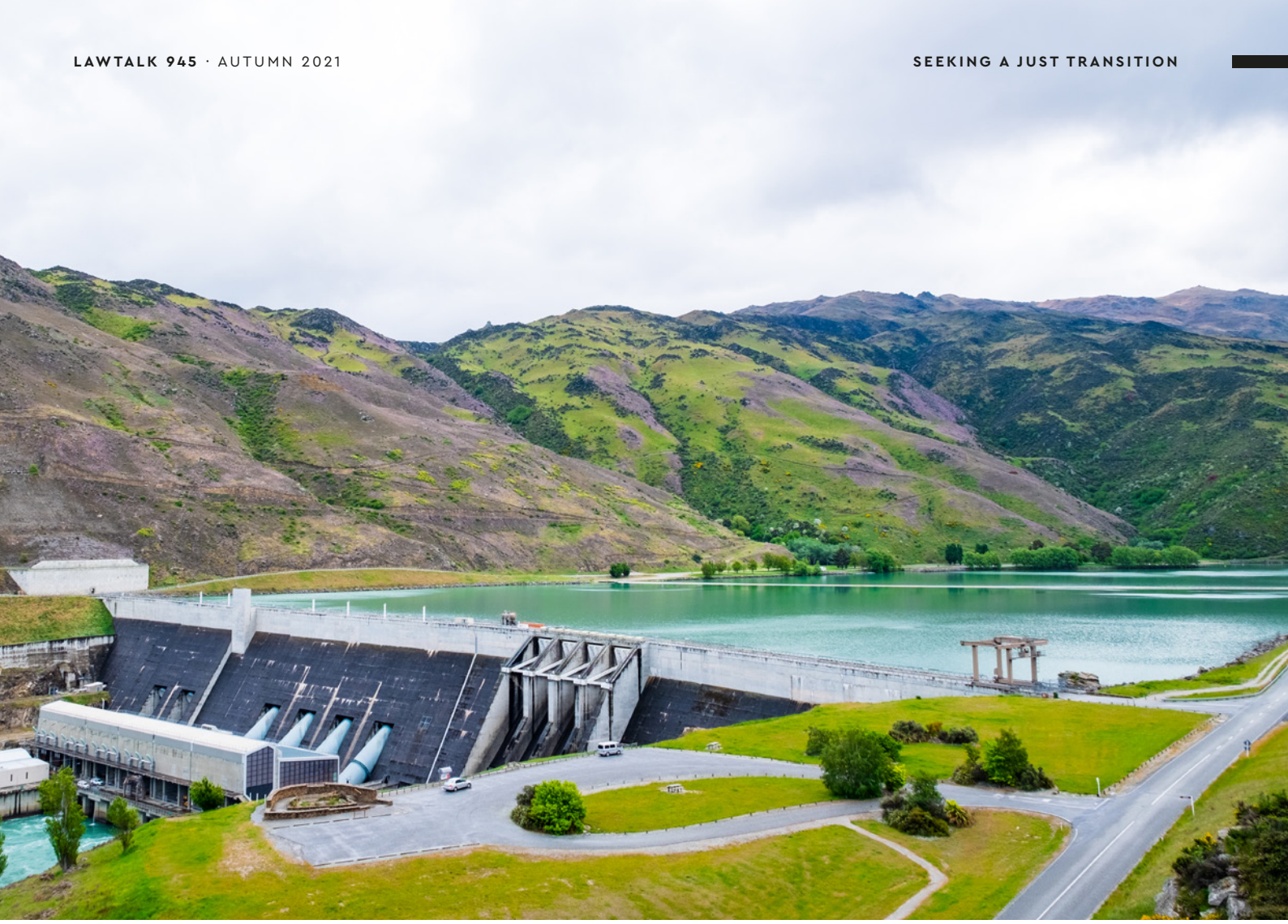
In the meantime, LCANZI has been engaged in consultation with the Climate Change Commission – the independent Crown Entity set up to advise the Government on climate action – over its draft advice to the Minister for Climate Change under the Climate Change Response Act 2002. Under the Act the Commission has been asked to provide advice on the first set of national emissions budgets, the strategic policy direction to achieve those budgets, and what New Zealand should commit to as a new nationally determined contribution (NDC) under the Paris Agreement.

As of February 2021, the Climate Change Commission released their first batch of advice for public consultation, which is open now until 28 March 2021. At the time of writing, LCANZI's submission is still being finalised, but on current plans LCANZI will be asking the Commission to make some significant changes to its advice.

"There are certainly many elements of the advice we agree with and welcome", says Jenny.

"But we question whether the overall level of ambition is high enough. While we are still finalising our views, our current assessment is that the budgets proposed in

About the Paris Agreement: in 2015, 196 nations meeting in Paris for the UN Climate Change Conference bound themselves to limit their greenhouse gas emissions to prevent global temperatures from increasing more than 1.5(deg)C above the temperature benchmark; the ordinary average temperature set before the beginning of the industrial revolution.



the draft are too high to meet the purpose of the Act of contributing to the global effort to limit the global temperature increase to 1.5°C or to meet New Zealand's Paris Agreement obligations."

As well as how high or low future emissions should be, another key issue raised by the draft advice is how much effort New Zealand should make to reduce its emissions domestically, as opposed to paying for emissions reductions overseas. LCANZI is supportive of the idea of New Zealand helping less wealthy countries to decarbonize. However, it considers that this should be in addition to, not instead of, New Zealand doing its fair share at home.

"New Zealand is extremely well placed to achieve rapid decarbonization thanks to its abundant renewable energy," says Jenny.

"There is simply no excuse not to cut domestic emissions to at least the global average required to keep warming below 1.5°C. In fact, we should be aiming to do far more to reflect that our historic and current emissions are well above the global average and also that many other countries are less well off and will find it more difficult to transition to zero carbon."

To be **"Zero Carbon"** is to have produced carbon emissions equally offset by carbon sinks (which remove CO2 from the atmosphere). This is the target for New Zealand to reach by the year 2050. In current terms, this means reducing net emissions of greenhouse gases (except biogenic methane) to zero, and reducing biogenic methane (from plants and animals) to 24–47% below 2017 levels by 2050.

Advocacy for science

LCANZI sees the role of lawyers in the climate debate as vital. It's difficult to dismiss a group of senior lawyers as "a bit fringe" when weighing in on what is understood now to be such an important debate.

"As lawyers, part of our training is to pick up scientific expert evidence and explain it in layperson's terms to judges, juries and clients.

"If we can also come into the debate and support the likes of climate scientists in what they're saying, maybe that will help us communicate to different parts of the population and drive action."

In 2019, they weighed into the fray with a letter calling for the amendment to NZBORA, addressed to the Minister for Climate Change, the Minister of Justice and the Attorney-General. Signed by 60 Queen's Counsel, it stated:

"... the rights to peaceful assembly, freedom of expression, manifestation of religion and freedom of movement all presuppose that there will be a safe environment within which they may be exercised."

The design of the Bill of Rights aims to reflect the set of culturally normative behaviours fundamental to New Zealand. Including the right to a sustainable environment in that line-up would ensue in significant changes across New Zealand's legal landscape. Those making new laws would be required to vet them against compliance with the right. Existing legislation would have to be interpreted in a way that is consistent. And public decision makers would be bound to engage with whether their actions are justified if their decisions affect the right.

"This is instilling what has been coined as a 'climate lens' over decision making processes," Jenny says. And as those decisions around rules adapt, so too will the treatment of our environment as resources increase in scarcity.

"We will need new rules to manage that, and on the other hand of course, disputes will arise from that scarcity. Lawyers have an important role to play in ensuring a just transition can occur.

"This includes, of course, maintaining the rule of law, human rights, Te Tiriti o Waitangi, and the stability of New Zealand's democracy. In short, making sure that we're doing things in a way that is fair, equitable and orderly."

Pushing what is fair and equitable in the realm of business has already begun. Directors are the first group of actors who must be attuned to the material risks their business decisions pose to climate change. The Zero Carbon Amendment itself permits directors to consider the goal of New Zealand being "zero carbon" by 2050 in their decision making. Meanwhile, mandatory climate-related financial disclosures are looming.

There is also a need for legal support beyond the boardroom. LCANZI's pro bono panel is set up for community groups involved in local-based climate action initiatives.

"So far, most of this has been advising on the legal mechanisms these groups have to achieve change in their area, not only in environmental law with the likes of the RMA, but also in public law," Jenny explains. The realm of government, starting at the local level, is realizing its obligations through these sorts of changes. The recent High Court judgment overturning the Thames-Coromandel District Council's decision not to sign a national declaration on climate change due to its unlawful decision-making process is an early example, while central government is in the crucial development phase of how New Zealand reaches zero carbon by 2050.

With the introduction of the Climate Change Commission and its first draft report, the transition to a zero-carbon society is now on the cards. How we value the environment; how laws change and how businesses react to them, particularly industries with larger emission contributions, will demonstrate New Zealand's appetite for transition. Jenny Cooper QC and LCANZI see lawyers as crucial in helping that transition start in the best possible direction. ■

Lawyers for Climate Action NZ has members in all areas of the profession all over Aotearoa. Anyone holding a law degree is eligible to join as a full member – a practising certificate is not required. Associate membership is also available for law students and non-lawyers. For more information on LCANZI, how to join, or to make a donation, go to *www.lawyersforclimateaction.nz*

SEEKING A JUST TRANSITION

The legal enforceability of climate change declarations

BY **AIMEE DARTNALL**

THE COURT HAS SENT A STRONG signal that local authorities signing up to the Local Government Leaders' Climate Change Declaration ('Local Declaration') could expect legal consequences if they don't follow through on their commitments. This could potentially be extended to cover Parliament's recent declaration of a climate emergency.

Aimee Dartnall

The case

Last December in *Hauraki Coromandel Climate Action Incorporated v Thames-Coromandel District Council* [2020] NZHC 3228, Justice Palmer upheld Hauraki Coromandel Climate Action ('HCCA')'s application for judicial review of the Council's decision to not approve Mayor Sandra Goudie signing the Local Declaration.

The Local Declaration was drafted by Local Government New Zealand (LGNZ) and circulated to mayors and regional council chairs in the lead up to COP21 in December 2015. It called for an urgent and holistic approach to address climate change and included a number of 'Council Commitments', including to develop and implement ambitious action plans to reduce greenhouse gas emissions. By 2017, around 65 mayors and chairs signed the Local Declaration.

The exact legal status of the Local Declaration was unclear. LGNZ thought that it was a non-binding leaders' declaration. In a report to the Council, Mayor Goudie stated that the Local Declaration is "a potentially binding document as it *commits* the Council to developing and implementing an 'ambitious plan'." The Mayor believed that signing the Local Declaration would come with enforceable obligations to take action on climate change. She suggested that the Council resolve to receive the report and continue to take action, following a robust decision-making process, in response to climate change.

Another Councillor countered this proposal and moved that the Council approve the Mayor signing the Local Declaration. That motion was lost. Instead, the Council adopted the Mayor's suggestions. HCCA argued the Council should have approved the Mayor signing the declaration. They agreed with the Mayor that signing the Local Declaration would give rise to a legally enforceable legitimate expectation that the Council will follow through on its climate change commitments. Palmer J agreed with HCCA and agreed with their submission that the Council did not follow proper decision-making processes before reaching its decision, making the decision unlawful.

His Honour ruled that "decisions about climate change deserve heightened scrutiny on judicial review, depending on their context" and that "the potential and likely effects of climate change, and the measures required to mitigate those effects, are of the highest public importance". He concluded that "the intensity of review of decisions about climate change by public decision-makers is similar to that for fundamental human rights. Depending on their context, decisions about climate change deserve heightened scrutiny. That is so here."

New Zealand courts take a wide view of the extent of the powers, privileges and duties that could be subject to review, which is designed to curtail potential abuses of power. In this case, Palmer J found that the rights and duties of citizens and ratepayers could be affected by the decision to sign (or in this case, not sign) the Local Declaration, making it reviewable. He also found that the decision was important enough to trigger the Council's Significance and Engagement Policy, which wasn't followed before making the decision.

The courts' position on climate change policy

This isn't the first time courts have considered the justiciability of decisions involving climate change. In *Thomson v Minister for Climate Change Issues* [2018] 2 NZLR 160, Justice Mallon considered whether the Minister was wrong not to re-evaluate the government's 2050 target for reducing greenhouse gas emissions in light of the fifth Assessment Report ('AR5') of the Intergovernmental Panel on Climate Change ('IPCC'). AR5 was published in stages between September 2013 and November 2014 and is the most comprehensive assessment of scientific knowledge on climate change since AR4 was published in 2007.

After an extensive review of

New Zealand's climate change commitments, both internationally and domestically, Mallon J agreed that the Minister would be obliged to consider whether AR5 materially alters the information against which the existing 2050 target was set and whether a review is required.

This is in line with other courts around the world which have recognised that decisions on climate change are and should be subject to judicial review.

What does this mean for decision-makers?

The question now is whether this will extend to Parliament's recent declaration of a climate emergency. In her speech supporting her motion, Prime Minister Jacinda Ardern said that the declaration "now serves as a directive to all aspects of the public service around the urgency that we as a Government require and the urgency that we require around action." Ministers and government officials are expected to put climate change at the forefront of their minds when making decisions.

This is at odds with the Prime Minister's announcement in July 2019 that "a declaration in Parliament in itself actually doesn't functionally change what's being done on the ground", which is echoed in National's current objections to the Parliamentary declaration. Practical and sensible solutions are needed, said National's climate change spokesperson, Stuart Smith MP, not "extreme policies".

But the Prime Minister's current approach is in line with the court's attitude towards local government commitments. Local authorities have the choice to sign up (or not) to the Local Declaration. Once they do, they may be legally bound to follow a list of binding Council Commitments, although these are likely to be interpreted in the context of the general purpose and functions of local government in the Local Government Act 2002, including economic considerations. Even if they don't sign the Local Declaration, they may still be obliged to consult or consider consulting, their constituents before making decisions on climate change policy and action.

The status of the Parliamentary declaration is less clear cut. Parliament has approved the declaration and in a sense the directive to put climate change to the forefront of Ministers' minds when making decisions. But this is much more abstract than a pledge to adhere to a prescribed list of commitments.

The potential success of a judicial review claim will depend on the nature and circumstances of an individual case. Non-compliance with either declaration is unlikely to be fatal on its own except in the most extreme cases. It is only one criteria that decision-makers must consider. It will be an important one, but it will not necessarily act as a trump card against all Ministerial decision-making. Many other factors will be at play and these will often be embedded in the legislation empowering the Minister to make the decision. Climate change considerations will not give Ministers carte blanche to ignore considerations required by Acts of Parliament or to make unreasonable decisions.

The overhaul of the Resource Management Act may change where climate change sits in the hierarchy of decision-making considerations for both central and local government, particularly if the Government goes ahead with the Managed Retreat and Climate Change Adaptation Act. For example, the Act would change the way local authorities deal with infrastructure management by elevating climate change adaptation to the top of the list of considerations for decisions in coastal areas. For now, the priority of climate change is unclear but decision-makers at all levels should be alive to the possibility of a successful legal challenge if they refuse to factor it into their decision-making at all. ■

The declaration "now serves as a directive to all aspects of the public service around the urgency that we as a Government require and the urgency that we require around action"

Aimee Dartnall is a Solicitor at Wellington based firm Franks Ogilvie. Her expertise is in local government regulations as well as the Sale and Supply of Alcohol Act 2012. Aimee has worked with trusts, Resource Management Act issues, and has growing expertise in litigation. Aimee has appeared in a number of High Court cases, including for judicial review and Marine and Coastal Area (Takutai Moana) Act 2011 claims, as well as in the District Licensing Committee and the Court of Appeal.

Since this article was written, Franks Ogilvie has been instructed by Thames-Coromandel District Council in this matter.

SEEKING A JUST TRANSITION

Climate lawfare

Business in the firing line

BY **DR SAM MCGLENNON**

In brief

Litigation is gaining traction as a new and promising means to force adequate corporate responses to the climate crisis. Legal activists view this as the climate equivalent of the moment when litigation began winning concessions from big tobacco.

The climate remains a new frontier of practice. Courts globally remain in a period of legal testing on climate grounds, with rapidly evolving subject matter and a case history accumulating in real time. These factors place us in the midst of a very exciting decade in legal history, with an undeniable thrill of the unknown.

For the businesses involved in defending, settling or positioning to avoid climate lawsuits, however, there can be no doubt about how dangerous litigation risk has quickly become.

The state of play

A survey in late 2019 counted a cumulative, global total of 1400 climate-related litigation cases, with annual case volumes experiencing a sharp uptick from 2007 and a further jump from 2016. More than 1000 of those cases have been filed in the United States, with – by this count – 18 here in New Zealand and another 104 in Australia (the second highest number globally).

The vast majority of these climate cases have targeted governments and their agencies. Some cases have been grandiose in scope, for example demanding that governments up their ambition in reducing national

Dr Sam McGlennon

emissions. In 2015, Sarah Thomson, then a Waikato law student, made a Statement of Claim against the Minister of Climate Change Issues to do just that. It failed, but the case Ms Thomson's mimicked – filed by Urgenda, a Dutch NGO, against the Dutch Government that same year – was ultimately successful. Just last month, in February 2021, a coalition of NGOs won a similar case against the French Government.

Other cases against government implicate business, however, by challenging the approval or consenting of particular projects. An iconic example is the legal challenge to the expansion of Heathrow Airport, which was upheld by the Court of Appeal in February 2020, then ultimately denied by the Supreme Court last December. (It is still not guaranteed that the project will proceed.)

Globally, by late 2019, there had been 135 cases where businesses were named as defendants. These came predominantly, though not exclusively, against mainstays of the energy industry, as well as extractors of other natural resources.

Strictly speaking, the legal success rate of these lawsuits has been relatively low, with many cases successfully defended. That in itself does not tell the whole story. Like all legal battles, these climate cases are costly to defend (financially and reputationally). Some cases are settled in favour of the claimants, creating a victory in all but the strict legal sense. And in the instances where cases do win a legal victory, the consequences can be severe.

A sign of the stakes comes via the Californian utility company, Pacific Gas and Electric, which in 2019 became widely regarded as the first 'corporate casualty of climate change', after it filed for bankruptcy in light of legal liabilities for its role in sparking various Californian wildfires between 2015-18. While it ultimately managed to resolve these liabilities with a $25.5bn payment in mid-2020, experts suggest the utility remains exposed to similar liabilities for future wildfires.

A case history accumulating

Claims against business are being launched by an expanding array of litigants, who tend to make one – or more – of four broad demands (see accompanying graphic). Several recent and current cases serve to illustrate the variety on show.

In 2018, Mark McVeigh launched a lawsuit against his Australian superannuation provider, REST, for 'failing to have, and failing to disclose, strategies to deal with climate-related risks' relevant to his retirement savings. This case was notable for the customer-provider relationship underpinning it. In November 2020, the case was settled out of court, with REST acknowledging climate change as a 'material, direct and current financial issue' for its activities, and promising alignment with global best practice in identifying, considering, mitigating and disclosing the climate-related risks to its portfolios.

Local and regional governments have also been active in litigating against business. In 2018, the Mayor and City of Baltimore sued 21 members of the oil industry, noting the City's vulnerability to rising sea levels and flooding, and seeking damages for costs already borne and expected in future. Attorneys General from a host of other U.S. states, including California and New York, have signed an amicus brief

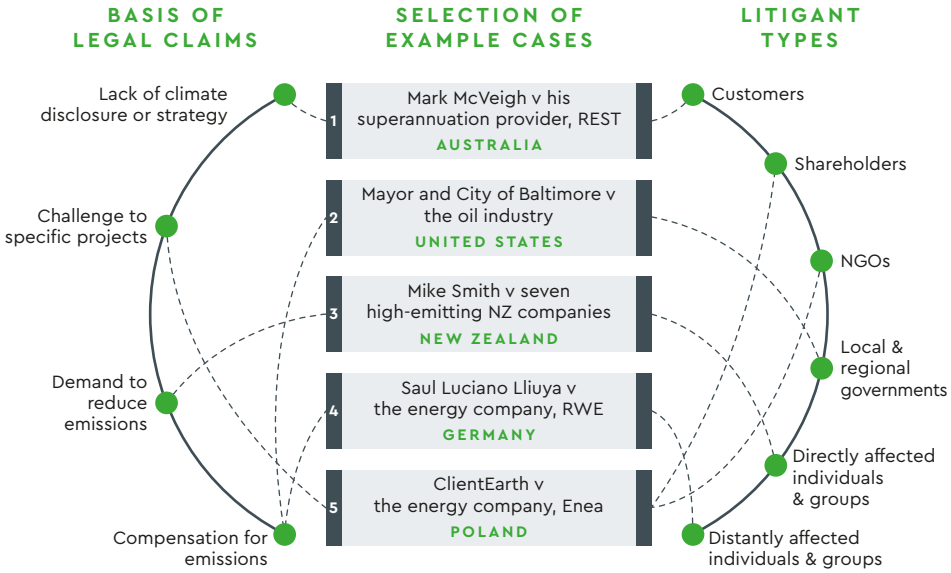
in support of the lawsuit (as well as a comparable one filed by Rhode Island against the same defendants). The Baltimore case is currently before the Supreme Court, not on its merits but instead tangled up in a question over the appropriate jurisdiction to hear it.

Perhaps one surprising climate lawsuit is the case of Saúl Luciano Lliuya, a Peruvian farmer from Huarez, who sued a giant German energy company, RWE, for its share of cumulative historical emissions (calculated to be 0.47%). Those emissions have contributed to melting the Andean glaciers above his farm, threatening it with flood damage. The case is open and ongoing, currently awaiting Covid-19 restrictions to lift so experts can visit the plaintiff's farm and adjacent area. However, an independent study by University of Oxford and University of Washington scientists recently supported the claim by concluding that human activity had caused 'at least 85 percent' of glacial melt above Huarez.

Closer to home, several NZ businesses have also begun to feel the scrutinising gaze of the court. The most high profile case comes courtesy of Iwi Chairs' Forum's climate spokesperson, Mike Smith. Mr Smith filed a claim – in his personal capacity – against seven NZ businesses with large emissions footprints, including Fonterra, Genesis Energy and Z Energy. In March 2020, the High Court struck out two of the three causes of action in the suit, but was unwilling to strike out the third, which proposed that the defendants had failed the plaintiff in a novel 'duty of care'. If parties opt not to appeal the High Court's decision, the merits of this third cause of action could be determined at trial.

Collectively, these cases illustrate how courts are testing legal arguments on climate grounds. Litigants are pursuing multiple potential business vulnerabilities in multiple jurisdictions. Successful cases seem likely to unleash a host of 'chaser' lawsuits leveraging any new precedents, as well as setting business scrambling to reposition their activities and strategies.

CLIMATE CASES: WHO'S TARGETING WHO, AND WHY?



Implications for everyone

Business is under increasing pressure to account for its past activities and to publicly convince us of its compatibility with a carbon-affected, carbon-constrained, world. Any business that has not been paying heed risks a tightening noose. And the litigation risk is not only real, but urgent.

There is a clear intention from a wide range of stakeholders to use the law to challenge previous, current and future corporate activity. Some of these cases have resulted in legal victories, while others have been successful in other ways. Legal advisory services, including Lawyers for Climate Action here in NZ, have sprung up to deploy their skills in pursuit of future cases as they are needed. As a side-note, in February 2021, climate advocates – with the support of Lawyers for Climate Action – noted in a presentation to Auckland Council that the latter could face legal action for failing to adequately reduce the region's emissions.

As New Zealand's Chief Justice, Helen Winklemann, and colleagues articulated in their working paper 'Climate change and the law', climate is shifting from being an *ethical* issue to a *financial* issue. That shift triggers a variety of legal obligations for both companies and their directors, whose responsibilities go hand in hand with the material and financial risks of the companies they oversee. For businesses, the urgent challenge is to expand their thinking about, and augment their responses to, the variety of climate risks they face.

In closing, climate litigation's role in altering our future course is currently unknowable. The ultimate verdict on business' responsibilities on climate will emerge not just from the world's courtrooms, but from the corner offices of financial stability agencies, the halls of government, and the boardrooms of business themselves. The waves of change in each of these places are running together to recalibrate business behaviour, both here in NZ and elsewhere around the world.

In that sense, it may not matter how much of the change in business behaviour will be attributed to litigation. There will certainly be headline-grabbing instances when it plays the hero role, and likely many others when the mere threat of litigation effectively shuffles business along the path to wiser, more future-oriented corporate behaviour. A safer climate than the one we're currently headed for is the only real end game. ■

Dr Sam McGlennon is the New Zealand Associate for BWD Strategic, based in Whaingaroa/Raglan. He is a climate educator and advises New Zealand and Australian businesses on climate risk, strategy and reporting, as well as modern slavery.

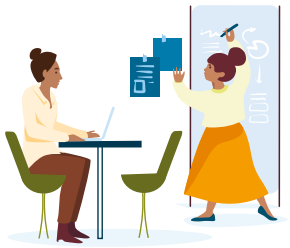
SEEKING A JUST TRANSITION

Preparing for climate-related financial disclosures

BY **MORWENNA GRILLS**

Organisations will be expected to report against four thematic areas that represent core elements of how organisations operate

Governance – The Board's oversight of climate-related risk and opportunities and management's role in assessing and managing those risks and opportunities.



Strategy – Identifying the climate related risks over the short, medium to long term and their impact on the organisation and its future plans.

Risk Management – Describing how the organisation will manage the identified climate-related risks, including from a regulatory perspective.

Metrics and Targets – Measuring how the organisation is tracking against the identified climate-related risks and opportunities.

Last year Climate Change Minister James Shaw announced that New Zealand is aiming to become the first country in the world to make climate-related financial disclosures mandatory.

"To be first in the world to introduce mandatory reporting on the potential financial impact of climate change is a major milestone and a real challenge," says Nicola Swann, Partner at Chapman Tripp.

"Having worked in the UK I know that many countries are gearing up to bring in reporting based on the recommendations of the Taskforce on Climate-related Financial Disclosures (TCFD) which were made in 2017. The difference in Aotearoa is that we are the first, with the UK also now having announced its own regulation, to make this a legal requirement."

The TCFD grew out of a meeting of G20 Finance Ministers and Central Bank Governors in 2015. It was established to help avoid major shocks to the global economy from unpriced climate related financial risk, and identify the information needed by investors, lenders and insurance underwriters to appropriately assess and price climate related risks and opportunities.

There are around 200 entities in New Zealand that will be required to produce climate-related financial disclosures. These include:

- All registered banks, credit unions, and building societies with total assets of more than $1 billion.
- All managers of registered investment schemes with greater than $1 billion in total assets under management.
- All licensed insurers with greater than $1 billion in total assets under management or annual premium income greater than $250 million.
- All equity and debt issuers listed on the NZX.
- Crown financial institutions with greater than $1 billion in total assets under management.

The Government is seeking to introduce mandatory reporting from 2023 at the earliest. Some organisations are well ahead, already voluntarily publishing climate related disclosures. Others are just starting to understand what's required of them, and some are yet to even begin considering the impact climate

change will have on them, rather than their own impact on climate change via their GHG emissions, which has been the traditional way that businesses have engaged with climate change.

So, what can lawyers be doing to support organisations preparing for this new regulation?

Role of lawyers

Meridian Energy was one of the first organisations in Aotearoa to start reporting against the TCFD framework in 2019. General Counsel Jason Woolley and Head of Sustainability Tina Frew say their teams have worked closely together to support the organisation to make these disclosures.

"Our sustainability team has led the organisation on climate-related disclosures. Our role as in-house counsel is to work closely with them, look at the proposed disclosures and apply rigour to ensure that we are fulfilling what's required and expected of us," says Jason.

"As we have looked to grow and build out the detail of the climate-related disclosures we make each year we've found it's been important to engage early with key people across the whole organisation to ensure we have done the work necessary to back up the disclosures we propose to make. This hopefully puts us in a good position to ensure we're ready for when the regulations come into force."

▲ Nicola Swan

▲ Tina Frew

▲ Jason Woolley

Over at Air New Zealand, Senior Legal Counsel, Sam Bailey, has had a similar experience as his organisation prepares for the regulations to come in.

"My team has been involved in looking at the TCFD framework to help the business understand what they have to do from a regulatory perspective.

"It's been a really interesting exercise to switch how we've traditionally thought about climate change. Like most businesses, we're used to considering the impact that our business is having on the climate but the TCFD framework flips that lens and is asking us to identify and prepare for the impacts that the climate will have on our business."

Experienced climate risk lawyer Nicola Swan of Chapman Tripp sees the legal profession playing a key role in tackling climate change.

"Lawyers have a responsibility to help their clients respond to the challenge of climate change. For example, thinking about climate change when drafting contracts, particularly those that contain supply or pricing commitments for many years to come.

"As a profession we need to upskill on climate change risk and regulation, as this is increasingly impacting all areas of the law."

Main challenges with TCFD reporting

Both Meridian and Air New Zealand's legal teams agree that the TCFD framework itself isn't hugely complex, with the four pillars of reporting allowing quite a bit of flexibility for what to include. However, there are some challenges:

Modelling

Scenario modelling is an important part of the work that needs to be done to quantify the impacts of climate

change on your business.

"We use climate science and modelling to understand what's coming down the track," says Jason at Meridian.

"As a retailer and renewable electricity generator with a number of hydro stations and wind farms, understanding as much as we can about the weather is a core part of our business so we have some great people with highly skilled expertise in this area."

For Air New Zealand, Sam admits it's been more challenging.

"There are really two key challenges," says Sam.

"The first is around educating businesses to identify climate-change related risks. Businesses are used to looking at risks in the short term but are not quite as good at projecting what will be happening in five to ten years' time and beyond – which is when many of the impacts of climate change will begin to manifest. It's a real shift in how you look at your risk horizon.

"The second challenge is around how you go about quantifying those risks. There is a significant amount of modelling of forward-looking data that is required to do this. Many businesses will need external help to do that, and I can see that this will be a significant challenge especially in the first few years of reporting against the TCFD framework."

Nicola Swan agrees that finding in-house expertise in modelling will be challenging.

"The government is aware that many organisations will need help in undertaking physical risk scenario analysis to help them prepare their climate-related financial disclosures.

"We need to get better at forecasting business impact in ten – twenty years' time."

Businesses are used to looking at risks in the short term but are not quite as good at projecting what will be happening in five to ten years' time and beyond

Getting cross-organisational buy-in

"One of the key things we've learned in preparing for reporting is that it requires a broad cross-functional group to provide input," says Sam.

"Meaningful disclosures will rely on every business unit providing input to ensure you've considered all material risks. This kind of intense business analysis can be time consuming so be prepared."

At a Board level, Chapman Tripp has been helping directors work through their responsibilities under the governance pillar.

"There is already a focus on directors to be aware of and to lead on managing climate related financial risk," says Nicola.

"We've been working with the Aotearoa Circle to provide practical advice for directors to manage this risk as we've seen how important it will be for directors to upskill in this area."

The biggest risk is not doing it

When Meridian came out in 2019 with their first round of reporting under the TCFD framework for Climate-related Financial Disclosures many were impressed they'd jumped on board so early. At that stage there was no guarantee this would become the norm for New Zealand, let alone a regulatory requirement. When asked if there was a risk in forging ahead Jason turns that

question on its head.

"The bigger risk for us was probably not picking up the recommendations of the TCFD and giving the reporting a go. It can feel uncomfortable making disclosures based on forecast information that will almost inevitably change, but for us it would have been more uncomfortable not to adopt the TCFD framework and start using it. Sustainability is at the core of what makes Meridian who we are, so it made absolute sense to run with this."

Following seven years in London Nicola can see the increasing global pressure being placed on organisations to play their part in the fight against climate change.

"Even without the TCFD framework being made mandatory, most organisations would want to be looking at how climate change will impact them. Organisations need to understand that climate risk is also financial and reputational – the best indicator of your future litigation risk from climate change is what your stakeholders are thinking about the issue and you want to be on the right side of this one."

The opportunities TCFD reporting can bring

Head of Sustainability at Meridian, Tina Frew says the reaction to their first Climate-related Financial Disclosures has been positive.

"Investors have been pleased to see us taking a responsible approach and getting on board with TCFD before it becomes mandatory. More than ever organisations are looking at taking a sustainable approach, otherwise investors are turning away."

Even just doing the work to prepare for reporting on climate risk disclosures has been beneficial for Air New Zealand.

"It's been a really useful process to go through to look at what strategies we need to put in place to make us more resilient to the impacts of climate change" says Sam.

"Identifying and quantifying the risks climate change poses on us as a business will feed into what strategies we adopt over a medium and long term. For example, this work helps to support decisions around sustainable alternative fuels as well as fleet efficiency and looking at next generation aircraft."

Advice for those preparing for climate related disclosures

"From an in-house perspective start early," says Sam.

"It takes time to get where it needs to go. Make sure you have the right people in the room from the start – the decision makers are key. Learn lessons early so when mandatory reporting (and enforcement) comes in you've got a good set of reporting already to hand.

"For those coming in from the outside – be patient! In-house teams are pulled in every direction so provide strong guidance and be flexible."

At Meridian, Tina says the best advice she has is not to do it alone.

"Talk to others and work out what will be best for you. Look at examples. Whilst the reporting still feels really new there are people who are well versed in this area and happy to share their knowledge and experience."

Jason agrees that using your networks is important. He also says people need to recognise it will be hardest the first time round.

"The reporting will get easier year on year as people become more comfortable with the process. Our first year was really challenging – now we have a benchmark and figures to compare against having published two reports so far."

From her experience, Nicola's advice is also to start early.

"The more businesses can dedicate resource to thinking through the implications of climate change the better. The earlier you start planning the better prepared you will be and may potentially lessen any financial impact climate change will have on you." ■

SEEKING A JUST TRANSITION

Climate Change and the RMA

A Sea Change Has Begun

BY **HANS VAN DER WAL**

Climate change is currently one of the hottest environmental topics, but this is not reflected by how the Resource Management Act 1991 (RMA), our main environmental statute, has been dealing with it. The Government has recently announced it is to repeal the RMA, replacing it with three separate Acts. However, that doesn't mean reforms won't be happening between then and late 2022 (the earliest the new legislation could come in).

In fact, a key aspect is set to change on 31 December this year (unless an Order in Council delays it), ushering in a sea change in natural resources and planning law.

For environmental management and planning purposes there are two separate, but important aspects of climate change:

1. **Effects on climate change** – this refers to activities that discharge greenhouse gases into the atmosphere, like burning hydrocarbons and livestock farming. These activities directly contribute to climate change through those discharges, while activities that fuel the demand for these activities, contribute indirectly. Others, like deforestation, reduce uptake of greenhouse gases from the atmosphere, thereby likewise increasing greenhouse gases, while tree planting will do the opposite. It is these activities that are the focus of efforts to slow and eventually stop climate change (hopefully).
2. **Effects of climate change** – these are the effects caused by climate change. Climate change will change the setting in which activities occur that Councils (regional and district/city) are seeking to manage through resource consents and planning documents (plans containing the rules and policies for resource consents). For example, rising sea levels or more intense and frequent flooding caused by climate change will make low-lying riverside and coastal areas unsuitable for building in the future. Increased droughts and higher temperatures may mean certain types of farming will become unviable or require more irrigation water.

Current status

Surprisingly, under the current law, sections 70A, 104E and 104F RMA (introduced in 2005), confine Councils to considering only one tiny aspect of the effects on climate change – the greenhouse gas emission-reducing effects of renewable energy proposals. For all greenhouse gas emissions themselves, the effects on climate change must be disregarded when preparing planning documents and processing resource consents. Supreme Court authority holds that this also extends to activities likely to cause greenhouse gas emissions indirectly, like mining coal.

As a result, climate change-focused "sustainable" initiatives like converting to electric vehicles, or planting to promote carbon uptake, have been relegated largely to the sphere of public relations and personal moral duty, playing almost no role under the RMA. Whether a proposal will indirectly increase or reduce greenhouse gas loadings in the atmosphere is currently all but legally irrelevant under the RMA.

Only the effects of climate change, the other key aspect of the climate change hot topic, have been something that Councils could manage through plans and resource consent processes under the RMA. It is already a matter to which section 7(f) RMA requires them to have particular regard, even if this stops short of the national importance status accorded by section 6 to issues seen as critical for the entire country. Post-RMA this issue's profile will be raised further when it receives its own specific piece of legislation, the Climate Change Adaptation Act. In the interim though, it is a legally relevant matter for planning documents and resource consent applications, in contrast with the effects on climate change, which remain almost entirely out of bounds – but not for long.

What's changing

The momentous step of ending the legal irrelevance of the effects on climate change for resource consents and planning documents has not been left to the RMA repeal and replacement but will occur far sooner. Under sections 35 and 36 of the of Resource Management Amendment Act 2020 (RMAA20) sections 70A, 104E and 104F RMA will be repealed on 31 December this year (barring an Order in Council postponing this). With these sections removed, the previously binding Supreme Court authority, which had hinged on these sections, will no longer apply. When deciding whether or

not to grant consent, or to adopt new rules and policies governing consents, the resulting effects on climate change will no longer be out of bounds for councils.

This applies not only to discharges of greenhouse gases (like those which come from hydrocarbon burners) that require or could be made to require resource consent, but also extends to activities that may not themselves involve discharge consents, but can, indirectly, cause increases or reductions in greenhouse gas emissions. Anything that could indirectly have an effect on the level of greenhouse gases entering or being removed from the atmosphere will be affected. For example, the fact that a subdivision is some distance from an urban centre and is likely to result in more vehicle trips burning fossil fuels, or conversely that it is located right next to a railway station with electric passenger trains, will become relevant. Likewise, the planting and retention of trees to promote carbon uptake will also be relevant, as will the opposite effect, from removing trees.

Under the RMAA20 this legal change will apply only to consents lodged and planning documents notified after the repeal takes place, so not before 31 December this year. For those though, steps taken or not taken to lessen or counter the atmospheric build-up of greenhouse gases will for the first time have real legal consequences for whether planning and environmental approvals can be obtained or not. Legally binding commitments to run only electric vehicles, or to set aside land for trees to take up carbon could come with concrete legal benefits in helping get necessary consents. The importance of this change is underscored by the fact that the function of a resource consent is to make something lawful that would, without that consent, be an offence under s338(1)(a) RMA. It represents a fundamental shift of focus that should bring an equally fundamental change in the future design and form of our built and natural environments.

Nine months is a very short time when it comes to environmental planning and consents. While applications lodged before 31 December this year may still dodge the effects on climate change, Councils have become adept at using short consent durations to limit the extent of any benefits applicants might receive from this. Basically, the need to address effects on climate change in all but our shortest term is already upon us.

That the Government was not prepared to put off making the reduction, avoidance or compensation of greenhouse gas emissions part of day-to-day environmental management and planning, to the RMA repeal reveals a great deal. It shows that in the post-RMA world both aspects – both the effects of and on climate change will play a central role with important legal consequences for consents and planning documents, whatever form they take.

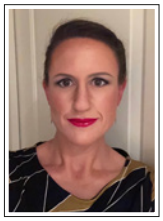
Compared with the current status, particularly of the effects on climate change, this is indeed a sea change. Due to the fast-approaching repeal of sections 70A, 104E and 104F RMA, it is a change that is not relegated to the post-RMA world but has had its first steps already ushered in by the RMAA20. It makes climate change, especially the contributions made by daily activities controlled by Council such as planning documents and resource consents, legally relevant and something for which we have to start planning for today. ■

Hans van der Wal is a resource management, environmental and local government law specialist. He acts for private clients in enforcement and contentious resource consent, plan-related or other regulatory matters and for insurers in environmental statutory liability claims. Hans has worked with the Resource Management Act since 1996, first as a council officer, then, following his admission in 2003, as an in-house council lawyer, and since 2008 in private practice.

SEEKING A JUST TRANSITION

The Proposed Managed Retreat and Climate Change Act & Local Authorities

BY **BARBARA MEAD**



Barbara Mead

In February 2021 the Government announced it would repeal the Resource Management Act 1991 (RMA), replacing it with three new Acts:

- **Natural and Built Environments Act (NBA)** – to provide for land use and environmental regulation (this would be the primary replacement for the RMA).
- **Strategic Planning Act (SPA)** – to integrate with other legislation relevant to development, and require long-term regional spatial strategies.
- **Climate Change Adaptation Act (CCA)** – to address complex issues associated with managed retreat and funding and financing adaptation.

As a country we have now reached a time where the hard work of various government and private organisations to research and identify the effects of climate change can be pulled together to create a cohesive understanding of the diverse and significant effects of climate change. The research indicates the effects of climate change for communities may be more far reaching than anticipated; including changes to primary production, reduction in biodiversity, impacts upon lower socio-economic members of the community, increased domestic violence and mental health issues, increased vulnerability of the elderly, children, women and the disabled and destruction or disconnection for Māori with their coastal taonga and kai moana.

These effects will have a significant impact upon vulnerable people within communities and in some cases entire communities. The interface between these communities and individuals and central government is and will remain local authorities. As a result local authorities must now consider what guidance and support they require from central government and how best to plan and implement managed retreat.

Currently planning and implementing a response is challenging for local authorities given the present legislative framework and funding shortages:

1. The current legislation is restrictive as to how these matters may be addressed under the Resource Management Act 1991 (RMA), Local Government Act 2004 (LGA) and the consenting process under the Building Act 2004 (BA) and the RMA.
2. The statutory timeframes are not in alignment spanning anywhere from 10 to 100 years.
3. There is limited capacity with respect to funding to support local assessment of risk and to implement measures to address the risks identified.
4. There is ongoing tension within any community that is highlighted in the consenting process between individuals resourced sufficiently to protect themselves and those that cannot or the wider interests of the collective community.

The responsibility lies with local authorities to draw together these legislative requirements and powers to create a cohesive picture for their communities. This requires intensive resource input by authorities, in depth understanding of the vulnerable and important features of its community and environment and the ability to consult and communicate clearly and effectively over and over again during this period. The focus tends towards future use and development rather than existing uses and development that are now or in the near future at immediate risk.

The proposed CCA will assist local authorities to plan for those uses and development that are currently in place and at risk whilst also considering the implication for the wider community should these come to an end or need relocating.

Purpose of Climate Change Adaption Act

Presently there is little information to glean on what the CCA will provide. It is clear however that it must work in concert with

the NBA and SPA to be effective in implementing managed retreat. The purpose of the CCA has been described as primarily to address the legal and technical issues associated with managed retreat and to fund some of that work. Managed retreat is a tool which requires careful planning for progressive withdrawal from areas that will be affected by climate change. It is focused on existing uses unlike many other planning and consenting processes that focus on proposed uses. A simple example of the proposed legislative combined approach would be the planning for transition of a coastal settlement to another more resilient location. This requires some support for resettlement of the home owners and key infrastructure (the CCA) but also the identification of a new area to settle together with the implementation of key infrastructure like roads, power, water and sewerage (the NBA and SPA).

The cost of implementing managed retreat for local authorities is twofold:

1. the cost arising from undertaking the required local research and assessment to identify those areas, uses and activities which are at risk; and
2. the cost arising from implementing the actions to withdraw its community from these areas and provide for them elsewhere.

Local Authorities are funded by their rate paying community and any investments they may have to supplement that source. Local authorities also charge for services they provide but these are based on recovering the reasonable costs of providing those services. It is essential that an additional funding stream is provided from a central source to ensure local authorities are in a position to implement managed retreat rather than leaving authorities to raise funds from ratepayers or user pay services that are already under strain.

The adaption fund proposed in the CCA will be geared to support local efforts to respond to climate change, presumably including local research, land acquisition, compensation, liability, insurance, securing key infrastructure and resources (for example Three Waters and flood protection) the extent to which it will assist local authorities in implementing managed retreat and to what degree local authorities will be left to manage these funds remains unclear.

Some indication of what the fund may support can be gleaned from the National Adaption Plan (NPA); a plan developed by central government to determine the approach to be taken in respect of climate change including the measures and indicators required to monitor the progress and effectiveness of that approach. The NPA is developed having regard to the risks identified in the National Climate Change Risk Assessment (NCCRA). The NCCRA is a central government assessment focused on identifying and prioritising the most significant and urgent climate change effects. The details of these are yet to be understood in the context of regional effects, in particular how diversely affected and resourced regional risks will be met.

Local authorities remain best placed as the interface between central government and their communities to consider the implications of the NPA, identify the local risks and plan for a cohesive, resilient future that maintains the values and character of their communities. The benefit of establishing a central fund to assist local authorities to do so and empowering them to use these funds cannot be understated. If the intention is to provide a consistent approach that lifts the wellbeing of our population generally then the disparity in financial and personnel resourcing in addition to the regional vulnerabilities posed by diverse local landscapes, populations and economies must be addressed.

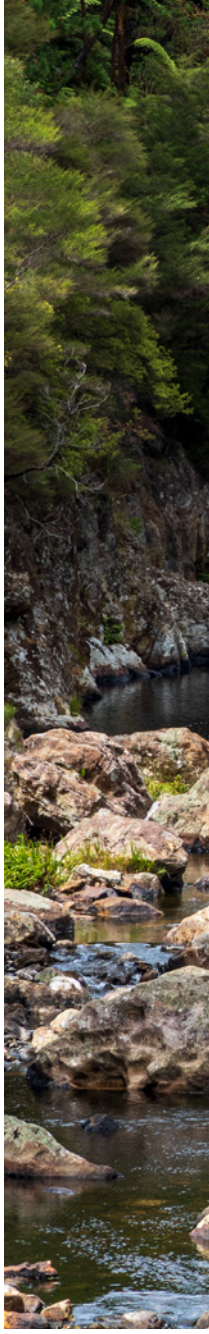
There are however many questions left to be answered including;

1. When will the CCA be passed? It seems although its development is to be in concert with the NBA and SPA there is no date yet identified, it may be as far away as 2023.
2. What will the fund actually provide for? Options include research, consultation, the implementation of plans.
3. Will the fund be directly administered from a central body or provided to regions to manage as they see fit?
4. How will the balance be struck in prioritising funding when regard is had to the diverse impacts of risk, population density and affluence of communities to name a few key factors for consideration?

Local authorities remain best placed as the interface between central government and their communities to consider the implications of the NPA, identify the local risks and plan for a cohesive, resilient future that maintains the values and character of their communities

Regardless of the answers yet to come, it is clear that local authorities must now plan for a future that is resilient to climate change effects by addressing past and existing development and use. The CCA and its sister legislation will be the first and vital step to enable them to do so with the corollary being that the importance of regional differences and grassroots knowledge is reflected in the administration of this fund.■

Barbara Mead is an Advocacy & Practice Integration Manager at Marlborough District Council.



SEEKING A JUST TRANSITION

He atua, he tangata, he atua, he tangata

Standing with the environment

BY **EDMOND CARRUCAN**

Edmond Carrucan

I OFTEN HEAR THE WORDS 'CLIMATE change' thrown about a lot. I am no expert and I admit it can be hard to understand. I can walk away from a typical chat at times vaguely retaining something along the lines of, more of the sun's rays are being trapped in by the earth's atmosphere which will increase temperatures globally (ie 'global warming'). This melts ice and then sea levels rise. Consequently, climates change.

It can be harder still to interpret what that means for my iwi.

When I look out towards our whenua, it really is the sort of beauty you'd expect to find on a tourist's postcard. I look and know I am from the best place on earth. Sometimes you can't even see your neighbours but you do see lots of trees. In some parts we still don't have traffic lights, let alone sealed roads. You'd forgive us for thinking that climate change hasn't really affected us, yet.

But, I worry that Māori will likely be affected by the choices of others. Choices which stem from how they view the environment. Māori identities are expansive and we are our taiao. Climate change may change our identities.

I feel hopeful where indigenous knowledge around the world is increasingly important in affecting how humankind (including law and lawyers) combat climate change. The western 'egocentric' worldview is challenged by an indigenous 'ecocentric' worldview.

What I thought might be helpful is to share first, a couple of things I see with analysis and then second, some whakaaro on how this is relevant to law and climate change.

In short, the choice to be a lawyer (however motivated) is a loaded choice to be a kaitiaki. It is a choice obligated towards meaningful law reform with an appetite for a legal commitment to Wai, water and Papa, land.

I take this approach because the whenua I look out upon is the whenua my tupuna looked upon, lived upon and hoped upon. We all have tupuna and we all have whenua to whom we belong.

I believe that when any person adopts this worldview wholeheartedly, they can experience moments of what I call 'seeing through the eyes of the tupuna.'

In te ao Māori, there are incredibly rare people born like this. It is by virtue primarily of their whakapapa, mana tupuna and mana atua. They are part of a very rare and tapu group Māori often call matakite. I have the honour (and at times burden) of being a matakite. I will be the first to tell you that the english translation of 'seer' doesn't even come close to its true meaning. For now, know we exist and navigate worlds and knowledge most people never will.

It is at this point that I mihi to a particular matakite and tohunga ruahine, Dr Rangimārie Turuki Arikirangi Rose Pere of Tūhoe, Ngāti Ruapani and Ngāti Kahungunu.

Her passing on 13 December 2020 is a massive loss for all Māori and the wider hāpori of Aotearoa. Matakite and tohunga are both critical to the maintenance and development of expansive identities, sacred knowledge, ways of knowing and so much more. Some of us still don't know that the government once sought to suppress and demonise these positions in society.

I worry that Māori will likely be affected by the choices of others. Choices which stem from how they view the environment. Māori identities are expansive and we are our taiao. Climate change may change our identities

I'll never forget the story I heard that when she worked at the ministry of education colleagues told her that education was about "assimilation of your people." She fought the good fight, she was the one who could. She believed we were all esteemed people until we proved otherwise.

E kui, nui kē te aroha. Ka ū ki te manako titiro atu ai, hei miringa ngākau mārū.

Most powerful woman, our love for you is still indeed great. We will hold to the hope of seeing, to ease our hearts.

The first place I look is one of my awa, Ohinemuri. A beautiful awa in Hauraki. I see her, Hinererewai, my Atua Wahine, flowing over the rocks in the Karangahake gorge. She works in unison with her parents to form the deep currents from clean water sources. She eases the body, mind and unsurprisingly, the wairua of anyone who rests in her gentle flow. She is intelligent and has a memory.

Ngā ngā kia ngā, ki te rere. Resting resting, with the flow.

Accordingly, my first whakaaro is around Wai. Water. Without her, we die. Fast. We know that. We also know that millions die every year from water related diseases. From this perspective, nobody can deny her importance.

In one iwi tradition, there is an entire chant around water and its connections to the origins of the universe. It is taught at an early stage to new initiates on their path to becoming tohunga. That iwi is not alone in their approach. Such an approach affirms her mana, the mana of water and its importance to the ongoing physical and spiritual wellbeing of iwi Māori.

Broader still, what some may not know is that water salinity is a real problem for our Pasifika whanaunga. That's because rising sea levels mix salt water with the groundwater areas, which shrinks drinking water reserves and makes it harder to irrigate agricultural land. In some places, high levels of salinity have 'poisoned' the ground and made it infertile for years.

What some may not know is that water salinity is a real problem for our Pasifika whanaunga. That's because rising sea levels mix salt water with the groundwater areas, which shrinks drinking water reserves and makes it harder to irrigate agricultural land

How is that discussion relevant to the law and climate change?

I look back at the passing of the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017. I think as a piece of legislation it is very successful because it recognised the legal personality of an awa. The keyword is recognised. The statute did not create legal personality. Our various awa have always had a legal personality. In fact, in times past, they dictated how lots of iwi lived, not the other way around.

If you won't take it from me consider this, Ngāhuia Murphy, a respected Māori academic has quite aptly described the menstrual flow of Wāhine Māori as 'Te Awa Atua'. I'll repeat that again, Te Awa Atua. It's an Awa. An Awa of life. An Awa of the gods. If the cycles of life, birth and death being tied up with awa do not affirm for you how important

awa are for Māori, I suspect nothing will convince you of their longstanding and persisting mana and legal personality.

Ngā wai pūwhero o Hauraki.

The chiefly, red, menstrual waters of Hauraki; the source of authority and life.

I look forward. In choosing to be lawyers, we have an absolute duty to the Court. But if there is no water, there are no people and there is no Court. Naturally, there needs to be a fundamental kaitiaki obligation of law and lawyers to water. We could recognise a 'Law of Wai'. We should.

I say a 'Law of Wai' because I know other iwi Māori have many different origins of water with one example immediately coming to mind being Wainuiātea. I suspect Wai often remains the common denominator. I submit if more acts recognise the legal personality of water, alongside the physical and the spiritual/metaphysical aspects, how we treat Wai can meaningfully change. Then consequently, climate change is taken more seriously and we know part of what we are fighting for: Water. Clean drinkable water.

We should not forget salt water or the moana too. How we treat our seas has an impact on the rest of the world. Not to mention, for an area like mine in Hauraki that is yet to reach settlement. You might be surprised how enthusiasm may build if the Crown offered to pass a Tikapa Moana Act in consultation with our 12 iwi and other interested iwi. But I simply leave the thought here for the people of my kuia, my people, aku aute tē awhea.

In choosing to be lawyers, we have an absolute duty to the Court. But if there is no water, there are no people and there is no Court. Naturally, there needs to be a fundamental kaitiaki obligation of law and lawyers to water

Ko Wai au. Ko Wairua au. I am Water. I am Spirit.

The second place I look is Papatūānuku. She's beneath my house. She is beneath the trees and the roads, many wharenui and city apartment blocks. I see her, another of my Atua Wāhine, providing the very land we walk on. She works in unison with Ranginui and their tamariki to prevent us from being exposed to space and certain death. She gives stability to all. Unsurprisingly, the mauri of any person who rests against her often becomes what is called mauri tau. She is intelligent and has a memory.

E Papa, tukuna te aroha me te māramatanga, kia tika te

haere ki te mata otō te whenua. Papa, please grant to us care and understanding, so that we may live right on the face of your earth, the place of ourbirth.

Accordingly, my second whakaaro is around Papa. Whenua. Land. Without her above the seas, where do we live? Beneath the sea? On ships? We give up a number of comforts. We even give up that nice place to lie in the shade. We know that. We all know we need a place to live and sleep; whether you have a house or not. We also know that you don't make more land. She just is. From this perspective, nobody can deny her importance.

Without Papatūānuku there is no Tāne, there is no Tāwhaki, there is no Tūmatauenga, Tiki or Kupe. More importantly there is no Hineahuone and certainly no Hinererewai, Kuramārōtini or Ohinemuri. Without her, Māori do not exist. You don't have an Aotearoa to call home. That reality affirms her mana, the mana of land and its importance to the ongoing physical and spiritual wellbeing of iwi Māori.

Broader still, what some may not know is that increasing land scarcity is a real problem for some of our Pasifika whanaunga. It's those rising sea levels. I think immediately of Kiribati. That's because their islands in some cases are mere meters above sea level. Current estimates indicate that the islands may be uninhabitable in a matter of decades. Their population: around 117,000.

Think Lower Hutt or Dunedin. Or think both Rotorua and Whangārei. Under the sea.

How is that relevant to the law and climate change?

I look back at the passing of the Climate Change Response (Zero Carbon) Amendment Act 2019. I think as a piece of legislation it is very successful in that it gave a much needed update to the Climate Change Response Act 2002. Its amendment to the purpose of the 2002 Act is in my view in complete alignment with what it should have always intended. The keyword is alignment.

This amendment aligned its purpose with a need for clear and stable climate change policies. That need has always existed for Papatūānuku and iwi Māori. Now I don't know how the Tiriti provision under 3A is working out in reality, but, whenua requires any response to come from at least a place of respect and collaboration. Papatūānuku is not something to be experimented with. *He atua ia. She is an all powerful god.* In times past, she completely dictated how iwi lived and where. Call that 'eco-centric' if you like, but again, we don't make land. She just is.

If you won't take it from me, consider an interview by E-Tangata in 2019 with Pania Newton, an activist and wahine toa; who you should know from SOUL (Save Our Unique Landscape) and protests at Ihumātao. She explains that it was her placenta and her mother's placenta which drove a want in her to protect her tūrangawaewae, her whenua. What you may not know is that whenua doesn't just mean land. It also means placenta. The two words are bound, deliberately and naturally. The word reflects reality. Pania explains that changing the landscape at Ihumātao impacts her identity. She is inseparable from her whenua.

She's not alone. Māori are our taiao; our whenua, our maunga, our awa and more. We tell people this whenever we recite our pepeha. It is very common for Māori to form an early attachment and relationship with Papatūānuku because

of the burying of their placenta at an appropriate time after they are born. I know where my placenta is buried. I'm not much of a protester, truly, but I think I would rather die than let my whenua be violated. I don't even think they'll ever be able to sell that land you know. It wouldn't be tika. It wouldn't feel right in my puku. The hope is one day, the singular lens that has led to commodifying land shouldn't feel right in your puku because it isn't.

Mā te wahine, mā te whenua, ka ngaro ai te tangata. For women and for land, men will die.

I look forward. If there is no land, then life as we know it simply can not be. Naturally, there needs to be a fundamental kaitiaki obligation of law and lawyers to land. We could recognise a 'Law of Papatūānuku'. We should.

This wouldn't even be completely original. Consider the 'Law of Pachamama' in Bolivia. Read its 10 Articles. Have a think. It may seem out of reach to you and yet I'm still unaware of a single time in our modern Courts' history that Papatūānuku forms a part of our unwritten constitution. I could be wrong, but I haven't seen one yet. For a lawyer to seriously ask if she even should, is part of the problem. I would even say that thinking is a reflection of continuing colonial oppression.

Why? Because a constitutional change wouldn't be original either if you looked to Ecuador. There the ecosystem can even have proceedings initiated on its behalf; e.g. the 2019 *Llurimagua* case. Read articles 71 to 74 of their constitution regarding rights of nature. Have a think.

I concede they have a written constitution, but there's nothing really stopping us from taking steps. A real commitment to Te Tiriti, is one made to tangata whenua and whenua. That should be obvious. That certainly gives us every reason to take steps.

Alongside billing, research, drafting, meetings or courtwork, seeking meaningful law reform is simply another obligation of what lawyers must do. My hope is we will do it with an adventurous spirit, some creativity and genuine collaboration with iwi Māori

Both Ecuador and Bolivia were influenced by powerful indigenous groups, their traditions, spirituality and worldview in making these reforms. We are bijural, that's part of our legal whakapapa. We need to start reflecting that in how we conceive being a 'lawyer' and what is required. If you walk away from this article wondering if Wai or Papa matters in your practice, you're missing the point. Alongside billing, research, drafting, meetings or courtwork, seeking meaningful law reform is simply another obligation of what lawyers must do.

My hope is we will do it with an adventurous spirit, some creativity and genuine collaboration with iwi Māori.

I submit if more acts or even a higher law recognised the legal personality of land and its supremacy, how we treat whenua can meaningfully change. Then consequently, we know another part of what we are fighting for: Land; a place to live and sleep; a place to call home.

We should not forget maunga too. How we treat our mountains has an impact on our awa and whenua. To put it simply, water and anything else, flows downhill. Not to mention, for an area like mine in Te Tai Rawhiti you might be surprised how enthusiasm may build if the Crown offered to pass a Hikurangi Maunga Act in consultation with our various iwi, including certainly the 52 hapū of Ngāti Porou and other interested iwi. But I simply leave the thought here again for the people of my koro, my people, aku wīwī nati.

"E Hika! He Ao! He Ao! He Aotea! He Aotearoa!"

My love! A cloud! A cloud! A white cloud! A long white cloud!

I close with what I was told were the words shouted by the wahine Kuramārōtini to Kupe on seeing this country. She named this country. Abel Tasman and Captain Cook weren't even born, let alone heard of yet. It was subsequently called New Zealand. ■

Lawyer Edmond Carrucan (Ngāti Hako, Ngāti Pāoa and Te Whānau-a-Iritekura) is currently studying towards a Masters of Laws in Māori/Pacific & Indigenous Peoples' Law with a focus on exploring Pūrākau and Pakiwaitara as a growing basis for legal submissions before the modern Courts in Aotearoa. His work will help champion Tikanga Māori as the primary source of law in its own right. He notes that "telling only the stories of case law and statutes, will do nothing but continue to oppress my chiefly people and make fools of us all."

Special thanks goes out to both Te Hira Pere, Katarina Riini-Ehau and their respective whānau. He mihi mō te tautoko o te tuhinga nei, ka pakaru, ka pakari, ka paki te rangi.

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WHY I PRACTISE?

Nan Jensen

To support disabled people and their families

My original interest in this topic was selfish: Our autistic son was struggling at school, and we took the Ministry of Education to arbitration to get him the help he needed. I was not a lawyer at the time and had no clue what I was doing, but I wrote the submissions and presented them, and we were successful. It is the most stressful thing I've ever done, but it changed my son's life – and mine!

Not long after that, I found myself at Waikato University studying law. By the time I finished, I knew I would practise Disability Law to help others like my son and our family.

While in law school I met a lawyer called Tony Banks who was running a workshop on disability-related topics. The audience was families of disabled people. When Tony retired I took over. I now run a variety of workshops and speak at conferences and symposiums, am on a professional expert panel for Altogether Autism and have also been asked to work with schools and residential services to ensure they are complying with the law.

I have broken down my workshops into smaller topics and have made videos available on Youtube and Facebook. Ironically Covid-19 has helped more people get access to the workshops as these are now often run online.

Disability Law – what is it?

There appears to be no official category of Disability Law according to NZLS or ADLS. So what is it? Of course some areas of law are more relevant than others, but really it is about servicing a community, understanding their needs and understanding the disability framework in New Zealand.

There are many different types of disability so the needs of the community are diverse. People in wheelchairs with physical difficulties but perfectly functioning brains do not want to be infantilised and understandably demand their rights to self-determination and support, such as accommodations in the workplace and accessible homes. But those with intellectual or other developmental disabilities may be incredibly vulnerable to 'fake friends' and salespeople (the people I call predators). This group must have their rights respected and their decision making and autonomy supported, but it is my view that we are being negligent if we allow them to be abused and taken advantage of in the guise of protecting their rights.

Not everyone learns from their mistakes – some autistic people struggle to generalise one situation to another. So if they are abused or taken advantage of by a predator, it may happen repeatedly with different people. They may not recognise the common characteristics of the abusers or situations. Achieving the proper balance between protection and rights is an ongoing challenge. Blind and hearing-impaired people share a variety of challenges and also have their own separate and unique issues.

I practise in most areas of private law – because disabled people have the same issues as everyone else. The difference is that most matters are complicated, because disabled people's lives, and their families' lives are complicated. Families are exhausted from always advocating. Where a specialty that I don't have is needed, I refer to other lawyers and work with them if they are willing.

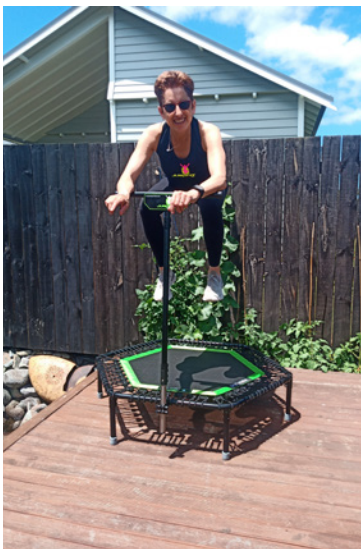
Last year I got my own diagnosis of autism. I believe I am able to contribute advice and ideas to clients which it seems many other lawyers cannot. I understand because of my own family and experience.

The ultimate problem facing most families is: what happens to the disabled person when their parents are gone? This is the greatest concern and fear – I know this from my own life!

I accommodate clients where possible, so I travel to meet them in their homes, or workplaces or wherever is most convenient to them. I work from home and do evenings or weekends – whatever works best. I would like to learn sign language.

The Future

I am continuously compiling a list of issues and problems that arise either because of legislation or lack thereof, but also because of attitudes and interpretation, and sometimes simply because of no experience of disability



or a specific kind of disability in the legal system. In the first half of 2021, I hope to be able to engage some of our politicians about this to help in the search for solutions on how our legal system can help, and not inflict more harm.

I would love to find other lawyers who share my passion, want to learn what I know, and who might want to collaborate in this area. All too often I have clients coming to me with legal work which might be suitable for non-disabled but which just won't work for the family situation. I would like to start slowing down but I feel that I cannot until I find others who will carry on this work. ■

Nan Jensen is a lawyer specialising in Disability Law, she is a consultant with Quinlaw in New Plymouth. Practising from her home in Hamilton, she utilises technology to service New Zealand's disability community nationwide. Nan has practised for eight years, also providing legal education on Disability Law matters and acting as a director of The Disability Trustee, which provides Trustee services to trusts with disabled beneficiaries.

LEGAL AID

How services developed in the past two years

BY **TRACEY BAGULEY**

When the Ministry of Justice completed its last triennial review of the legal aid policy settings at the end of 2018, we identified operational improvements needed to reduce the administrative burden and improve the service for providers and other participants. Two years on from the review it is timely to reflect on what changes have been made to accomplish these goals and what we want to do next.

The Ministry has made a number of changes since the review to improve the provider experience and make it easier for people to engage with us, all of which have been made possible by the feedback and collaborative efforts of our stakeholders and legal aid providers.

In the first half of 2019 we reviewed and updated our high cost case policy, streamlining the management of expensive and complex criminal cases. Changes were made to our Amendment to Grant forms, combining what was eleven forms into three, to mirror legal aid applications, and to our invoicing forms to make them easier and quicker for legal aid providers to complete.

We have made various policy changes to recognise our changing environment and the additional challenges that providers face, such as amendments to our travel policy.

The next phase of work was to review, in 2019, our provider application, approval, and contracting process.

An early change to come out of this review was to streamline the process for Queen's Counsel to apply to become legal aid providers.

A year on in, August 2020, we launched a new application form and supporting guidance for all lawyers who want to apply to provide legal aid. The new simplified form has made it easier for lawyers to obtain approval and has resulted in processing times reducing from 5-8 weeks to around 15 working days.

Tracey Baguley

Brett Dooley

At the same time, we made changes to our contract renewal and reapproval process. Legal aid lawyers' contracts are now combined with the application form and approval documentation. Contracts and approvals also no longer expire, removing the requirement for providers to reapply for approval every few years.

My hope is that these changes will encourage more lawyers to apply to become legal aid providers, ensuring that we have a robust pool of providers now and in the future to ensure no one is denied access to justice because they can't afford a lawyer.

We are currently in the second phase of this work, which will focus on making improvements to our audit and quality assurance processes.

The last year has not been without its challenges. Prior to 2020, we had already been gearing up to move away from paper-based processing and streamline internal processes to pave the way for an electronic operating model.

When we moved into Covid-19 alert level 4 in March last year, we moved quickly to the electronic model within 72 hours. This enabled us to continue to provide the service with minimal interruptions while keeping our staff safe.

Whilst the implementation of our model has not been perfect and there is still more work to do, we have seen significant improvements in timeliness across all aspects of our work.

Our focus for the future continues to be improving and streamlining our processes. I look forward to continuing to work with you in the future to achieve our goal of delivering a modern service that works based on the needs of those who use it.

Tracey Baguley is Manager, Legal Aid Services at the Ministry of Justice.

A word from the Legal Services Commissioner

It has been over two years now since I started serving as the Legal Services Commissioner. I am pleased to say that during this time we have been able to make continuous improvements to the administration of the legal aid service, making it easier for our customers and for providers to engage with us.

In the last year alone, we have introduced a number of changes, such as updating policy to provide further opportunities for junior counsel to gain experience in Court of Appeal and Supreme Court hearings.

After feedback from legal aid providers, we also made changes and provided clarity on other policies,

CONTINUED FROM PAGE 29

such as DNA testing in the family jurisdiction and policy that has seen legal aid being made available for applications under section 67 of the Parole Act 2002, ensuring that legal aid is available to those who need it.

As Tracey mentioned, the last year also saw Legal Aid Services transform swiftly when needed in response to Covid-19. At short notice a number of changes were able to be made to our current policy and processes to allow providers to continue to work safely and remotely where needed. We also focussed on paying invoices as quickly as we could during this time.

I would like to take this opportunity to thank all our legal aid providers for their patience and understanding during the time of uncertainty last year. Your continued commitment to providing legal aid services during this time was greatly appreciated.

Legal Aid Services has come a long way since I started as the Commissioner and I am proud of the accomplishments we have made, but there is still more to be done.

A key area of focus for me this year will be a review of the Duty Lawyer Service. It has not been reviewed for some time and so it is important that we define what this service needs to be so that it is fit for purpose for the future and our policies can be refreshed.

The changes over the past two years would not have been possible without the feedback and help of the legal profession.

I look forward to continuing to work with you all in the future as we continue to modernise and improve legal aid services to ensure continued access to justice for the people of Aotearoa. ■

Brett Dooley is the Group Manager National Service Delivery at the Ministry and Legal Services Commissioner.

BUSINESS OF LAW

How succession planning can save you time, money and stress

PLANNING FOR THE FUTURE HAS always been challenging, and it's even more so this year with the threat of Covid-19 still hanging over all of us. But whilst it's challenging it's still critically important for any organisation or sole-practitioner to be constantly planning for the future.

Key to any plan will be supporting your greatest assets – your people. That is true of any size legal workplace, from the sole-practitioner to the large global corporates. Attracting the best people, keeping them, developing them and then preparing for when they leave is time consuming, and that's time that isn't generating any money.

But it's also time that can save you significant amounts according to consultatant Emily Morrow.

"I estimate that the direct financial cost of a typical failed succession planning attempt is somewhere between $500,000 and $1 million.

"This is made up of salaries, time taken in meetings and interviews, recruitment fees, lost revenue and productivity and damage to a firm's reputation when a hire goes badly wrong.

"Then, of course, there are the non-financial costs associated with a failed senior level hire and or promotion. These include increased office disorganisation, client dissatisfaction, stress and uncertainty that can lead to disagreements about the best way forward."

What is succession planning?

Succession planning typically consists of promoting existing talent as well as hiring externally. It's about preparing for those future employee movements and hiring those people who will help your organisation achieve its objectives.

"Succession planning should be a key component of any well-crafted strategic plan", says Emily. If a firm knows where it is going, what skills it will need, understands its culture and supports its people, then optimal succession planning will be a likely outcome. This is proactive succession planning embedded in a strategic plan.

How do you go about succession planning?

Proactive, strategic succession planning starts with partners identifying the firm's core values and articulating a clear organisational vision. It includes understanding the firm's culture, its people, professional expertise, marketing opportunities and future direction.

"An excellent way to achieve this is for the partners or directors to set aside a day to discuss what you really want and value and what most matters for your firm going forward", says Emily.

"Although such retreat discussions can be designed by and facilitated by a member of the firm, it can often be helpful to engage an outside facilitator. In designing and

facilitating discussions of this type, I usually start the process by having confidential, one-on-one interviews with retreat participants to identify the firm's key issues and what success for the planning process might look like.

In these interviews, partners tell me about their retirement and other plans, discuss their hopes and concerns about the firm and consider possible outcomes for the retreat discussion. I then develop an agenda for the discussion designed to encourage everyone to engage in his or her best thinking about the firm's future."

The next step is to have a high quality, candid and comprehensive discussion about a vision for the firm and what will need to be done to implement this vision.

"This typically is a "high-level", conceptual discussion in which participants put aside day-to-day concerns and think big. Then we drill down into the details of implementation so participants leave the discussion knowing what needs to be done, how to achieve it, who will do what, the time frame in which to operate and benchmarks for success.

"After the retreat, firms typically have a much clearer idea of what their succession planning needs are and how to achieve these in a timely, realistic and cost-effective way."

Key questions to consider when succession planning:

- Will there need to be external hires?
- Are there current employees who are high potentials within the firm and how can they best be cultivated?
- Do some current employees not align well with the firm's needs and how should that be handled?
- Does the firm have appropriate management to assist the partners in implementing the strategic plan?

All of these considerations will impact the succession planning process.

"Getting this right will save you time, stress and money in the long-run." ■

Emily Morrow, BA (Hons), JD (Hons, Juris Doctor) provides consulting services for lawyers, barristers, in-house counsel, law firms and barristers' chambers focusing on non-technical skills that correlate with professional success; business development, communication, delegation, self-presentation, leadership, team building/management and strategic and succession planning.

LAW REFORM

DNA collection and retention in proposed new regime

BY **KATE MCKENZIE-BRIDLE**

The collection, use and retention of DNA is intrusive of both physical and informational privacy, as DNA reveals information about an individual and their whānau. It also provides the genetic link to past and future generations, which is whakapapa information, considered a taonga by Māori. Its collection also has implications in terms of tikanga Māori, such as the tikanga relating to mana and tapu.

To address these and other concerns, Te Aka Matua o te Ture | Law Commission has proposed considerable changes to the regime for Police collecting and retaining DNA samples and profiles, set out in the Criminal Investigation (Bodily Samples) Act 1995 (CIBS Act).

We recommend new legislation with a clear purpose to facilitate the collection and use of DNA in criminal investigations, prosecutions and investigations into missing and unidentified people in a way that:

- minimises interference with a person's privacy and bodily integrity
- recognises and provides for tikanga Māori
- is consistent with human rights values.

We also recommend a new interdisciplinary DNA Oversight Committee with strong Māori representation should underpin the regime. This Committee would be charged with fostering a regime that upholds the purpose of the legislation.

This article outlines recommended changes to the existing suspect and databank regimes for practitioners familiar with the CIBS Act. These changes are intended to align the regimes with the proposed purpose of the new legislation. Key to the regimes is the recommended establishment of a new DNA Databank. This databank would hold DNA profiles generated from DNA samples obtained in both criminal investigations and investigations into missing people. There would be indices for different profiles – Crime Scene, Elimination (for victim and third-party profiles), Pre-conviction (for both suspect and arrestee profiles), Offenders, Missing and Unidentified, Unidentified Deceased and Relatives.

Collection of DNA

Suspect regime

Currently Police may obtain suspect samples by consent in respect of an imprisonable offence (or for the non-imprisonable offence of peeping and peering) from adults or from young people, if their parent or caregiver also consents. If consent is refused, a compulsion order can be sought.

We recommend that due to the inherent power imbalance, DNA should not be sought by consent from young people nor from those adults who lack the ability to provide informed consent (a court order would be required, as discussed below). Other adults should also have enhanced protections in relation to the consent process, including:

- Requiring police officers to explain (rather than "inform") prescribed information in a manner and language appropriate to the suspect's level of understanding.
- Providing materials in te reo Māori and other commonly spoken languages and visual aids.
- Video recording the consent process.
- Establishing the right to:
  - consult privately with a lawyer
  - nominate a support person to be present during the consent process.

The government will need to consider how to facilitate proposed access to legal advice, as per *Kerr* v *New Zealand Police* [2020] NZCA 245 at [68], in "a real and practicable way".

We also recommend legal services should be classified as criminal rather than civil, for the purposes of legal aid. This would mean lawyers with the most experience in criminal and DNA matters could provide assistance.

If consent is refused, or a court order is required, we recommend continuing the current compulsion order process. This would remain largely unchanged for adults, but for children and young people we recommend a Youth Court Judge decides whether DNA should be obtained.

In rare situations, a suspect sample may be obtained indirectly from an adult, such as from an abandoned coffee cup, but only if a Judge makes an order after considering certain matters.

Suspect profiles will be held on the Pre-Conviction Index and only compared to the relevant crime scene profile unless a Judge permits a one-off comparison to all profiles on the Crime Scene Index.

The databank regime

Much of Police's focus in the last 25 years has been adding profiles of known people to the DNA Profile Databank (DPD) and Temporary Databank, thereby increasing the pool of potential suspects who might match historic unresolved crimes and/or link to future crimes.

There are currently just over 200,000 profiles on the DPD originally obtained as follows:

- 1000 as suspect samples
- 91,000 voluntary databank samples
- 81,000 arrest or intention to charge samples

- 27,000 pursuant to a post-conviction contestable notice

Until 2009, Police's principal means of collection for the DPD was requesting voluntary samples from adults (usually known offenders). The resulting profiles are retained on the DPD until consent is withdrawn (which rarely happens). If a profile linked to an historic offence and/or the person is subsequently convicted, their profile remains indefinitely on the DPD.

Due to the privacy intrusion, absence of individualised suspicion, and concerns as to whether consent is truly free and informed, we recommend voluntary databank sampling is discontinued.

Since Police's powers of collection were statutorily increased in 2009, the focus has been compelling samples from:

- adults Police arrest or intend to charge with any imprisonable offence (or the offence of peeping and peering),
- young people Police arrest or intend to charge with a narrower range of offences.

DNA does not need to be relevant to the investigation or prosecution of the offence and there is no judicial oversight of the process. The resulting profile is held on the Temporary Databank and compared, prior to conviction, with profiles from unresolved crimes.

We recommend Police should no longer be authorised to obtain a sample on arrest or intention to charge from young people or from adults who lack the ability to understand. For other adults we recommend collection parameters are tightened so that a sample should only be obtained:

- in respect of an offence punishable by imprisonment for two or more years; and
- if a senior police officer considers it would be reasonable given the nature and seriousness of offending and the person's history of prior offending.

Resulting profiles are only to be compared on a one-off basis to the Crime Scene Index if a Judge makes an order. The Judge must be satisfied there are reasonable grounds to suspect prior offending and believe a comparison may result in a match.

We recommend that the final way Police currently obtain profiles for the DPD – through service of a contestable databank compulsion notice after a qualifying conviction – continues but only in respect of adults convicted of an offence punishable by imprisonment for two or more years.

Retention of DNA

Adult profiles

Currently profiles from suspects and arrestees are automatically added to the DPD on conviction for the offence for which DNA was obtained. Most are then held indefinitely.

We recommend that if suspects or arrestees are convicted of an offence punishable by imprisonment for two or more years (a qualifying offence), a senior Police officer must consider if it is reasonable to transfer the profile to the Offenders Index. If so, they must issue a databank transfer notice. This notice can be challenged, similar to a databank compulsion notice.

We also recommend profiles are removed from the Offenders Index if:

- the adult receives a non-custodial sentence and is not subsequently convicted of a qualifying offence within seven years; or
- upon their death.

Profiles of children and young people

Currently DNA profiles of children and young people are held for four years, 10 years or indefinitely, depending on the offence and how the DNA sample was obtained.

We recommend better alignment with the rehabilitative focus of the Oranga Tamariki Act 1989 (OTA). Currently if a child or young person is discharged under s 282 of the OTA their profile is retained if the charge was proven before discharge, but not if the charge was not proven. We recommend no retention at all after a discharge.

If an order is made against a child or young person under s 283 of the OTA, or they are convicted of a qualifying offence, we recommend a Youth Court Judge should decide whether their profile is retained. In doing so, the Judge must consider the principles set out in Part 4 of the OTA.

Retained profiles will be held on the Offenders Index for five years and then removed unless the child or young person is sentenced to imprisonment for the original offence or if, during the five year period, they reoffend in which case the adult retention rules should apply. ■

Read the Report at *www.lawcom.govt.nz*: The Government response to our Report is expected in May 2021.

JURY SELECTION

Transparency lacking in juror occupations

For several years criminal defence barrister Chris White has been successfully pushing for more transparency around the occupations of potential jurors in a series of jury trials in the Auckland District Court.

He's concerned about the number of jurors whose occupations are listed as 'Not Stated'. He says, for example, that the jury lists for cases being heard in the Manukau District Court for the week of 18 January 2021 showed that 75 of the 355 names had occupation Not Stated (about 21 per cent), and for the week of 25 January 2021, 64 of the 375 names had occupation Not Stated (about 17 per cent).

He's also concerned that an amendment that was made as part of the Jury Amendment Rules 2020 in response to Covid-19 has removed the power of judges to require potential jurors to provide their occupations.

Here he discusses the issue in his own words.

How occupations are given

The occupation of a juror comes from information the person provides when they register, or update their details, on the electoral roll. The required information includes full name, date of birth, place of residence, and occupation if any. An application can't be rejected for not including an occupation (if any), so if the person gives no occupation, it will simply be listed as 'Not Stated' when the Electoral Commission gives jury lists to the Ministry of Justice. But the Jury Rules 1990 (the Rules) require that for each person on a jury list the Electoral Commission must provide the full name, date of birth, place of residence, and – until an amendment to the Rules on 31 July 2020 – occupation. That is what gave judges the power, until the amendment, to require a potential juror to provide an occupation when it was listed as Not Stated.

Why a juror's occupation is relevant

It's important to know the occupations of potential jurors so the parties can have a fair trial by an independent and impartial court, which the Juries Act 1981 (the Act) tries to achieve by disqualifying and prohibiting certain persons from serving on a jury, and also by giving the parties the right to challenge jurors for want of qualification, or because they are not indifferent between the parties or are not capable of acting effectively because of intellectual disability, or without cause. The occupations of potential jurors can be highly relevant to all of these considerations.

The fundamental reason for the right of the parties to challenge jurors is the right to a fair trial by an independent and impartial court, which is guaranteed by s 25(a) of the New Zealand Bill of Rights Act 1990 and which the Supreme Court described in *R v Condon* [2007] 1 NZLR 300 at [77] as "an absolute right".

Most of the occupations prohibited by the Act are jobs that may be perceived as creating a risk of not being independent and impartial, such as police employees, lawyers, members of the judiciary, and members of parliament. Other prohibited persons include parties to prison management contracts or security contracts, and "a security officer within the meaning of s 3(1) of the Corrections Act 2004". Some government jobs are also prohibited, including employees of "the Public Service" who are employed in the Ministry of Justice or the Department of Corrections or as an officer of the High Court or of a District Court.

The occupation of a potential juror may also be grounds for a judge to direct the person to stand by. Section 27 of the Act gives judges power, on application or of their own motion, to direct any number of jurors to stand by until all available jurors have been called, where it is in the interests of justice to do so. It is reasonable to infer that such directions ought to relate to trial fairness.

The need for specifics

The description of occupation as "Public Servant" (which the writer has seen on jury lists) gives insufficient information to determine if the person is prohibited from serving on a jury by s 8 of the Act. So too are occupations that may indicate other prohibited persons, such as "Security Officer". The potential for enquiry into many other descriptions of occupation is far reaching.

Power of supervision of jury selection practices

In *Gordon-Smith v R* [2009] NZSC 20, the Supreme Court recognised jury vetting as a feature of the New Zealand jury trial system that helps to ensure fair trial by an impartial and independent court. The court held that the prosecution should disclose juror vetting information to the defence that gives rise to a real risk that the juror might be prejudiced against the defendant or in favour of the prosecution, which reconciles the interests of accused persons with the legitimate privacy and security concerns of jurors.

More broadly, the inherent powers of a court provide sufficient power to supervise the jury selection process. As the Supreme Court noted in *Siemer v S-G* [2013] 3 NZLR 441 (which was a case about contempt of court), every court has inherent powers that are incidental or ancillary to its jurisdiction, whether that jurisdiction is inherent or statutory, the scope of which extends to preventing abuse of the court's processes and protecting the fair trial rights of a defendant.

Legitimate privacy and security concerns

The legitimate privacy and security concerns of registered electors and members of jury lists are well provided for by the Act, which

provides for protected particulars, and makes it an offence to identify a juror or former juror, and by the Electoral Act 1993, which provides for non-publication on the electoral roll and unavailability for public inspection. These provisions are important safeguards for people with sensitivity about their personal information, including occupations.

The amendment

On 31 July 2020 the Jury Amendment Rules 2020 came into force in response to Covid-19, and included what was described as some 'minor and technical amendments', one of which was the insertion of "(if known)" after "occupation" in the Rules. This amendment effectively removed the power of judges to require potential jurors to give their occupations when they are listed as Not Stated.

How the amendment was presented

In the Jury Amendment Rules 2020, which were approved by Cabinet and enacted by Order in Council, the accompanying explanatory note makes no mention of this particular change. The only mention of it is in the proposal by the Associate Minister of Justice to the Cabinet Legislation Committee (CLC) for submission of the amendment rules to the Executive Council, in which this particular change is mentioned only once, sandwiched in the middle of a series of innocuous sub-paragraphs in a paragraph that itself is sandwiched in the middle of a 20-paragraph document, under the heading "Minor and technical amendments are also being made to the Jury Rules 1990". To be precise, it is in paragraph 8.3, which reads:

> 8.3 adding the words, 'if known' after 'occupation' in the rules governing jury lists, provisional panels and jury records to recognise this information is not always available;

The nature and significance of this particular change was further obscured by it not being mentioned in the passages at the beginning and end of the proposal to the CLC, which effectively begins with these words:

> "Jury trials are currently suspended and are due to recommence from 3 August 2020. In order to provide assurance to potential jurors regarding their safety while completing jury service, and for jury trials to operate in compliance with any future physical distancing requirements, amendments are needed to the Jury Rules 1990. The Amendment Rules also progress other minor and technical amendments to the Jury Rules."

The proposal to the CLC ends with recommendations which "note that the Jury Amendment Rules 2020 make minor changes to enable compliance with any future physical distancing requirements and to address technical issues". This note is repeated in the Minute of Decision of the CLC on 21 July 2020 (which is attached to the released proposal to the CLC).

The proposal to the CLC records that the Chief Justice, the Chief District Court Judge, and the President of the New Zealand Law Society were consulted about the proposed amendments, and says the Heads of Bench and the President all support the proposed amendments.

The writer does not know the extent to which those stakeholders considered the implications of this particular amendment, which has bypassed consideration of its significance by Parliament and evaded the opportunity for submissions about it to the relevant select committee.

Conclusion

The seemingly innocuous insertion of 'if known' after 'occupation' in the Rules, passed off as being a minor and technical amendment, and obscured in the middle of a proposal dealing with juror safety and physical distancing in response to covid-19, has undermined the guaranteed absolute right to a fair trial by an independent and impartial court.

The remedy is to reinstate the unqualified requirement in the Rules that jury lists include occupations. Doing so would not affect protected particulars for the safety of persons and their families, non-publication in electoral rolls, and prevention of public inspection where appropriate. ■

From the Law Society:

"Under s 35 of the Juries Act 1981 the Minister of Justice/Associate Minister of Justice is required to consult with the President of the Law Society on proposed changes to the Rules (along with the Chief Justice and Chief District Court Judge).

"The Law Society President was consulted in 2019 on confidential minor/technical amendments and again in 2020 on urgent amendments to enable Covid-19 physical distancing requirements for juries. "The Law Society did not specifically comment on the proposed change to rules 4, 6 and 7 to include the words "if known" after occupation.

"On both occasions, the Law Society's Criminal Law Committee (made up of senior criminal practitioners) reviewed the amendments and didn't raise any concerns about the qualifier."

PERSONAL FINANCE

How to invest to effect positive change

An interview with Patrick Fogarty, Client Director at The Private Office

The impact that investors can have in driving an organisation's actions and ethos on climate change has never been clearer. As well as investing money, shareholders are increasingly demanding corporate accountability from the companies they invest in, attempting to influence boards to take environmental sustainability and social issues seriously.

As regulations dictate that companies publish more and more information about the impact they're having on the environment, it's become easier to assess which companies to invest in, and which to avoid if you're passionate about these issues.

One key question investors face is how to manage the trade-off between investment returns and social responsibility. For instance, how can one reduce the environmental footprint of their investment portfolio while maintaining sound investment principles like diversification?

"A growing number of people want their investments and their values to be in alignment, but at the same time they don't want to sacrifice their financial objectives", says Patrick Fogarty.

"In the past, the approach investment managers used to address these concerns was quite blunt, often excluding whole industries such as oil and gas completely from portfolios.

"While the first iteration of socially responsible investments helped investors to meet their values objectives, the 'negative screening' approach often resulted in portfolios that compromised key components of best practice portfolio design."

Instead, fund managers now use more sophisticated weighting mechanisms to measure a company's environmental credentials. This means that investors can maintain exposure to sectors like oil and gas, but weight the companies within that sector by their environmental credentials, measured against variables such as carbon emissions, biodiversity, toxic spills, operational waste and water management.

"This evolution has resulted in more investors adopting a socially responsible approach, creating a virtuous circle of companies responding to meet this growing demand."

In New Zealand around 70% of professionally managed assets claim to be "socially responsible" based on ESG (Environmental, Social and Governance) factors. These are:

Environmental – covers a company's carbon footprint, its use of renewable energy sources, its waste management program, how it handles potential problems of air or water pollution arising from its operations, and the company's attitude and actions in relation to climate change issues.

Social – covers the nature of a company's business activities. Are they for example involved in the production of tobacco, cluster munitions or landmines? Do they use child labour or factory farming? How do they treat their employees, suppliers, customers, and the communities where they operate?

Governance – deals with a company's leadership, executive pay, audits, internal controls, and shareholder rights. Will you as an investor have the ability to use your power to vote at shareholder meetings to influence socially responsible decisions?

Putting this into practise, Patrick explains that at The Private Office they account for all of these factors when building portfolios.

"Clients who want to express their values through their investments are looking for a broad approach, one that considers all aspects of environmental and social responsibility."

Although the investment landscape is moving in the right direction, there is a long way to go. It takes advocacy and education to move investors towards this space, and despite the large range of options "there are still a lot of strategies that aren't fit for purpose if your objective is to do well financially while adhering to your core values."

"Ultimately, my job as a wealth adviser is to help investors address their sustainability and social objectives while building robust investment solutions aimed at growing their savings for future consumption.

"I have spent a lot of my career helping investors to achieve this, and plan to continue doing so for as long as I'm in this industry."

If you would like to know more about The Private Office's approach to Socially Responsible Investing you can find more information on their website.

The Financial Markets Authority has more information on investing ethically in an article recently published on its website. ■

TALKING ABOUT MENTAL HEALTH

What really is the state of our wellbeing and mental health?

BY **JACQUI MAGUIRE** AND **AARON JARDEN**

My name is Jacqui Maguire. I am a clinical psychologist and science communicator. My professional career has been anchored in corporate wellbeing, where I have provided support to optimise wellbeing and mental health across New Zealand's business community. I have always felt a particular kinship when working alongside the legal profession, which spurred my personal interest to better understand the research on why wellbeing in this field is so unfortunately poor.

In 2016, my neighbour and family friend Andrew McIntyre took his own life. Andrew practised law for many years, and made significant contributions to the New Zealand law profession. Throughout his career he worked with numerous people from a myriad of backgrounds, and that was the part of his work that inspired him the most. His work impacted many, and Andrew made himself unforgettable to all, an attribute that served him well in his community, professionally and personally. Andrew had managed this whilst battling with depression and mental illness, a battle that ultimately ended his life.

Following his death, Andrew's wife and close friends (also lawyers) decided to form Life Squared Trust in his honour. This charitable trust was established with the core purpose of understanding, promoting and raising awareness for mental health amongst Kiwi legal professionals. I was asked to support the trust by providing clinical guidance to achieve these goals. I knew that in order for the Trust to have a sustainable and effective impact, we must first truly understand the lay of the land. Whilst research into legal wellbeing dates back to the 1950's, there is very little empirical evidence based on our New Zealand cohort. We needed to understand the severity of the problem and identify the unique factors that both protect and prevent good mental health and wellbeing.

Jacqui Maguire

Aaron Jarden

In late 2020 Life Squared Trust partnered with academics at the University of Melbourne, to develop a research project to tackle this critical first step. This project will take the form of a three-year longitudinal study. The aim is to understand in more depth (prevalence, enablers, barriers) and over time, the levels of, and changes in, mental health and wellbeing amongst the New Zealand legal profession. The quality and level of research undertaken will provide scientifically credible information to advocate for positive and preventative change in the legal profession. Such information may guide policy development and resource utilisation (eg, investments in mental health and wellbeing programmes that are fit for the legal profession).

Thank you to Sarah Taylor for inviting us to contribute to this series and to the New Zealand Law Society for enabling us to share the outline for this project with you.

The background: What we already know

Research has consistently shown that members of the legal profession experience higher adverse mental health conditions such as depression and anxiety compared to both the general population and to workers in other professions. Evidence also suggests that there is a reluctance among lawyers to seek professional mental health support due to stigma among the profession. Accordingly they experience high levels of alcohol use and substance abuse in order to help cope. Over the last 10 years there has been an increasing effort to understand why members of the legal profession experience these disturbing trends given that they result in negative consequences for individual workers (and their families), their clients, the organisations they work for and the legal system as a whole.

Three main sources of legal stress have been proposed. First, research consistently demonstrates that legal students also experience higher psychological distress compared with other higher education students. This has led to scholars concluding that legal education can be a breeding ground for future psychological distress with "the conception of a lawyer as adversarial, emotionally detached, and competitive to be possible sources of the negative impact on student wellbeing" as students are prepared for the careers in the challenging profession. Second, the nature of legal work is difficult with many role characteristics being challenging. Examples include juggling multiple complex cases, the burden of client expectations, inherent competitiveness of the adversarial legal system, time pressure, pressure to maintain billable hours, and exposure to regular incivility by clients and opposing counsel.

Third, some legal organisations can be toxic including bullying, sexual harassment, very high emphasis on profits and being competitive, hierarchical structures and significant power imbalances. Furthermore, the effect of working in law will vary depending upon the legal setting and the type of law being practiced.

Given this grim situation there has been a call for the legal profession to recognise the challenge of stress and wellbeing in legal workers and law students and to take proactive steps to understand, and rectify the situation. In addition, almost all research to date (the vast majority of which is from America) has been on lawyer illbeing, and not lawyer wellbeing; meaning we know a lot about what is going wrong with lawyers, but extraordinarily little about what is going right, or how what is going right can be leveraged to help remediate what is going wrong. A crucial first step is to identify prevalence, enablers and barriers for lawyer and law student stress and wellbeing, and to identify these trends in changes of wellbeing and mental health over time.

New research on lawyer wellbeing and mental health

Leading this research are the academics at the Centre for Wellbeing Science at the University of Melbourne, led by Associate Professor Aaron Jarden and Professor Dianne Vella-Broderick, are world renowned specialist in assessing psychological wellbeing and mental health.

In 2020 they conducted a thorough literature review capturing the research to date on lawyer wellbeing, and also collected information on the key findings of lawyer illbeing. Based on this review, and in consultation with the Life Squared Trust, they created a research study aiming to help understand the prevalence, enablers and barriers of wellbeing and mental health among the legal profession and law students of New Zealand. This project will provide research-based evidence to advocate for positive change in the legal profession and educational facilities that provide legal training. The key questions under investigation in this ground-breaking study include:

- What is the *prevalence* of wellbeing and poor mental health of individuals working in the legal profession and of individuals studying law?
- What are the *enablers* and *barriers* of good mental health and wellbeing in individuals working in the legal profession and of law students in New Zealand.
- How does wellbeing and mental health of lawyers and law students *change* over a 3-year period.

The longitudinal nature of the study also means this is the first study to monitor the change in mental health and wellbeing over time allowing insight into the impact and drivers of changes over a long time period.

What will the research involve?

The research is open to all New Zealand lawyers with a practising certificate (irrespective of the area they work in), and to all law students as of March 2021 (although only first year law students will be invited for ongoing surveys for years 2 and 3 assessment points). All participants will need to be over the age of 18 at the start of the first survey. The study will run in April and repeat at the same times in 2022 and 2023.

When the research begins, the Work on Wellbeing (WoW) survey platform (WoW: *https://www.workonwellbeing.com/*) will be used to collect the data, and will include questions on work, study, wellbeing (e.g., happiness, passion, relationships, meaning) and mental health (e.g., depression, stress, distress,

anxiety). It is estimated to take approximately 15 to 20 minutes to complete the survey at each time point. Some of the benefits of participating include:

- an option to choose a summary research report at completion of the project,
- an individualised wellbeing report at the completion of each survey wave that is automatically generated and tracks individual level wellbeing overtime, and
- access to a range (30+) of wellbeing activities to proactively manage personal wellbeing.

Putting results into action

With the aims of this project to have a positive impact on the wellbeing and mental health of the New Zealand legal profession, the results of this project will be made public through peer-reviewed journal articles, a report for the Life Squared Trust, social media and website postings, media appearances, book chapters and conference proceedings, and professional presentations to relevant stakeholders. It is hoped that the results and data will lead to better evidence-based decision making for the future wellbeing of the profession. It is also possible that the data collected in this study may be used in the future for related research, for example, if funding is obtained to extend the study beyond the three-year time frame.

It is hoped that the results and data will lead to better evidence-based decision making for the future wellbeing of the profession

On behalf of Life Squared Trust, thank you for taking the time to read through the details of our research project. It is a personal honour to be supporting the memory of Andrew and his family, and I believe this investment in knowledge, time, energy and resource has the propensity to benefit all current and future lawyers. However, the success of this project is solely dependent on participation rates. The more data we collect, the more informative the results and applications will be. I hope as a collective, the profession sees this as an opportunity to personally gain and give back.

If you are interested in participating in this study and would like to register or read the study Plain Language Statement or Informed Consent statement, please email *aaron.jarden@unimelb.edu.au* ■

Jacqui Maguire is a registered clinical psychologist and science communicator. Her professional career has been anchored in corporate wellbeing, where she aims to provide practical psychological theory and strategies to optimise personal wellbeing, work and relationships. She is one of New Zealand's prominent mental health and wellbeing thought leaders, and is a sought after keynote speaker. Jacqui is also the founder of #1 ranked podcast Mind Brew, and is about to release her first Children's book 'When the Wind Blew' to support children and families through unexpected change.

Associate Professor Aaron Jarden is Director of the Masters of Applied Positive Psychology (MAPP) programme at the Melbourne Graduate School of Education, University of Melbourne. He is a wellbeing consultant, social entrepreneur, has multiple qualifications in philosophy, computing, education, and psychology, and is a prolific author and presenter. He is past president of the New Zealand Association of Positive Psychology, co-editor of the International Journal of Wellbeing, lead investigator for the International Wellbeing Study, and Senior Scientist for Work on Wellbeing amongst others.

Sarah Taylor is a senior lawyer, a mental health champion, and the founder of this series. If you'd like to contribute to this series, please contact Sarah: *sarah@lawstudio.nz*

COLLEGIALITY

AIJA – what it is, what does it do and why you should join

BY **KATE DAVENPORT QC**

SERENDIPITY IS NOT A TERM THAT IS OFTEN used in legal writing but one that is particularly apt when describing my first encounter with the AIJA. I became a member while on the Council of the New Zealand Bar Association and after attending a seminar on discovery (yes really!). Since joining the AIJA it has provided a wealth of information, research material and camaraderie for me.

Kate Davenport QC

The AIJA is the acronym for the Australian Institution of Judicial Administration. Despite the title it is not just an organisation for judges and judicial administrators, but rather it is an organisation that is truly trans-Tasman and embraces the profession as well as the judiciary. Its members come from the Higher Courts in New Zealand, all judiciary in the State and Federal Courts of Australia and practitioners in both countries.

It is an organisation that encourages the profession to work with the judiciary to achieve better operation of our courts and better education of our judges and our practitioners. I am now in my second term as a Council member of the AIJA. In that time the AIJA has provided me with a lot of insight into the issues that both New Zealand and Australian judges grapple with. You also never know the other things you will learn. For example, Matt Collins QC (the former President of the Victorian Bar and now also a member of AIJA) educated me last year on the importance of styling your Zoom-scape to increase envy amongst one's peers. He told me an unverified but nonetheless interesting fact that his Zoom-scape, a tasteful mix of photos, art and flowers scored 9/10 in an international competition! I have shared this useful information with my colleagues as we strive for just a little extra in the age of Court via Covid-19.

What does the AIJA do and why would you want to join?

But more seriously, AIJA is about ensuring the Courts achieve excellence; funding and supporting research into judicial administration; and the development and conduct of educational programmes for Judges, Court Administrators and Lawyers. The AIJA has funded much research into the administration of Courts and it offers seed funding to academics and others who would wish to develop research projects for publication. It publishes Bench books for judges, a guide for Judicial Conduct and a guide to uniform production of judgments. It has produced a document called International Framework for Court Excellence.

Recent examples of interesting studies carried out by the AIJA are research into perpetrator interventions in Australia looking at judicial views and sentencing on domestic violence; looking at the history of public information officers in Australian Courts; research on obstacles to parole and community based sentences for Aboriginal and indigenous Australians; and the impact of self-represented litigants on civil and administrative justice, just to name a few.

So, what does the AIJA stand for?

According to the website (*aija.org.au*) the values of the AIJA are to promote excellence in judicial administration by providing practical assistance and information for courts, tribunals and judicial officers. Its members are committed to:

- rule of law
- the integrity of the justice system
- equality of access to justice
- independence of the judiciary
- excellence in the administration of justice
- achieving practical reform on contemporary issues; and
- effective and efficient court administration.

These are vital issues for all judges and lawyers to grapple with and the AIJA offers practical support and intellectual debate on the issues of the day.

What does this mean practically?

The AIJA traditionally holds a number of educational events. Last year, the AIJA was particularly proud of the fact that despite Covid-19 it was able to hold a very well attended virtual conference series called "Providing Justice in a Viral World; Where to From Here?". Over approximately five weeks panels made up of Australian and New Zealand Senior Court judges and practitioners examined how Covid-19 had impacted the work that we do in how Courts and the delivery of justice might look in the future and the lessons that we had learned from Covid-19 – what had worked and what hadn't worked. A particularly interesting session entitled, "The Different Sociological and Neurological Impacts of Viral or Online Courts" was very well attended, with Professor Ian Lambie, a clinical psychologist from the University of Auckland, giving insight into how an online administration of justice could potentially affect litigants. I chaired a fantastic session on the impact of current lockdown restrictions on the principles of open justice and access to the Courts, which featured Justice Cooper from the New Zealand Court of Appeal, two Australian barristers and the President of the New Zealand Law Society.

At recent Committee discussions the AIJA has been thinking about such diverse topics as judicial bullying, discussing the Australian therapeutic jurisprudence clearing house and mental health and the Courts. The work on therapeutic jurisdiction reflects some of the thinking currently being done by a working group of New Zealand judges on how to improve participants' experiences in the courts. There is no doubt that the concerns that Australian judges have are almost identical to those held by New Zealand judges. None of us who litigate operate in a vacuum and we cannot ignore the social issues of our day and their impact upon courts. Gender equity, ethnicity, social economic position of participants in our justice system, the issues raised by administration of justice to our indigenous people are all issues which lawyers and judges need to consider. AIJA has helped to channel some of the intellectual debate and hopefully drive forward lasting change in the Courts.

There is no doubt that the concerns that Australian judges have are almost identical to those held by New Zealand judges. None of us who litigate operate in a vacuum and we cannot ignore the social issues of our day and their impact upon courts

AIJA also provides gender statistics for Australian judges in Australia. Readers might be interested to know that 37% of the Australian Commonwealth judges are women as at 30 June 2020, an increase of only 0.7% from the previous year. Women judges make up 30% of judges in the New South Wales state courts (a drop of 1.1% from the previous year) and only 28% in Tasmania which is up almost 5% from previous years. This reflects some of the analysis done in New Zealand and reinforces recent work done by the New Zealand Bar Association updating statistics on participation of women counsel in our higher courts.

The AIJA is a great organisation to belong to, and it's a bargain – only about AUS$185 per annum for membership.

For all of us involved in litigation and who care and think about access to justice and how justice ought to be administered fairly and equitably to all those who seek justice, the AIJA is the place for you.

The AIJA has recently undergone somewhat of a transformational change in that it has moved its base of location from Melbourne to Sydney and has a new Executive Director. The new committee have put forward a number of exciting initiatives to propel the work of the AIJA into a post-Covid world. I hope that you, as readers will be interested enough to join and to take part in the debate. ■

TECHNOLOGY

Demystifying cloud-based software with OneLaw

Cloud-101

BY **EMMA-JANE GRAY**

Emma-Jane Gray

COVID-19 LOCKDOWNS AND THE changing pace of tech have forced many New Zealand firms to consider switching to Cloud-based technologies much sooner than they might have otherwise expected. We keep hearing that it's the way of the future, but what actually is "the cloud?" How can you find the right solution for your firm? If you find this technology confusing, we've written this "Cloud 101" to help you make educated decisions – and hold your end of the conversation with your IT provider.

What is "the cloud?"

Cloud computing is the delivery of computing services over the internet. This includes servers, storage, databases, networking, software, analytics, and intelligence – all provided via the same platform that brings you Facebook, Netflix and Zoom (ah, our new best friend Zoom). When your software is in "the cloud," you are using a platform owned by a provider such as Microsoft or Amazon, and your data is transferred to and from that platform via the internet.

Why is the cloud so important?

The cloud offers faster innovation, more flexible resources, and economies of scale. You typically pay only for cloud services you use, helping you lower your operating costs, run your infrastructure more efficiently, and scale as your business changes without investing in hardware with a finite lifespan.

It also allows you to work more flexibly – you can access your data anywhere you have an internet connection – (even via your mobile phone), without the need to set up anything extra like a VPN (virtual private network).

What is the difference between public and private cloud?

The "public cloud" is what most people mean when they refer to the cloud. It is defined as computing services offered by third-party providers over the public internet, making them available to anyone who wants to use or purchase them. "Private cloud" is similar to public cloud but is not offered to the general public, and is often monetised differently. You may also hear about "hybrid cloud," which can be a mix of both.

Who controls the public cloud?

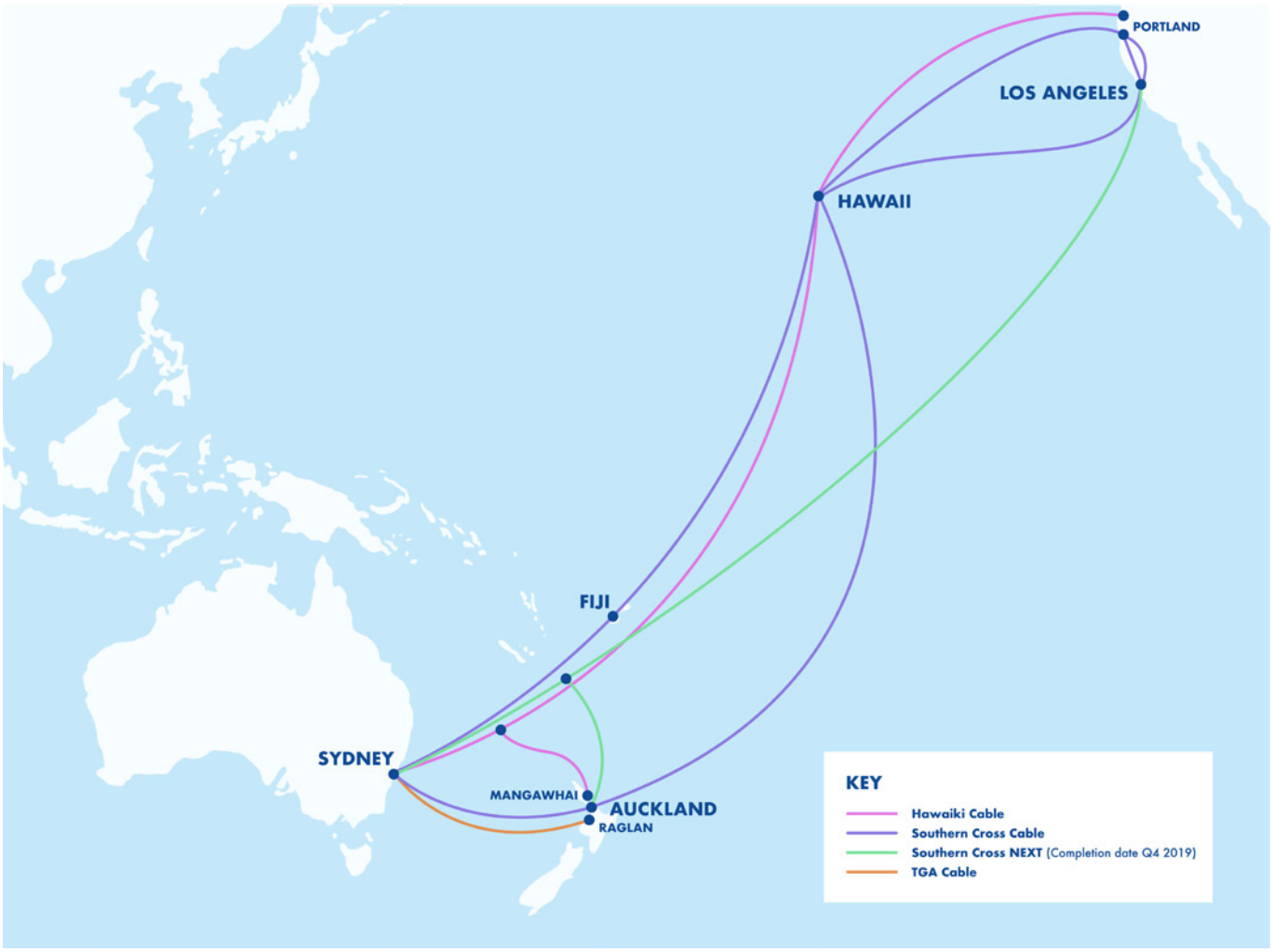
Most of the big computing companies offer public cloud solutions. By far the largest are Amazon Web Services (AWS), Microsoft Azure, Alibaba and Google Cloud (AWS holds more than 40% global market share). Other companies such as Apple, IBM, HP, Oracle and Salesforce also offer public cloud services that are often specific to their business offerings (e.g. Apple iCloud services).

Where is the cloud?

Most cloud services are located offshore from New Zealand. The largest cloud providers; AWS, Google, Apple and Microsoft operate out of the East Coast of Australia. However, Microsoft has announced that it is building a data centre in New Zealand ready sometime in 2023-2024.

What are the benefits of moving to cloud-based software?

The benefits are many and varied. Cloud platforms remove the need for private server infrastructure and the accompanied cost and hassle. Moving to cloud-based software is a significant step in any firms' plan



to modernise and future-proof. It is by far the top development firms ask us for, and is forefront of everyone's minds.

Is my data secure in the cloud?

Data security should be one of your key decision factors, as not all cloud systems are created equally. The big players invest heavily in creating a secure foundation across physical, infrastructure, and operational security. Microsoft, for example, invests over a billion dollars every year into security, so that your data and business assets can be protected.

There can be additional security from your software provider. OneLaw uses the same technology as online banking systems to secure communications between your PC and the cloud. We have also added two-factor authentication (2FA) for those clients who want it.

How does remote access work with the cloud?

Most people considering moving to the cloud post-2020 have one key thing in mind: remote access. You want to be able to take your laptop and work from home, from court, out meeting clients – even overseas (remember "overseas?"). When you're looking for cloud-based software, you will have two options: browser or app-based. These are essentially the same delivery platform (your data is still being stored and transferred via the internet), however there is one key difference: your user experience.

▲ Internet connections, image from the New Zealand Telecommunications Forum

Most people considering moving to the cloud post-2020 have one key thing in mind: remote access

Some cloud systems (such as Xero) operate within your web browser. This means you can log in on any device, anytime using your web browser to connect to the cloud service.

OneLaw will operate using its own "app", installed on your PC. This can offer a better user experience for more complex software. You simply log into the app on your device, from anywhere you have an internet connection and the OneLaw cloud service works out the rest.

Does moving to the cloud mean my software will work faster?

It depends. There are two key factors that will determine the speed your software operates at: Internet

connection and cloud setup.

Firstly, the cloud platform you choose is partially reliant on your internet connection. Make sure you are set up with the highest-speed internet available to you.

Then there's the cloud setup. Let's look at OneLaw's cloud platform, for instance. All of the heavy processing work is done by our cloud servers, and because of the way the cloud works we can massively scale our back-end operations on demand. Our cloud services will initially operate from east coast Australia. New Zealand has multiple fibre links across the Tasman and up into the Pacific. Most day-to-day tasks transfer very little data between you and the back-end servers. There are some tasks, such as printing reports, that do send more data – these need to be optimised for cloud operation.

How do you get cloud set up?

This depends if your current software provider offers a cloud option. Ask your provider, or shop around.

At OneLaw, we provide a one-click link for you to download our client software to any PC. Setup and installation is a very simple process, for both new and existing customers.

What about our firm's data sovereignty?

The term 'data sovereignty' is interchangeable with the term 'jurisdictional risks', which means that your cloud provider is subject to the laws of the country from which they operate. Each cloud customer should do their own risk assessment of their cloud provider in this respect.

We consider there to be a relatively low sovereignty risk with a US multinational (such as Microsoft, AWS or Google) operating a subsidiary service from Australia or New Zealand.

If your system is multi-tenanted, it's like you've been forced to put all of your belongings in one single large suitcase along with everyone else's on family holiday. If you decide to part ways, it's difficult

How do backups and restores work?

All major cloud platform providers have built-in backup and restore services. These range from restoring a single document to restoring an entire system back to a snapshot in time. One of the major benefits of Microsoft Azure, for example, is the ability to use other global regions to host near real-time copies of your entire system. You can choose to host a copy of your firm's system in another Azure region such as the US or Singapore for disaster recovery (this does add some extra cost to your subscription). It will come down to your individual setup and subscription on what backup options you have.

How does my IT provider fit into the equation?

Moving to the cloud doesn't mean you don't need the services of an IT provider or integrator. Sure, they may not need to look after an in-house server, but they are still responsible for keeping the computers, printers and network in your office operational and secure. There may be other systems you use, such as digital dictation, which cannot easily move to the cloud. Your IT provider should be the first point of contact when planning to move to the cloud.

Can we move back to our own server if we want to?

The ease with which this can be done depends on the architecture of your cloud service.

Imagine your database (including information and document collection) is "luggage." If your system is multi-tenanted, it's like you've been forced to put all of your belongings in one single large suitcase along with everyone else's on a family holiday. If you decide to part ways, it's difficult – your belongings are mixed up with everyone else's, and you don't have your own suitcase.

With OneLaw you can, because we single-tenant or "containerise" your system, so you have your own instance of OneLaw. Single-tenanting means you have your own "suitcase," and you can move freely if you wish. This further reduces data sovereignty risk and allows for operational independence. For example, when a OneLaw software upgrade becomes available you can choose when the upgrade is applied to your system, all OneLaw clients aren't forced to upgrade at the same time. ■

We are going to run a webinar on demystifying the cloud in early May. If you are interested in this free event, send us an enquiry via our website, *www.onelaw.co.nz*

LAW SOCIETY | TE KĀHUI TURE NEWS

Changes to Professional Indemnity Insurance Minimum Standards

THE MINIMUM STANDARDS FOR THE level of professional indemnity insurance (PI Insurance) held by law practices are increasing from Tuesday 6 April 2021. These changes follow a review by the New Zealand Law Society | Te Kāhui Ture o Aotearoa.

At present the minimum indemnity limit is whichever is the greater of:

1. $1 million per practice; or

2. $750,000 per partner.

These rates have been in place since 2008 and their review incorporated an inflationary adjustment to ensure they remain current. The revised minimum indemnity limits, and standards are set out below.

Increased minimum indemnity

Following the review, the minimum indemnity limit will now be whichever is the greater of:

1. $1.2 million per practice; or

2. $900,000 per partner.

Rule 3.4(b) of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 requires a law practice to disclose its professional indemnity insurance arrangements to its clients. However, the rule provides that this obligation is met if it is disclosed that the practice holds indemnity insurance that meets or exceeds minimum standards from time to time specified by the Law Society. The rule further provides that if a practice is not indemnified this must be disclosed in writing to the client.

The above are not 'minimum standards' in the true sense. They are simply standards that must be met to enable a law practice to limit its disclosure to stating that the practice holds PI insurance that meets the minimum standards specified by the Law Society. However, for convenience, they are referred to as minimum standards.

Reinstatement

The present requirements will remain in force under which the indemnity limit applies either:

1. on an aggregated basis to claims made in the policy period with not less than one automatic reinstatement; or

2. on any one claim basis, with no aggregate limit.

Excess

The current requirement is that the excess payable by a law practice must not exceed 1% of the indemnity limit.

It is understood that this is causing difficulty for some practices which carry out significant conveyancing or trust work. In such cases, some insurers are requiring the excess to be increased to 2% of the indemnity limit or charging an increased premium if it remains at 1%.

However, a large law practice would normally have an excess of much less than 1%. An excess of 1% for a law practice with cover of $50 million would result in $500,000, whilst an excess of 2% would amount to $1 million.

In the circumstances, it has been decided that the excess requirement is amended so that the excess payable does not exceed the greater of:

1. 1% of the indemnity limit; or

2. $20,000.

The table below shows how this will operate (using the increased minimum indemnity limits). It will have the effect of allowing a practice of not more than two partners to have a higher maximum excess but would not alter the position for practices with three or more partners.

Partners	Limit	Current maximum excess	Revised maximum excess
1	$1,200,000	$12,000	$20,000
2	$1,800,000	$18,000	$20,000
3	$2,700,000	$27,000	$27,000
5	$4,500,000	$45,000	$45,000
10	$9,000,000	$90,000	$90,000

Defence costs cover, Cyber cover and Run-off cover, do not form part of the minimum standard requirements set out above, but are recommended matters for law practices to consider when arranging their PI Insurance.

Cost of increased cover

A law practice which decides to increase its cover to meet the new minimum standards will wish to ascertain the additional cost involved. Each law practice will be individually assessed by its insurer. However, the Law Society is advised that the additional premium for a two-partner law firm which increases its cover from $1.5 million to $1.8 million is likely to be in the 7.5% to 10% range.

Of course, where defence costs, cyber or run-off cover is also arranged, this will involve an additional premium as well.

Effective date

The above minimum requirements will take effect from and inclusive of Tuesday 6 April 2021. However, PI insurance cover which meets the present minimum standards and is in place at Tuesday 6 April 2021 may remain in force until the annual expiry date. At that time the cover must, if necessary, be extended to meet the above minimum standards, if disclosure is to be avoided. ■

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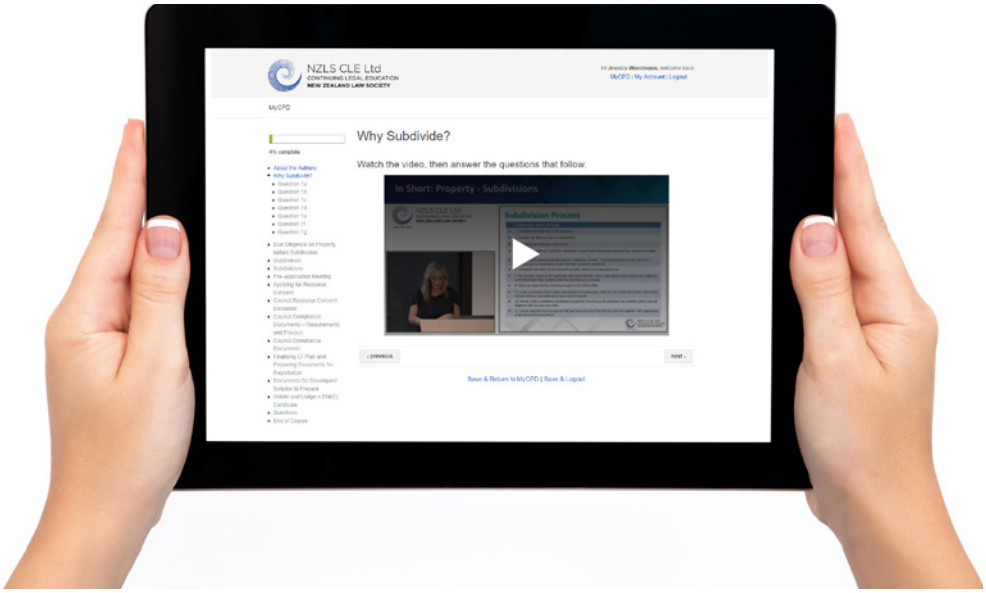

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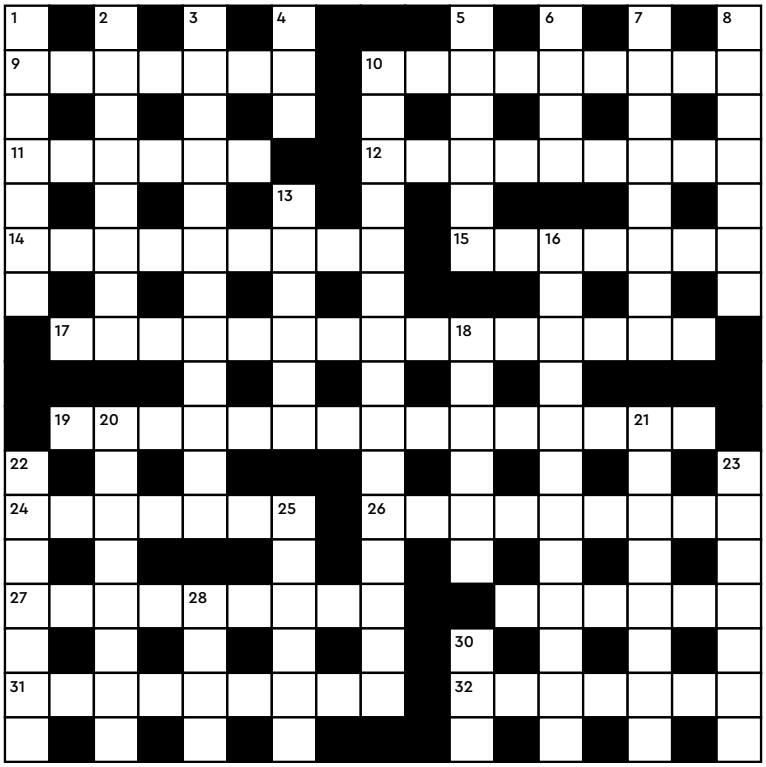

Across

9 Officer playing on cello (7)

10 See 19

11 Close church with my following hesitation... (6)

12 See 4 down

14 ...possibility of French milk-catcher's work being overturned (9)

15 See 23 down

17 One ear-splitting commotion – they seep in everywhere (11,4)

19/10 Epiphany follows reception of 12 partridges, 22 doves, 30 hens etc (3,6,4,2,9)

24 Conducted serenade almost with 16ness (7)

26 Heading west, American purchaser and upholder of trousers (9)

27 Ma is known to provide an example (9)

29 Bridge players house where I shot a man in song in the past (3,3)

31 Scottish vocalist tells girl what he does for mica (9)

32 Go near the naked intensifier? What __ ____ could it be? (2,5)

Down

1 Space 101 is rocketing from the poles (7)

2 Old German woman holds out, taking drug for a lark in France (8)

3/30 No holding end of prayer up over new motto, with a chap left to cut the grass (3,3,4,2,3)

4/12 Apple of yesteryear and duck for farmer (3,9)

5 Detailed record (with weight) drawn up for shopkeeper (6)

6 See large exchange of capital (4)

7 Laurie Lee, Pam Melroy and I hold back Avenger (4,4)

8 What is purpose of Freud? So confused (4,3)

10 Copper brought up nose (essential in faces) – 2, 3 30, 4

12 and 19 10 across, for example (10,5)

13 Raging fire destroyed church (6)

16 Unfeeling to deny Earth's problem (12)

18 Book wot I did about havin' no duds (6)

20 What a 26 does, cruelly lain on your fingertip (8)

21 Gold coin? Yes, that's completely normal (8)

22 "Star..." 10 and Kirk's new novelty single (and singular 10 down) (7)

23/15 "Green..." Singular 10 down, wax love around unedited footage (4,3,6,1!)

25 Cuban dances graduate out of desserts (6)

28 Jokers' bunks (4)

30 See 3

Answers from LawTalk 944, Summer 2020

Across: **1** Gilbert, **5** Doctor Who, **10** Tit, **11** Areolae, **12** Eclat, **13** Subrigid, **14** Oklahoma, **16** Maids, **18** Aqueduct, **22** Negus, **23** Okapi, **25** Tiana, **26** Minstrel, **28** Shrek, **31** Libretto, **33** Sullivan, **36** Weena, **37** Sublime, **38** All, **39** Retronyms, **40** Stewart.

Down: **1** Gethsemane, **2** Lethbridge, **3** Epati, **4** The Mikado, **5** Dale, **6** Checked, **7** Opera, **8** Willow, **9** Outlaw, **15** Sumatra, **17** Sushi, **19** Cites, **20** La Traviata, **21** Parking Lot, **24** I Claudius, **27** Satisfy, **29** Flower, **30** Object, **32** Erato, **34** Liege, **35** Ibis.

ABOUT LAWTALK

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