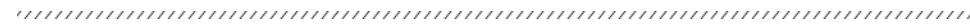
NEW ZEALAND WOMEN'S LAW JOURNAL



TE AHO KAWE KAUPAPA TURE A NGĀ WĀHINE

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EDITORIAL – KŌRERO TĪMATANGA

On 11 November 2020, Chief Judge Heemi Taumaunu announced the transformative Te Ao Mārama model for the District Court. The Chief Judge explained that Te Ao Mārama means "the world of light" or "the enlightened world", and described the model as the creation of a court where everyone, regardless of means, abilities, culture or race, could seek justice.

To us, the kaupapa of Te Aho Kawe Kaupapa Ture a ngā Wāhine is about bringing to light gender justice issues. Inspired by Chief Judge Taumaunu's vision and call for change, we adopted his philosophy when taking the reins as Co-Editors-in-Chief of the 2021 edition of the Journal. Recognising the whakapapa of the Journal, we wanted to build upon the work of those who had come before us, by continuing to create a platform for greater diversity in voice and influence within the Journal and, more broadly, te ture (the law).

We quickly realised that a collective approach underpinned by kotahitanga would be needed in order to publish an edition that was different from the rest. We drew on the experience of the Trustees, our predecessor Editors-in-Chief, our leadership team, and wonderful group of Editors, to learn from one another and create our vision for 2021. Kia kotahi te hoe o te waka; it was not enough to simply be in the same waka, rather we needed to be paddling as one.

With the Journal whānau on board and our vision in place, our engagement with submissions and authors began. Drawing on whanaungatanga, we wanted to create an experience that was more than just writing an academic piece for a Journal. To us, the Journal is as much about publishing gender justice academia, as it is about wāhine supporting wāhine. We wanted our authors and editing team to manaaki each other, build relationships, lift each other up, learn from each other, and be inspired by their involvement in the kaupapa. We challenged our authors to build upon their ideas, as we ourselves sought to learn and engage with new and unfamiliar areas of law to assist them in publishing the best possible version of their work. On occasion, we asked authors to consider bringing in a co-author; someone with a different

background, expertise and perspective from them so they could consider their kaupapa through a different lens.

Hon Kiritapu Allan and Tiana Epati, both inspiring rangatira in their own right, open this year's Journal with reflections on their experiences in te ture and visions for the future. The Journal is then divided into three sections, each reflecting a common kaupapa and stage in time, and each opening with a kōrero delivered from members of the Judiciary throughout 2021.

We begin with an acknowledgement of our Earth Mother, the foundation of us all, in our section "Papatūānuku is breathing". This year the Mana Wāhine Kaupapa Inquiry was heard by the Waitangi Tribunal, almost thirty years after the claim was filed in 1993. It is timely that our authors acknowledge the impact of te ture on wāhine Māori and te ao Māori in particular, before offering solutions through exploring mana wāhine and kaupapa Māori practices/ideologies.

We then move into "Changing the narrative" where our authors explore how the rights of wāhine, pregnant people and victims of violence are impacted upon by the current state of the law. Each author sets out an array of informed options that could be implemented to improve outcomes. Ultimately, this section reflects on where law reform and changes in societal and judicial approaches are needed in order for wāhine, pregnant people and victims of violence to be afforded equality, autonomy and justice.

Our final section, "Still more work to be done", contemplates various and recent law reform that primarily affect our workplaces (including the legal profession). Despite efforts for change, however, the authors in this section suggest that te ture still has a long way to go to truly achieve holistic change for wāhine, with the conclusion being drawn that the law alone will not be enough to affect the change that we all want to see.

As we hand over the reins to a team of wonderful wāhine, where do the challenges lie for 2022 and beyond? First, our Māori and Pasifika sisters in te ture are overburdened being all things to all people. We must find a way to balance the desire for diversity and cultural safety with ensuring we protect indigenous knowledge and wellbeing; we encourage partnership with Te Hunga Rōia Māori o Aotearoa and the Pacific Lawyers Association as a first step. Second, we are still hearing of wāhine in te ture who are experiencing bullying and sexual harassment in their legal mahi. We are pleased to see the Journal organisation formally broaden its scope to start focusing on advocacy

and law reform and, as a result, we have no doubt that it will become a prominent voice in this area. However, it will take a collective approach from the profession to truly turn the tide.

We also want to thank all of those who have been involved in the Journal this year: the authors who have produced such insightful articles and who were willing to continuously work on their article throughout the year; our hard-working associate and technical editors who had to meet some difficult deadlines but always produced excellent work; the leadership team who were there to guide us throughout the year and help share the load; the peer reviewers who provided such considered critique; the typesetter who had to get a lot done in a short period of time; and our publishing partner for their ongoing generosity.

So, returning to Chief Judge Taumaunu's model for transformative change, Te Ao Mārama, how do we create an enlightened world for gender justice in te ture? We know there is a lot of work to do, but we hope this edition of the Journal adds fuel to the ever-growing fire.

Alice Anderson and Ella Maiden
Editors-in-Chief
14 December 2021

FOREWORD – KUPU WHAKATAKI

Being a young person from Paengaroa and from a family that was relatively disconnected from the law, the only engagement with it was negative and it felt really inaccessible. Not only was it a language understood by few, it was a tool for those in the ruling class to wield over the poor and the vulnerable.

So, my entry into the legal profession (and later politics) was unconventional. Like many in my whānau, I left school at 16 and spent a few years working in KFC and other odd jobs. My sliding doors moment came while working in a bar in Auckland, when I discovered the regular I had spent hours vigorously debating law, politics, and social inequality was a law professor. Eventually, he brought in an application pack, telling me I should think about doing a law degree. I thought why not! I never looked back.

My first job was as a young law clerk working for the judiciary before going on to private law firms. I enjoyed the intellectual challenge; it was really interesting work, but the wider culture of the legal profession was one where women were objectified and had to deal with lewd remarks and inappropriate behaviour.

We saw a lot of women leave the profession, in part because of that underlying culture crisis and, in part because the profession was structured in a way that made it almost untenable to become a senior, a partner or otherwise - because of the lifestyle associated with it.

There was a lot of alcohol, long hours, working through the night and pressure. Lots, and lots, of pressure.

For me, there were the added "ism's" which came with also being wahine Māori and from the rainbow community. That inter-section of so many differences meant I not only had to contend with being a woman, but also being the total antithesis of what the legal profession was, and expected you to be. Trying to "fit the mould" was never going to work for me. And that was very hard at times.

We need to reflect on the significant changes the likes of the #MeToo

movement has brought and the brave young lawyers who stood up for themselves, and others. Proof that using your voice, and telling your stories, your honest stories, can always spark charge. The year that was 2018 was undeniably a watershed moment for the legal profession and made everyone hold up a mirror up and ask hard questions. It needed to happen. As the author Ursula Le Guin once said:

> We are volcanoes. When we women offer our experiences as our truth, as human truth, all the maps change. There are new mountains.

I want to commend the work of New Zealand Law Society President Tiana Epati – the first person of Pasifika descent to hold that role – for the work she, and the Law Society, are doing to address toxic workplaces and promote women in discussions about equality. Ms Epati has also been staunch about ensuring the conversation is bigger than sexual harassment, and covers racism and the much more pervasive bullying. It has been a tough mountain to climb.

But through that reckoning, the tide is turning.

Since 2016, the number of women who are lawyers in firms, in-house lawyers, barristers, and practitioners has increased by nearly 20 per cent. In 2020, women accounted for almost 53 per cent of New Zealand-based lawyers.

If the rate of women being admitted as lawyers continues, women will account for about 60 per cent of the profession by 2030.

When the gender of lawyers first began being collected in 1977, just 4.6 per cent of the profession were women.

In 1988, the Rt Hon Helen Winkelmann became the first female partner in her firm's then 117-year history. In 2019, she was sworn in as New Zealand's 13th Chief Justice.

More and more women – particularly under this Government – are smashing the glass ceiling. We are regularly seeing women appointments in the Queens Counsel rounds. More appointments of women and ethnically diverse lawyers are being made to the judiciary than ever before. Dame Cindy Kiro is Aotearoa's first female Māori governor-general. Rebecca Keoghan will be the first woman Chair of the Fire and Emergency New Zealand board. Public sector boards are now made up of over 50 per cent women.

There is also what I would describe as collective consciousness around issues of gender discrimination and discrimination more generally. These issues

were just never even spoken of when I entered the profession. Ever. The fact we now openly discuss it, and call it out, cannot be underestimated.

So, we have to keep going. We did not come this far, to only come this far. My aspiration is that young women from any background can enter the profession and contribute through her unique experience and her knowledge. And bring her whole self. Whether from Paengaroa, or Ruatoria, or Te Kaha. There is a place for you in this profession. My hope is that the 16 year old girl, working in a bar, with dreadlocks and nothing but true grit and big dreams can see her way right through to the apex of Government, if she chooses.

I did, and there is no looking back.

Hon Kiritapu Allan
Ngāti Ranginui, Ngāti Tūwharetoa
Minister of Conservation, Minister for Emergency Management,
Associate Minister for Arts, Culture and Heritage,
Associate Minister for the Environment, Member for East Coast, Labour Party
1 December 2021

#METOO MUST NOT LEAVE ANYONE BEHIND

Tiana Epati*

"The experiences of Māori women lawyers may have been that they are invisible or made invisible in the mainstream."[1] That quote came from the "State of the Nation – Tauākī o te Motu" conversations in issue two of this Journal in 2018. It came out just after I had been appointed President elect of the New Zealand Law Society.

The article by Bernadette Arapere and Kate Tarawhiti titled: "Me aro koe ki te hā o Hineahuone – Pay heed to the mana and dignity of Māori women" was one which gave me pause for deep thought and ultimately became one of the foundation drivers for much of my work on change in the legal profession.

By the time I became President in 2019, the #MeToo issues and the Russell McVeagh allegations had put our profession under intense scrutiny. Those revelations were quickly framed as violence against women, particularly young women in large law firms. I said at the time that view was too narrow.

The Law Society's comprehensive survey of lawyers in 2018 revealed some stark truths about bullying, sexual harassment, sexual assault and racism.[2] This included that Māori and Pasifika lawyers, and Asian ethnic minorities, are being subject to bullying, sexual violence and harassment at alarming rates.

Yet, even as the Law Society raced to deal with the revelations from Russell McVeagh, we left out those most affected by bullying and harassment.

There was a flurry of initiatives; including a working group of experts to review the complaints process, a Taskforce Committee, free webinars with senior lawyers on sexual harassment and refreshing the Friends Panel. But we didn't include Te Hunga Roia Maori or the Pacific Island Lawyers Association

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* Tiana Epati is the President of the New Zealand Law Society (April 2019 to April 2022). She is the fourth female President, and the first of Pasifika descent. Tiana is based in Tūranganui-a-Kiwa where she is a criminal defence lawyer at Rishworth Wall & Mathieson.

1 Kate Tarawhiti and Bernadette Arapere "Me aro koe ki te hā o Hineahuone – Pay heed to the mana and dignity of Māori women" in Bridget Sinclair, Bernadette Arapere, Kate Tarawhiti, Monique van Alphen and Indiana Shewen "State of the Nation – Tauākī o te Motu" [2018] NZWLJ 18 at 25.

2 "The 2018 Legal Workplace Environment Survey" (29 June 2018) New Zealand Law Society <www.lawsociety.org.nz>.

at the outset. We didn't ensure they had a seat at the table so their voices were not only heard, but validated and given their rightful place in plotting the way forward.

I will never diminish the bravery of the four young women who spoke out in 2018. Undoubtedly the role their courage played as a catalyst for massive change cannot be underestimated. But given the survey told us that ethnicity and practice area[3] plays a material part in the prevalence of both sexual harassment and bullying, we cannot just deal with gender on its own.

We must have the same conversations about racism and bullying, about our lawyers with disabilities, about our brothers and sisters in the LGBTQIA communities to ensure they are safe and can thrive in the profession.

#MeToo must not leave anyone behind.

As I have said previously, this is not a competition as to who is the "victim". In fact, I really don't like the labels. Like everyone in the profession, I too am a work in progress. But it is not lost on me that as my term as President of the Law Society draws to a close, I am again writing about these same issues.

Everything needs to be out in the open and dealt with, with the same courage as the four young women who spoke up four years ago. They proved that when we tell our stories—our very human stories—we can create change. We must not let the shutters go down or the curtain be drawn again on our newfound collective consciousness to talk about, and call out, bad behaviour.

My challenge to the profession is do not let anyone be invisible anymore.

3 "The areas people work in also influenced the extent of harassment reported by women lawyers, with higher than the average (17 per cent) being experienced by women lawyers working in criminal law (30 per cent), tax (23 per cent), immigration (22 per cent) and civil litigation (21 per cent)". Report of the NZLS Working Group 2018, at page 29.

ADDRESS TO INTERNATIONAL ASSOCIATION OF WOMEN JUDGES CONFERENCE 2021

Judge Sharyn Otene

Judge Otene presented at the 2021 International Association of Women Judges conference – the theme was Celebrating Diversity. Judge Otene's panel consisted of the Hon. Lillian McLellan (Canada), Hon. Fleur Kingham (Australia), and Hon. Irina Graciela Cervantes Bravo (Mexico), which focused on Indigenous women and was moderated by Judge La Verne King of the District Court. This speech has been adapted for publication.

E ngā mana

E ngā reo

E ngā rau rangatira mā

Tēna koutou katoa.

Ko wai au? Sharyn Otene tōku ingoa. Ngāpuhi ahau. He kaiwhakawa ahua ki Te Kōti a Rohe o Aotearoa. My name is Sharyn Otene. I am Ngāpuhi and I am a judge of the District Court of Aotearoa.

In opening, I acknowledged the many voices that comprise our gathering. Extending that metaphor, I am going to speak about narratives for the power they have to influence thinking, and, thus, shape action and outcomes. Within that, I wish to reflect upon the challenge for wāhine Māori (the indigenous women of Aotearoa New Zealand) in the context of our contemporary narratives.

I therefore begin with a story about the Mana Wāhine Inquiry that the Waitangi Tribunal commenced in February this year. The Waitangi Tribunal is the body charged with investigating claims brought by Māori against the Crown for breaches of promises that were made in 1840 when they signed Te Tiriti o Waitangi or the Treaty of Waitangi, often described as Aotearoa New Zealand's founding document.

The Mana Wāhine Inquiry will, amongst other things, examine how wāhine Māori have been excluded from decision making since 1840 and

what that has meant for participation of wāhine Māori in society and for intergenerational wellbeing.

There are many claimants and strands to this inquiry, but the foundation claim was brought by 16 of our pre-eminent wāhine Māori leaders. It was triggered by the removal of one of them, Dame Mira Szaszy, from the shortlist for appointment to a body that received the return of our fishery on behalf of Māori. It was one of the most important settlements of the time for its economic value and so for the self-determining future that it would enable.

The claim was made in 1993. As I said, the inquiry commenced in February of this year. It has taken more than a quarter of a century for the voices of those claimants to be heard. And of course, many of them have now passed. That lapse of time might in itself say something about the marginalisation of wāhine Māori. But it is also a powerful example, demonstrating that when you understand your responsibilities to your past and to your future, a quarter century is an irrelevance; that the passage of time in no way dims the resolute, unswerving commitment to address the negation of the power, authority and status of wāhine Māori that has occurred by colonisation.

If anything, the resolve is deeper and strengthened by the other claimants who have gathered around and carry the kaupapa forward. What the claimants advance is a foundation for the future that has a firm hold on the past when men and women were essential parts of the Māori collective. The claimants set an expectation that the Crown engage with them on that basis.

That claim resonates with the strong and compelling contemporary narrative in Aotearoa, the narrative that the justice system in Aotearoa is broken, that it harms families and most especially whānau Māori and that in doing so it perpetuates intergenerational harm. It is a narrative calling for transformative change.

Those calls are heard most urgently and loudest in the criminal justice sphere. And to provide context for that, as Chief Justice Winkelmann has said, we have not only high rates of imprisonment, but we have staggering and rates of Māori imprisonment.[1]

As we heard yesterday, our court leadership has acknowledged the calls for transformative change and said that there will be response, not only for

1 Helen Winkelmann, Chief Justice of New Zealand "Picking up the threads: the common law – continuity and change in challenging times" (Robin Cooke Lecture 2020, Victoria University of Wellington Law School, Wellington, 2 December 2020).

Māori but for all whom our courts serve. That response is primarily focused on criminal justice and the detail is still in development. But it is announced that it will draw upon the best practice of solution-focused courts already in operation and will be designed in collaboration with Māori and with local communities.

Those signals of leadership have been embraced by the justice sector. The energy and momentum is palpable. If that energy is galvanised so that not only offending, but also the underlying drivers of offending are addressed, it is axiomatic that the wellbeing of the entire community will be enhanced.

But there is a challenge in this – looking back to the example of Dame Mira and her sister claimants, the challenge is to ensure that the voice of wāhine Māori in these calls for transformative change is heard, that it is a voice that contributes to the shaping of responses and that it is a voice that affects outcomes.

To ensure that the voice of wāhine Māori is heard and included, I suggest that we broaden the narrative about incarceration so that it starts with our children. The power of that is to be found in the simple logic of statistics which tell us that Māori comprise approximately 24 per cent of the child population of Aotearoa, yet 68 per cent of children in the custody of the state are Māori.[2] As staggering as our Māori incarceration rates are, equally staggering is the rate at which the state assumes the care of Māori children.

If we look ahead to our young people who appear in our youth justice system, the statistics tell us that around 90 per cent have had involvement with the state care system in some way.[3] And you will understand how, for some, the trajectory continues to incarceration.

Our Prime Minister's Chief Science Advisor puts it this way:[4]

> Talking about the cumulative effects of family violence and child maltreatment, and the wellbeing of babies, seems a long way from arguments about the prison muster, but that is where the evidence says we must begin.

2 Oranga Tamariki Ministry for Children *Annual Report 2019/2020* (December 2020).

3 Ministry of Justice *Youth Justice Indicators Summary Report—December 2020* (Wellington, December 2020) see 17 in particular.

4 Juliet Gerrard *Every 4 minutes: A discussion paper on preventing family violence in New Zealand* (Office of the Prime Minister's Chief Science Advisor Kaitohutohu Mātanga Putaiao Matua kit e Pirimia, 6 November 2018) at 5.

But how do we broaden the narrative to our children? How do we make the mana wāhine voice heard if wāhine are not an equitable presence in the power structures that control narratives? In the short time I have I make one suggestion – that it can come by empowering the community. A key example of active empowerment is an organisation called Te Korimako.

Te Korimako is a collective of Māori Family Court practitioners, all who are women. Te Korimako was formed in 2018 out of concern that whānau involved in the state child protection system were effectively disenfranchised from it by an absence of knowledge of its processes. You might frame that with the language of access to justice and equity of treatment.

These wāhine responded by creating a training and education programme for Māori social service providers who work with those families. Those providers are often the only point of effective engagement with families, working with them at grassroot level in their community and in their homes. They can get their foot in the door in the way that state agencies often cannot.

However, the social service providers do not usually have legally trained workers, which is where Te Korimako comes in. They give those workers (whom they call navigators) an understanding of the child protection system, how it works, and the roles of various agents within it. Once the navigators have that information, they can pass that knowledge onto families.

Te Korimako started with a three-day training course in 2018 with about 80 participants. Since then, it has extended to many additional trainings the length and breadth of the country and they continue. Its reach has become significant.

If I think about my experience in the Family Court, what we are so often lacking because of disenfranchisement is family participation in the process through which the most fundamental decisions are being made for their children. Initiatives like Te Korimako's have the potential to assist whānau towards being agents of their own solutions for their children, rather than have those solutions imposed. Te Korimako and its kaupapa encourages participation rather than disengagement.

But there is another important aspect. It is unlikely to be fully appreciated until we have the lens of history to look through, but I think that Te Korimako has educated and energised iwi and community social services to make state custody of Māori children a matter of urgent public discourse. I do not think

it is going too far to say that it may have played a part in a recent fall in the number of Māori children entering state care.

In effect, Te Korimako's work has created a narrative that has energised the community and shaped outcomes and for that,it is undoubtedly an exercise in mana wāhine.

Kia ora mai tātou.

CONCEPTUALISING MANA WĀHINE AS A LEGAL FORCE

Nerys Udy*

This article emerged from kōrero with Annette Sykes and her challenge that we, as Māori, need to continue exploring new ideas and pushing boundaries; her tono was for us to keep writing. Annette's contribution to the mana wāhine kaupapa is renowned, as is her advocacy for tino rangatiratanga. My kōrero with Annette has been integral in developing my understanding of the work that has already been done in relation to this kaupapa in order to think about where we need to go. Consequently, this article aims to explore new ways of conceptualising mana wāhine and to encourage fuller exploration as to how it could be recognised as a legal principle to serve our wāhine Māori. This piece is dedicated to the multitude of wāhine toa who have been advocating, challenging and tirelessly working toward a better future in which the mana of wāhine is protected and upheld.

I INTRODUCTION

Women constitute our world. This statement is evident perhaps no more clearly than in the well-known directive "Me aro ki te hā o Hineahuone - Pay heed to the dignity and power of women". This whakatauākī[1] is not merely an instruction (or a warning, depending on context!) to recognise the power of women, but it is also a potent reminder of where that power comes from. It was from the clay of Papatūānuku that Hineahuone was formed, the first woman from whom we all descend.[2] Her breath has given life to us all, and has constituted our very existence. Focus your attention on the breath, the essence,

* Nerys Udy (Ngāi Tahu) graduated from the University of Otago in 2020 with a BA/LLB(Hons) majoring in History and minoring in Māori Studies. Thank you to the many tuakana who supported the development of this article. Many of the tikanga concepts I discuss in this article are drawn both from written sources and from my own experiences and kōrero with tuakana and tikanga practitioners. The views expressed in this article are the author's own.

1 Famously uttered by Dame Mira Szazy in the title of a landmark address to the Māori Women's Welfare League conference in 1983.

2 For more on the narrative of Hineahuone in Māori cosmogony, see Witi Ihimaera *Navigating the Stars* (Penguin Random House, New Zealand, 2020) at 124.

of this first ancestress that breathes in every woman and feel the constituting power of women. Me aro ki te hā o Hineahuone!

This article is an exploration of that power, of the mana of wāhine as both a constituting and constitutional force. With the Mana Wāhine claim now progressing through the Waitangi Tribunal, it is timely to give active consideration to mana wāhine and the way our society and law responds to wāhine Māori. The aim of this article is to provoke consideration of how mana wāhine as a concept may be of relevance to the legal world. It begins by briefly delving into the origins and forms of mana wāhine before illustrating through examples the way mana wāhine has been denigrated over time, with a particular focus on the role of the State.

This article then considers how the mana of wāhine can be honoured and protected in Aotearoa New Zealand today. It is argued that mana wāhine can be conceptualised as a legal principle, which is constitutionally protected and embedded by Te Tiriti o Waitangi (Te Tiriti). Appropriate mechanisms for upholding and protecting mana wāhine must therefore be informed by the concepts and processes of tikanga Māori within a legal framework that affirms te tino rangatiratanga embodied in Te Tiriti. From that foundation, this article examines the current protections in place for wāhine who have suffered in the spaces constructed by colonial law, using the example of wāhine Māori suffering violence at the hands of the State in prisons to develop that argument.

This article concludes that the available international and domestic instruments that are premised on Western individualised concepts of rights are not appropriate as legal mechanisms to restore mana wāhine to its proper status. Constitutional transformation that embeds mana wāhine as part of a Te Tiriti-centred structure is required to restore that status. Common law mechanisms that invoke tikanga to challenge the State's action may also offer pragmatic and immediate responses but remain embedded within the colonial constitutional framework. This article ends by exploring benefits and drawbacks of recognising the legal force of mana wāhine through both constitutional and common law mechanisms, as a means to advance the current conversation over future possibilities for the legal landscape of Aotearoa New Zealand. Ultimately, this article concludes that upholding Te Tiriti must include breathing life back into mana wāhine as a constitutional and actionable legal force.

II TE MANA O TE WĀHINE

Mana wāhine is an expansive concept, of central importance in the Māori worldview. Mana wāhine is a form of mana; the expressions and forms of which are diverse and wide ranging. Mana is variously described as dignity, prestige, authority and sacred power but it defies complete translation into the English language. At its core, mana is a metaphysical force that can manifest in various ways.

Forms of mana include:[3]

i) mana atua (mana derived from the divine ancestors);

ii) mana tīpuna (mana derived from one's ancestors);

iii) mana whenua (mana derived from and indicating authority in relation to land); and

iv) mana tangata (mana gained through one's personal actions).

These various forms of mana refer to the different ways in which mana can manifest in people and natural features and how it can be obtained and utilised.

Mana wāhine is the metaphysical force possessed by women. As Ataria Sharman defines it, "mana wāhine is the expression of mana from the atua through Māori women, the expression of mana through the hine element, the female essence and time and space".[4] It exists in balance with the mana tāne of men and refers to the mana inherent in all women, as a collective.[5] At its core, it is a force that denotes the prestige, authority, sacrality and power of women. It is closely related to the cosmological principle of tapu (sacrality, state of restriction), as the mana of wāhine is informed by the inherent tapu of women, deriving from their whakapapa connection to the atua (divine ancestor) Papatūānuku and Hineahuone. This intrinsic tapu gives wāhine the ability to control the sacrality and restriction of people and things around them, thus informing their authority and prestige.[6]

3 Cleve Barlow *Tikanga Whakaaro: Key Concepts in Māori Culture* (Oxford University Press, England, 2019), at 60.

4 Ataria Sharman "Mana Wahine and Atua Wāhine" (MA Thesis, Victoria University of Wellington, 2019) at 46.

5 It is important to note here that in exploring this power, this article has a narrow focus and does not specifically address mana tāne nor the mana of those who exist outside the gender binary. This article has a specific focus on mana wāhine but acknowledges the gender diversity within te ao Māori.

6 Suzanne Duncan and Poia Rewi "Tikanga: How Not to Get Told Off" in Michael Reilly and others (eds) *Te Kōparapara: An Introduction to the Māori World* (Auckland University Press, Auckland, 2018) 30 at 40.

It is important to understand that mana wāhine is not simply a Māori equivalent of western concepts of feminism, although there are intersections.[7] Rather, it is a way to understand sacred feminine energy as a collective spiritual force which exists within a broader cultural and spiritual context, thriving in balance with mana tāne and the many other forces that shape our world. In order to truly understand mana wāhine, one must understand its cosmological origins and how those origins relate to the position of women in today's society. The mana of wāhine is not something that is merely gained by individual women throughout time but rather has its origins in the very cosmology of the universe, from a Māori perspective. Wāhine Māori collectively possess tapu and mana that derives from their whakapapa connections to the whenua (land). This is evident within the various stories of creation within te ao Māori. The mana and tapu of women can be traced back to the creation of the first human, Hineahuone from the clay of Papatuānuku.

A Creation and Mana wāhine

The mana of wāhine is evident in the very stories of creation that abound in te ao Māori, even despite the many iwi variations in the cosmological beginnings of the universe. Within Ngāi Tahu, one account of this is that the universe was sung into creation by the atua, going through many stages of creation, from Te Kore to Te Ao, to Te Mākū to Te Po, where Papatūānuku resided. Although Papatūānuku is famously known as the intertwined partner of Ranginui, in this account she was first married to Tangaroa.[8] She is a powerful example of female agency, wielding her sexuality in choosing to engage with Ranginui in Tangaroa's absence, and leaving the tāne to battle it out between themselves upon Tangaroa's return. In this account, Papatūānuku eventually formed a lasting relationship with Ranginui, and it is this relationship that forms the basis for most iwi accounts of creation. Papatūānuku and Ranginui, Earth and Sky, lay intertwined, until they were separated by their children, Tāne, atua of the forests, and his brothers. Through this separation, Te Ao Mārama, the world of light we inhabit today, was formed.[9]

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7 See Leonie Pihama "Mana Atua, Mana Tangata, Mana Wahine" in Leonie Pihama and others (eds) *Mana wāhine Reader: A collection of Writings 1999-2019 (Volume II)* (Te Kotahi Research Institute, Hamilton, 2019) 190 at 195.

8 See Matiaha Tiramōrehu *Te Waiatatanga Mai o te Atua* (Manu van Ballekom and Ray Harlow (eds), Department of Māori, University of Canterbury, Christchurch, 1987).

9 See Witi Ihimaera and Whiti Hereaka (eds) *Pūrākau: Māori Myths Retold by Māori Writers* (Penguin Random House, New Zealand 2019); see also Michael Reilly "Te Tīmatanga Mai o te Ao: The

It is from Papatūānuku's sacred feminine energy that humankind descends. When the first woman was formed by Tāne with clay taken from Papatūānuku's pubic region, she was imbued with this energy.[10] Many iwi accounts identify Hineahuone as the first woman, although in the Ngāi Tahu account described above she was named Io-wāhine.[11] The sacred, feminine energy that Papatūānuku provided for the creation of this first woman has passed down into her female descendants and is central to the mana and tapu of wāhine Māori today. The ability to bear children means women continue to give life to humankind, beyond this first instance of creation. Women quite literally constitute the world. Women hold the whare tangata (houses of humanity, referring to their childbearing capabilities) and thus the mana and tapu of women are intrinsically tied to the ability to bring forth new life. At the end of life, woman is also central. Hinenuitepō, the guardian of the underworld, awaits the dead, who pass back through her whare tangata to Rarohenga, closing off the cycle of life in Te Ao Mārama, that begins and ends with woman.[12]

These cosmological explanations of the universe demonstrate that women have always had an important position in the world, built into the very creation of the universe and deriving from the whenua itself. This is evident not only from the creation of woman from Papatūānuku but also in the many intertwined concepts relating to land and new life. For example, the word "whenua" can refer to land but also refers to the placenta, emphasising the parallel between the land nourishing humankind and the nourishment a child receives in the womb.[13] As Annette Sykes has described, "we earth our mana wāhine to Papatūānuku the earth mother and her mauri. From this whakapapa Māori women established their identity as being the land".[14]

Beginning of the World" in Michael Reilly and others (eds) *Te Kōparapara: An Introduction to the Māori World* (Auckland University Press, New Zealand, 2018) 12 at 18.

10 For further discussion of Hineahuone and her role in Māori cosmology see; Ani Mikaere *The Balance Destroyed* (Te Tākapu, Te Wānanga o Raukawa, Ōtaki, 2017) at 28; Ihimaera, above n 2.

11 Tiramōrehu, above n 8, at 33. Note that in the Tiramōrehu account, before creating Io-wāhine, Tāne first created a man, Tiki-auaha.

12 Reilly, above n 9, at 29.

13 Huia Jahnke "Towards a Theory of Mana Wāhine" in in Leonie Pihama and others (eds) *Mana wāhine Reader: A collection of Writings 1987-1998 (Volume I)* (Te Kotahi Research Institute, Hamilton, 2019) 183 at 186.

14 Annette Sykes "Constitutional Reform and Mana Wahine" in Leonie Pihama and others (eds) *Mana wāhine Reader: A collection of Writings 1999-2019 (Volume II)* (Te Kotahi Research Institute, Hamilton, 2019) 19 at 22.

These parallels between women, land, and life-giving ability are central to the mana of wāhine. As Ani Mikaere notes in her seminal work, *The Balance Destroyed*, "the significance of the whare tangata is rooted in the creation of the world and in the overriding tapu of whakapapa".[15] Mikaere links this tapu to the broader power and position of women in society,[16] explaining that women had many important social and spiritual ritual roles in traditional Māori society as a result of their tapu and mana.[17] This meant that women were a powerful force in society, such that it is "indisputable that their female presence makes the difference between life and death".[18] That can be true both in the immediate sense of exercising their power to assist the community in various ways and from the generational perspective of the continuation of whakapapa. Thus, women play a vital role in constituting our universe and in constituting humankind. Mana wāhine is therefore inherent in the creation of the universe and continues to be a powerful force today.

B Constitutional Power of Wāhine

The constituting power of wāhine is complemented by, and indeed gives rise to, their constitutional power. The role of wāhine Māori in both pre and post-colonial society was not limited to the unique mana they held as whare tangata. Wāhine were also powerful leaders, military strategists and political agents. Female sexuality could itself be a potent political tool, as evidenced by women such as Erenoa Taratoa of Ngāti Raukawa, who composed the famous pātere Poia Atu Taku Poi, celebrating both her strategic and political connections with male rangatira throughout the North Island.[19] During early settlement, wāhine Māori were also influential and deliberate in connecting Pākehā men into their communities, which brought with it prestige and influence, thus playing a role in constituting new communities and eventually a new nation.[20]

The role of wāhine Māori in constituting a new nation is most significantly demonstrated through Te Tiriti. This constitutional power of wāhine is both asserted and protected under Te Tiriti, with at least 13 women signing Te Tiriti,

15 Mikaere, above n 10, at 41.
16 At 43.
17 At 39–40.
18 At 41.
19 Apirana Ngata and Pei Te Hurinui Jones (eds) *Ngā Moteatea the songs: Part Two* (AH and AW Reed Ltd, Wellington, 1974) at 142.
20 Angela Wanhalla *In/visible Sight: The Mixed-Descent Families of Southern New Zealand* (AU Press, Edmonton, 2010) at 4.

although it is possible there are more given many Māori names are not gender specific. In signing Te Tiriti, wāhine asserted their mana as constitutional actors, agreeing to the creation of a new constitutional structure founded upon tino rangatiratanga and (limited) kāwanatanga.[21] There are also examples of wāhine Māori being denied the opportunity to sign Te Tiriti by English men.[22] This not only suggests that more women would have likely signed Te Tiriti given the chance, but also highlights the lack of political agency the British worldview afforded women, in contrast to the te ao Māori centering of mana wāhine.

Arguably, mana wāhine is also inherently protected in Article Two of Te Tiriti, which affirms the rangatiratanga of Māori, naturally including the constitutional and constituting mana that wāhine Māori wield.[23] Article Two essentially asserts that, in the new constitutional vision, te ao Māori and its tikanga will be recognised and Māori will retain control over it.[24] In tikanga Māori, mana wāhine is a central concept as is evidenced by its inalienable entwinement with the te ao Māori worldview and the place of women embedded in Māori cosmology. Consequently, mana wāhine is a constitutional force inherent in the notion of tino rangatiratanga. It is also a powerful legal principle, which will be explored later in this article.

III KUA TAKAHIA TE HĀ O HINEAHUONE: THE DENIGRATION OF MANA WĀHINE BY THE STATE

Despite the centrality of mana wāhine in traditional Māori society, our present-day society is marred by continual inequalities for women, with wāhine Māori particularly afflicted. The stark history of colonisation in Aotearoa New Zealand illustrates the way mana wāhine has been steadily denigrated over time. The arrival of waves of settlers brought patriarchal values that positioned women as inferior to men. Ani Mikaere's *The Balance Destroyed* explores the way this imposition persisted not only in Pākehā society, but also how

21 See Margaret Mutu "Constitutional Intentions: The Treaty of Waitangi Texts" in Malcolm Mulholland and Veronica Tawahi (eds) *Weeping Waters: The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010) 13 at 30.

22 See for example Interview with Moana Jackson (He Tohu Permanent Exhibition, National Library of New Zealand, 2017).

23 For more on the recognition of mana wāhine as a constitutional principle in Te Tiriti, see Annette Sykes "Constitutional Reform and Mana Wahine", above n 14.

24 Justice Joe Williams describes tikanga as a "necessary and inevitable expression of self determination", which is encapsulated in the term tino rangatiratanga. See Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Wai L Rev 1 at 9.

it invaded te ao Māori.[25] Mikaere demonstrates how the new patriarchal framework obscured certain tikanga processes and principles that recognised the mana of wāhine. The Crown played a key role in the introduction and perpetuation of these values. Whilst the introduction of such patriarchal values into Māori society has meant that mana wāhine has suffered denigration within te ao Māori, this article focuses on the ways in which Crown actions have contributed to that denigration and failed to address it effectively.

A State Systems that Operate Against Wāhine Māori

The Mana Wāhine claim (Wai 2700) currently before the Waitangi Tribunal addresses this very issue. Wai 2700 was first filed in 1993, after Dame Mira Szazy was removed from contention for the Waitangi Fisheries Commission and replaced with a male candidate. This action was the catalyst for a group of wāhine Māori to bring a claim against the Crown for its ongoing adherence to the patriarchal values which have denigrated mana wāhine, in breach of Te Tiriti. Wai 2700 was formally initiated by the Tribunal in 2018 and is currently being heard at the time of writing this article. The Tribunal will explore if, and how, Te Tiriti has been breached by the Crown in relation to wāhine Māori, across four key focus areas: rangatiratanga (self-determination), whenua (land), whakapapa/whānau (family) and whai rawa (prosperity).[26]

Within this, a key focus of Wai 2700 is to look at the way the effective participation of wāhine Māori in decision making and the Māori relationship with the Crown has been restricted by colonial laws and political, economic and social systems.[27] In addition to the political aspect of the claim, Wai 2700 will also look at the personal injustices wāhine Māori have suffered in relation to failures by the Crown regarding domestic and sexual violence, justice, education, health, social development, employment and equal pay.[28] These are areas in which wāhine Māori have particularly suffered, largely as a result of the cycle of trauma and deprivation resulting from colonisation.[29]

The Tribunal Inquiry is ongoing, but there is long-standing evidence to

25 Mikaere, above n 10.

26 Waitangi Tribunal *Kaupapa Inquiry into Claims Concerning Mana Wāhine* (Wai 2700) Memorandum-Directions of Presiding Officer 22 July 2020, at 3.

27 Waitangi Tribunal, above n 26, at 2.

28 At 2.

29 See for example Law Commission *Justice: The Experience of Māori Women* (NZLC R53, 1999). See also Patricia Johnston and Leonie Pihama "The Marginalisation of Māori Women" in Leonie Pihama and others (eds) *Mana wāhine Reader: A collection of Writings 1987-1998 (Volume 1)* (Te Kotahi Research Institute, Hamilton, 2019) 114.

demonstrate the barriers Māori women have faced in these areas. Wāhine Māori are particularly overrepresented in negative social statistics, at disproportionate risk of sexual and physical abuse. According to recent research, 36 per cent of Māori adults experience some form of intimate partner violence in their lifetimes and being female is a factor associated with higher risk.[30] 41 per cent of referrals to Women's Refuge in 2019 were Māori, compared to 41.2 per cent of Pākehā women[31], which is starkly disproportionate to the fact that wāhine Māori only make up approximately 16.5 per cent of the female population in Aotearoa New Zealand.[32] Further, 66 per cent of female prisoners in New Zealand are Māori.[33] These negative statistics demonstrate that the State has failed to effectively safeguard both Pākehā and Māori women and children from violence. While the previous term Labour government has made some progress in the prevention of family violence, this is an ongoing issue:[34]

> …victims' access to safety, justice, and recovery remain hindered by aspects of the wider social and legislative contexts that frame their vulnerability to family violence, experiences of family violence and opportunities to rebuild their lives in the aftermath of family violence.

Wāhine Māori are particularly vulnerable to the impact of violence and marginalisation from support systems, given the prevailing social and legislative contexts are not designed for them. Research demonstrates that there are structural barriers in the social, economic and legal spheres that have hindered wāhine Māori from accessing support services and seeking justice in the face of abuse and poverty.[35] In the late 1990s, the Law Commission report *Justice: The Experiences of Māori Women* found that "the rules and values of colonial society effectively marginalised [Māori women] from participating in the

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30 Ministry of Justice *Māori victimisation in Aotearoa New Zealand – Cycle 1 and 2 (March 2018 – September 2019)* (March 2021) at 3.

31 National Collective of Independent Women's Refuge Inc *Annual Report 2019-20* (2020) at 31.

32 Figure calculated by reviewing the number of Māori women in New Zealand (426,800) and identifying that number as a percentage of the total female population in New Zealand (2,571,600): Compare "Population – Summary figures" (December 2020) Stats NZ <www.stats.govt.nz> and "Māori population estimates: At 30 June 2020 (17 November 2020) Stats NZ <www.stats.govt.nz>.

33 Department of Corrections *Wāhine – E rere ana ki te pae hou Women's Strategy 2021–2025* (28 October 2021) at 7.

34 National Collective of Independent Women's Refuge Inc *Briefing to Incoming Minister* (2020) at 4.

35 Law Commission (NZLC R53), above n 29. See also The Royal Commission on Social Policy *The April Report* (Volume II) April 1988.

new regime"[36] which bled into the contemporary sphere, creating "systematic failure" of the justice system and the marginalisation of Māori women.[37] The marginalisation of wāhine Māori through colonisation has only been exacerbated by the structures of the State that act as disincentives for Māori women to be able to engage with these imposed justice processes, with factors such as lack of legal aid, socio-economic disadvantage and the responsibilities of motherhood presenting powerful barriers for wāhine Māori.[38]

B State Violence Against Wāhine Māori

The State has not only created the conditions for this denigration of mana wāhine but has itself been an active participant in that destructive task. This was reflected most recently in the appalling treatment of wāhine Māori in Auckland's Women's Prison. In 2020, a Radio New Zealand investigation revealed that two wāhine Māori, Mihi Bassett and Karma Cripps, were gassed with high strength pepper spray and subjected to dehumanising treatment.[39] They were required to change in front of male guards, beg for hygiene products and lie prone on the floor to receive food. Mihi and Karma were subjected to long-term cell confinement and prolonged solitary confinement. Following an in-prison protest, Mihi was charged with arson. At her sentencing Judge McNaughton described her treatment as "serious physical and psychological abuse"[40] and heavily criticised the Department of Corrections, stating:[41]

> …the measure of a civilised society is how it treats its most vulnerable and disadvantaged citizens... we judges know from experience that Māori women prisoners are amongst our most vulnerable and disadvantaged and damaged citizens.

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36 Law Commission, above n 29, at 20.

37 At 20–21.

38 Law Commission (NZLC R53), above n 29, at 27. See also The Royal Commission, above n 35, at 155. In the decades since these reports it is clear there has only been tinkering at the margins and not widespread structural change: see for example; Khylee Quince "Bottom of the Heap? Why Māori Women are Over Criminalised in New Zealand" (2010) 3 Te Tai Haruru Journal 99; Ministry of Women's Affairs *CEDAW Report: New Zealand's Seventh Report on its Implementation of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women March 2006 - March 2010* (2010); Human Rights Commission *A Fair Go for All? Addressing Structural Discrimination in Public Services* (Discussion Paper, July 2012).

39 Guyon Espiner "Gassed in their cells, 'begging' for food at Auckland Women's Prison" Radio New Zealand (24 November 2020) <www.rnz.co.nz>.

40 *R v Bassett* [2021] NZDC 5067 at [22].

41 At [20].

This treatment continued a tradition of similar State abuses against women in prison, such as the use of mechanical shackles on pregnant women and those in labour.[42] This practice is particularly harmful to the mana of wāhine, degrading them at a time when they are especially vulnerable and tapu, bringing new life into the world. Associate Professor Khylee Quince said of the practice, "the overwhelming majority of female prisoners have lived histories of trauma and these practices serve to physically and psychologically re-traumatise women at their most vulnerable".[43]

This trauma forms part of the broader history of State violence against vulnerable people, including wāhine Māori and children. The Royal Commission into Abuse in State Care currently underway is providing a long overdue focus on the brutal treatment that vulnerable New Zealanders, including Māori, have suffered. The scale of this violence is profound and, again, Māori were disproportionately victims of this violence as a "direct result of enduring structural and systemic racism across multiple settings" including social welfare, health and disability, educational and law enforcement contexts.[44]

Ultimately, this brief visitation of the Crown's violence against Māori highlights that the denigration of mana wāhine has not merely been an incidental consequence of colonisation. There is clearly a connection between the State's co-option of the constitutional space belonging to mana wāhine and the consequent harms wāhine Māori suffer, as the essence of their mana suffers in the face of violence, poverty and social inequality. This has occurred both indirectly through the State's failure to maintain the balance of mana tāne and mana wāhine that was inherent in pre-colonial Māori society,[45] through the structural barriers that exist in State systems for wāhine Māori to find justice and support,[46] and directly, in cases where the State has been an active participant in such violence.

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42 Michelle Duff "Women are being forced to give birth in handcuffs, with prison officers in the room" Stuff (9 May 2021) <www.stuff.co.nz>.

43 Duff, above n 42.

44 Ihi Research *Hāhā-uri, hāhā-tea: Māori Involvement in State Care 1950-1999 Executive Summary* (Royal Commission of Inquiry into Abuse in Care, July 2021) at 14.

45 See "Tikanga Colonised" in Mikaere, above n 10.

46 Law Commission (NZLC R53), above n 29. See also The Royal Commission on Social Policy, above n 35.

IV DEFICIENCIES IN THE CURRENT LEGAL FRAMEWORK TO PROTECT WĀHINE MĀORI

The denigration of mana wāhine traversed above is not new or unknown.[47] It speaks to the need for the constitutional power of wāhine Māori to be appropriately recognised, so that they can enact their tino rangatiratanga in seeking solutions that work for wāhine as a collective. Wai 2700 is a significant step on the journey to addressing these issues.

This article now turns to consider how, if at all, our modern legal framework addresses these deeply embedded issues, beyond the political Tribunal process. Where can wāhine turn to have their mana recognised and vindicated at law, when it is the State, the parent of settler law, that has been integral in denigrating that mana and co-opting the constitutional space? Where could a woman like Mihi Bassett, for example, turn for relief?

There are a broad range of legal instruments of specific relevance to women, as well as laws of more general application to which women may have recourse. Ultimately however, while there are legal instruments that women could turn to, they are conceptually insufficient in that they do not recognise the integral mana of wāhine Māori women as a collective force.

A Human Rights Protection for Māori Women

The Human Rights arena is a forum where wāhine Māori (and women in general) could look to protect and invigorate their position in relation to the State.

Targeted instruments such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Declaration for the Eradication of Violence Against Women (DEVAW) and the Declaration on the Rights of Indigenous Peoples (UNDRIP)[48] all offer rights and protections of varying relevance to wāhine Māori. General human rights mechanisms such as the United Nations Declaration on Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Social, Cultural and Economic Rights, the New Zealand Bill of Rights Act 1990 (NZBORA)

47 See Leonie Pihama and others (eds) *Mana wāhine Reader: A collection of Writings 1987-1998 (Volume I)* (Te Kotahi Research Institute, Hamilton, 2019) and Leonie Pihama and others (eds) *Mana wāhine Reader: A collection of Writings 1999-2019 (Volume II)* (Te Kotahi Research Institute, Hamilton, 2019) for a comprehensive collection of writings on mana wāhine from multi-disciplinary perspectives.

48 Article 22 is of particular relevance, and its inclusion was hard fought for by indigenous women, including Dama Mira Szazy. It requires that States take measures to ensure that indigenous women and children enjoy full protection against violence and discrimination.

and the Human Rights Act 1993 are also of relevance to the relationship between Māori (as a collective and as individuals) with the State. Many of these mechanisms allow for individual complaints to be brought against the State, including for inhuman treatment in detention, or for failure to properly implement mechanisms to uphold the rights enshrined in these documents.

The concept of human rights has a complicated relationship with indigenous peoples and it is clear that human rights discourse can have value for indigenous communities. Fundamentally, as Moana Jackson has stated:[49]

> [T]he whole history of human rights was based on the idea that all peoples have the right to self-determination. It is the base from which all other rights flow. If Indigenous Peoples were denied that right, then their very existence as free peoples was again being dismissed.

Human rights discourse that includes indigenous peoples and recognises their right to self-determination can therefore be important in affirming indigenous peoples as 'free peoples'[50] and can galvanise positive change for indigenous communities.[51] For example, UNDRIP plays an important role in affirming Māori self-determination and is increasingly recognised as sitting alongside Te Tiriti o Waitangi.[52] Human rights instruments can also provide immediate redress. In the case of State abuse of wāhine Māori in prison, such as the abuse of Mihi Bassett, s 9 of the NZBORA allows for a claim against cruel, degrading or inhuman treatment, (a right also reflected in UNDR, ICCPR and CEDAW) while s 23(5) of the NZBORA protects the "inherent dignity" of incarcerated persons. However, these rights have high thresholds and there is no guarantee that a claim for breach of these rights would be successful.[53]

At the same time, however, it is clear that the discourse of human

49 Moana Jackson "A challenge not a threat" *E-Tangata* (online ed, New Zealand, 1 August 2021).

50 While recognising that the self-determination of indigenous peoples is only recognised by, but not founded in human rights instruments.

51 See for example Linda Te Aho "Creating our Own Prosperity: Human Rights from a Tainui Perspective" (2007) 10 Yearbook of New Zealand Jurisprudence 43.

52 See Claire Charters and others "He Puapua: Report of the Working Group on a Plan to Realise the UN Declaration on the Rights of Indigenous Peoples in Aotearoa/New Zealand" ((November 2019) (Obtained under Official Information Act 1982 Request) [He Puapua] at i.

53 *Taunoa v Attorney General* [2007] NZSC 70, [2008] 1 NZLR 429 at [175], [176] and [209]–[212]. Taunoa discusses a graduated hierarchy of standards between s 9 and s 23(5). In that case the Supreme Court found that treatment of prisoners, arguably analogous to the treatment suffered by Basset and Kripps, was not a breach of s 9, but did breach s 23(5).

rights sits in tension with the Māori worldview. Much of the law relevant to human rights in Aotearoa New Zealand does not truly hold space for wāhine Māori. Whilst wāhine Māori can search for justice in the spaces that the law leaves open, there is little specific, collective protection,[54] despite the constitutional embedding of mana wāhine in Te Tiriti. As such, the lack of specific constitutional protection for women, and indigenous women particularly, in our current legal framework creates a conceptual, ideological gap. It is not enough to simply turn to international rights instruments or to domestic mechanisms to protect the mana of wāhine in the face of continued degradation. Avenues such as s 9 and s 23(5) of the NZBORA are lacking conceptually in that they do not directly address the denigration of mana wāhine.

The individualistic nature of gender-neutral rights instruments illustrates this ideological gap and has faced criticism from authors such as Caroline Morris, who highlights this difficulty in relation to reproductive and sexual rights, freedom from violence and rights to just working conditions.[55] Morris demonstrates that the framing of certain rights as universal has often allowed the interests of the individual to be prioritised over the collective interests of women. For example, the right to freedom of expression has been utilised to prevent the passage of anti-pornography legislation in the US, which might have had a significant impact in curbing negative social attitudes that contributed to sexual violence against women.[56] Commentators have also criticised gender-specific instruments like CEDAW for attempting to empower women to a male-defined standard of equality that may not be appropriate or relevant for women.[57]

54 In addition, even where protections are available to Māori women, institutional racism and other social obstacles can create barriers to women actually accessing these options as discussed above.

55 See Caroline Morris "Remember the Ladies: A Feminist Perspective on Bills of Rights" [2002] 18 VUW Law R 33.

56 Morris, above n 55, at 460 citing *American Booksellers Association v Hudnut* (1985) 771 F 2d 323 (7th Cir). There are of course, nuanced arguments in this space, especially regarding what the collective interest of women might be in these kinds of scenarios, which we do not intend to explore here.

57 Kerensa Johnston "Discrimination, the State and Māori Women: An Analysis of International Human Rights Law and the Convention on the Elimination of All forms of Discrimination Against Women" (2005) 8 Yearbook of New Zealand Jurisprudence 32 at 55, citing Charlesworth and Chinkin *The Boundaries of International Law: A Feminist Analysis* (Manchester, Manchester University Press, 2000) at 248.

Relating the ideological tension within these instruments directly to the indigenous experience, Mikaere's argument is fundamental:[58]

> Reliance on principles of international human rights law as a means of overcoming current disparities is illogical…and founded on a form of selective amnesia which assumes that we can understand the present and plan effectively for the future without reference to the past. It is an undeniable fact that the current status of Māori women and men is colonisation. It makes little sense therefore for Māori to seek salvation in principles of law which have been formulated by colonisers.

Mikaere does not advocate jettisoning all rights-based discourse. Instead, she says the starting point must be the recognition of the inherent rights of Māori to self-determination and rangatiratanga as asserted by Te Tiriti and "first returning to our law to find workable solutions".[59]

Moana Jackson has also highlighted this ideological deficit in using Western rights in indigenous contexts, noting that: [60]

> …the mind from which the definitions [of rights] have sprung has remained bound by its own particular view of the world and by its own particular interests in relation to other people.

The late Dr Haunani-Kay Trask held a similar view, arguing that:[61]

> …Once indigenous peoples begin to use terms like language 'rights' and burial 'rights', they are moving away from their cultural universe… These…practices are not 'rights' which are given as the largesse of colonial governments. These practices are, instead part of who we are, where we live and how we feel.

Trask's analysis highlights the fundamental difficulty with turning to human

58 Ani Mikaere "Collective Rights and Gender Issues: A Māori Woman's Perspective" in Nin Thomas *Collective Human Rights of Pacific Peoples* (International Research Unit for Māori and Indigenous Education, Auckland, 1998) at 79.

59 For more on the view that tikanga must be the starting point for any interaction with human rights, rather than the inverse, see Ani Mikaere "Seeing Human Rights Through Māori" (2007) 10 Yearbook of New Zealand Jurisprudence 53.

60 Mikaere, "Collective Rights and Gender Issues" above n 58, at 183, citing Moana Jackson.

61 Haunani-Kay Trask *From a Native Daughter: Colonialism and Sovereignty in Hawaii* (University of Hawaii Press, Hawaii, 1993) at 112.

rights instruments framed by largely Western thinkers, to answer indigenous problems, aligning with Mikaere's view. This links directly to the constitutional issues at play. In order for concepts such as mana wāhine to be given space to operate fully, the tino rangatiratanga of Māori to live within the Māori worldview must be recognised, which indeed aligns with UNDRIP's affirmation of the indigenous right to self-determination. If the mana of wāhine Māori can only be honoured and protected through human rights law, then mana wāhine itself is not actually upheld because that mana is not explicitly recognised in the legal response. Framing this as a struggle to uphold mana wāhine is important. It means that a wahine Māori does not, for example, have to resort to western concepts of discrimination, before the law responds. The law ought to be able to respond to the denigration of mana wāhine from within its own cultural reality, independently of western notions of discrimination, cruel treatment and inherent dignity.

B Mana Wāhine as a Legal Principle

It is clear the current protections in place for women, and wāhine Māori particularly, are conceptually insufficient. There is space for legal arguments to be made to protect wāhine Māori under the mechanisms currently in place, but this is almost incidental space. Arguably, what is needed is specific space to uphold mana wāhine as law. This article suggests that mana wāhine should be conceptualised not merely as a social concept, but also as a legal principle in its own right.

As discussed, mana wāhine is a central principle in the tikanga system. In the traditional tikanga understanding, mana wāhine is not merely a principle, but a literal metaphysical force possessed by wāhine, passed down through our whakapapa from Papatūānuku and Hineahuone. Arguably, this metaphysical force can also be conceptualised as a legal force.

Tikanga Māori is both a legal and a social system at its core. Recently, this fact was recognised by the Supreme Court in *Trans-Tasman Resources Limited v The Taranaki-Whanganui Conservation Board*, where the Court held that a statutory reference to "any other applicable law" could include tikanga.[62] The Court definitively acknowledged that tikanga Māori is a body of law, moving beyond simple relegation of tikanga as values within the settler law. Of course,

62 *Trans-Tasman Resources Limited v The Taranaki-Whanganui Conservation Board* [2021] NZSC 127 at [169].

this State recognition of tikanga is not the starting point and indeed is long overdue. Without delving into jurisprudential discussion of what "law" is,[63] tikanga has long been understood as "law" within its own cultural context, that is, te ao Māori.[64] Tikanga literally refers to that which is "right" and it operates to regulate human behaviour, as all law does. Key principles within the law of tikanga include whanaungatanga (kinship), tapu (sacrality and restriction), utu (balance) and mana (authority, prestige);[65] although they are not necessarily always talked about in strictly legal terms, largely due to the intertwined nature of tikanga as a social, legal and spiritual system.[66] However, many principles of tikanga are already explicitly acknowledged as being integral to the legal regulation that tikanga provides. For example, mana whenua, a principle regulating rights over land, plays an important role in the discrete tikanga realm but also is of increasing relevance in the legal intersection between State and tikanga law.[67] There is also value in explicitly considering the nature of mana wāhine as a legal concept as well as a social and spiritual force. The legal nature of mana wāhine is evident in the way that it operated to regulate human behaviour in pre-colonial society in a wide variety of ways, mandating certain behaviours and denouncing others.

As Leonie Pihama et al suggest, "sexual violence within Māori understandings is an absolute violation of the mana of the person and the collective mana of whānau, hapū and iwi." The rejection of sexual or physical abuse of women is embedded within pūrākau (oral traditions) and, as Pihama highlights, can be understood as connected to the mana and tapu of wāhine, which is intrinsically connected to her whakapapa and her constituting ability,

63 While we do not focus on debate on what law is, Māmari Stephens has challenged the notion that tikanga Māori does not fit within popular jurisprudential definitions of law; see Māmari Stephens "Māori Law and Hart: A Brief Analysis" [2001] VUWLR 44.

64 See for example Eddie Durie "Custom Law" (Waitangi Tribunal Research Unit Discussion Paper, 1994), at 3; Ani Mikaere *Colonising Myths, Māori Realities: He Rukuruku Whakaaro* (Huia Publishers, Wellington, 2011) at 254 and 264; Jacinta Ruru "First Laws: Tikanga Māori In/And The Law" (2018) 49 VUWLR 211 and Williams, above n 24.

65 See Carwyn Jones *New Treaty New Tradition: Reconciling New Zealand and Māori Law* (UBC Press, Vancouver, 2016) at 38 and Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001).

66 Williams, above n 24, at 3.

67 See for example *Mercury NZ Ltd v The Waitangi Tribunal* [2021] NZHC 654 and *Ngāti Whātua Ōrakei Trust v Attorney-General* [2018] NZSC 84. See also Jacobi Kohu-Morris "Ko Wai Te Mana Whenua? Identifying Mana Whenua under Aotearoa New Zealand's Three Laws" (LLB (Hons) Dissertation, University of Otago, 2020).

and therefore the mana of all generations connected to her; past, present and future.[68]

This is embedded in pūrākau such as the story of Mataora and Niwareka and how the practice of tā moko (tattooing) was brought to human-kind.[69] Mataora, a human, abused his partner, Niwareka, who fled to her home in Rarohenga (the underworld). In striking her, he disrespected her inherent mana. Overcome by regret, Mataora followed her to Rarohenga. Mataora encountered Niwareka's father Uetonga, who was a skilled practitioner in the art of permanent tā moko. Uetonga tattooed Mataora's face and it was during this painful process that he reconciled with Niwareka. They both returned to the physical world and Mataora gave an oath to Uetonga that he would never harm his daughter again.

When I first heard this pūrākau explained by a kaumatua at a mokopapa (tattooing day), he emphasised that tā moko is therefore inherently intertwined with the principle of anti-violence against women. In this way, every tā moko that is applied, is, from one perspective, a reminder that such abuse is not accepted in Māori society and indeed could be conceptualised as honouring the mana and tapu of wāhine tracing back through to Niwareka.[70]

From one perspective, this pūrākau is a vessel of law, highlighting a legal principle relating to domestic violence that flows out of the recognition of the tapu and mana of wāhine. This principle could be actioned within te ao Māori in concrete ways. As Judge Stephanie Milroy discussed, "In pre-colonial Māori society a man's house was not his castle. The community intervened to prevent and punish violence against one's partner in a very straightforward way".[71] Rangimarie Rose Pere tells the story of a woman who was physically abused by her husband, resulting in the wider whānau declaring the abuser "dead" in the sense that he was shunned by the entire community and exiled from participating in ceremonial and mundane aspects of the community's life.[72]

These examples all demonstrate the power and importance of respecting

68 See Leonie Pihama and others "Māori Cultural Definitions of Sexual Violence" (2016) 7 SAANZ at 912.

69 Ngahuia Te Awekotuku and others *Mau Moko: The World of Māori Tattoo* (Viking Books, New Zealand, 2007) at 14.

70 At 14.

71 Stephanie Milroy "Domestic Violence: Legal Representation of Māori Women" (unpublished paper, 1994) 12, as cited in Ani Mikaere "Māori Women Caught in the Contradictions of a Colonised Reality" (1994) 2 Wai L Rev 125.

72 Rose Pere "To Use the Dreamers Are Important" in Leonie Pihama and others (eds) *Mana wāhine Reader: A collection of Writings 1987-1998 (Volume I)* (Te Kotahi Research Institute, Hamilton, 2019) 4.

the mana of wāhine and the consequences that could flow from a failure to do so within tikanga Māori. These specific practices also demonstrate the interconnections with other legal principles, such as whanaungatanga obligations, which in these examples create the conditions for community intervention when violence occurs.[73]

Mana wāhine also operated as law at the constitutional level in pre-colonial society. In pre-colonial society, to deliberately close off leadership spaces from women would also have been contrary to the principles of mana wāhine. As noted, at the time of the signing of Te Tiriti, the principle of mana wāhine meant that women had the political power to sign Te Tiriti, in contrast to the lack of such power afforded to women in British society at the time. The mana of wāhine requires that women are represented, or given the opportunity to be represented, in public positions in balance with men and their mana tāne. Mana wāhine as a metaphysical force gave rise to the political, military, social power of women in both pre and post-colonial society[74] and in this sense it is also a legal force, which mandates holding space for wāhine to commandcertain roles, power and authority within society today.

C Relating to the State

Explicitly recognising mana wāhine as a legal force within tikanga could be a powerful tool in shifting how we understand the relationship between wāhine Māori and the kāwanatanga State. It allows us to conceptualise that State abuse of wāhine Māori in prisons, for example, is an unlawful action, without needing recourse to the human rights framework and is fundamentally unconstitutional because it fails to uphold the holistic law of mana wāhine, in contravention of Te Tiriti o Waitangi.[75] Equally, the failure of the State to take active steps in combatting the degradation of mana wāhine in the social and economic spheres emerges as unconstitutional. Deliberately couching this in legal terms can be important in shifting our conceptual focus.

Once conceptualised from a legal perspective, the question of practical

73 See Pihama, above n 68, at 11.

74 Aroha Yates-Smith "Te Ukaipo- Te Taiao: The Mother, The Nurturer, Nature" in Leonie Pihama and others (eds) *Mana wāhine Reader: A collection of Writings 1999-2019 (Volume II)* (Te Kotahi Research Institute, Hamilton, 2019) 75 at 81.

75 Of course, some would also view the state imposition of a carceral criminal justice system as fundamental breach of Te Tiriti, regardless of how Māori within those institutions are treated; see Moana Jackson "Why Māori Never Had Prisons" (speech presented to JustSpeak New Zealand public meeting, Wellington, 2017).

value can be considered. When the State is unlawfully acting in contravention of mana wāhine, how can it be prevented from doing so? As a legal principle of tikanga, how can mana wāhine protect and assert itself as it exists, inherent within the hā (lifebreath) of women? This is a difficult question to address in the context of the Crown's co-option of "sovereignty", in breach of Te Tiriti's grant of kāwanatanga to the Crown subject to Māori tino rangatiratanga.

This article suggests two potential approaches arise to advance the recognition of mana wāhine. The first is a constitutional transformation approach, which focuses on giving life to mana wāhine as a legal principle through restructuring our systems into a Te Tiriti-based constitution, in which processes that uphold mana wāhine is embedded. This approach is the most ideologically sound pathway because it seeks to directly uphold Te Tiriti o Waitangi. This approach can therefore directly address the ideological deficit discussed in this article.

The second approach is to consider how mana wāhine, as a legal principle within tikanga, could exist in relationship with the common law of Aotearoa. This approach carries the risk of distorting tikanga and does not go as far in giving force to the constitutional nature of mana wāhine. It retains many of the ideological difficulties discussed earlier in this article because this option operates within the orthodoxy of the Crown legal system. However, this does not mean it is necessarily at odds with the constitutional approach, and it could be powerful in giving practical force to the legality of mana wāhine, as a step on the longer journey to the ultimate destination of constitutional transformation. However, this pathway must be approached with a sound understanding of potential risks.

V THE CONSTITUTIONAL APPROACH

There is growing and consistent discourse about the need for constitutional transformation in Aotearoa New Zealand to properly uphold Te Tiriti o Waitangi. Māori have long maintained that they did not cede sovereignty to the British in Te Tiriti o Waitangi[76] but rather Te Tiriti represented a bicultural power-sharing agreement.[77] Initiatives such as the 2015 Matike Mai Aotearoa

76 Indeed, the fact that Te Tiriti was not a treaty of cession has been recognised by the Waitangi Tribunal in Waitangi Tribunal *He Whakaputanga me te Tiriti: The Declaration and the Treaty: the Report on Stage 1 of the Te Paparahi o te Raki Inquiry* (Wai 1040, 2014).

77 For a discussion of the historical Māori assertion of Te Tiriti as a bicultural power sharing agreement and the need for the doctrine of parliamentary sovereignty to adapt to that agreement, see Jacinta Ruru and Jacobi Kohu-Morris "Maranga Ake Ai: The Heroics Of Constitutionalising Te Tiriti o Waitangi/

Independent Working Group on Constitutional Transformation have examined how constitutional transformation could occur to realise that bicultural power sharing agreement. Recently, the He Puapua report commissioned by Te Puni Kōkiri has also outlined constitutional amendments that could be made to better recognise the rights of Māori and to fundamentally affirm their tino rangatiratanga and right to self-determination.[78] The authors of He Puapua drew on the recommendations of Matike Mai Aotearoa in formulating the report.

In agreement with this discourse, this article supports the view of Te Tiriti as the foundational constitutional document of Aotearoa.[79] The text of Te Tiriti is clear that the Crown has the right to exercise a limited kāwanatanga, subject to the tino rangatiratanga of Māori.[80] The inherent nature of tikanga as an aspect of tino rangatiratanga therefore affirms tikanga as law, including concepts of mana wāhine.[81] As it currently stands, the Crown has co-opted more than the limited kāwanatanga that Te Tiriti granted, which has been part of the co-option of the constitutional power of mana wāhine.

As such, mana wāhine is a relevant legal principle in the Crown-Māori relationship by virtue of Te Tiriti, deriving from a distinct body of law; tikanga. Tikanga as law operates every day in Aotearoa, in Māori communities. It is more difficult to point to how tikanga can and does operate in the relational space between Crown and Māori, when the State is in breach of tikanga (and therefore of Te Tiriti). This issue requires consideration of how tikanga can operate as constitutional law in the relational space between the Crown and Māori.

The employment of mana wāhine as a constitutional legal principle in this relational space can be subversive. Mana wāhine does not have to operate analogously to a singular human "right" to be upheld or breached. Rather, it imports a holistic philosophy that can be used to guide the shape of constitutional power in Aotearoa as based on Te Tiriti. Matike Mai Aotearoa,

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The Treaty of Waitangi in Aotearoa New Zealand"(2020) 48(4) ANU Fed Law Rev 556.

78 He Puapua, above n 52.

79 Currently, Te Tiriti/The Treaty is recognised as a document of constitutional importance, see for example *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) and *Trans-Tasman Resources Limited v Taranaki-Whanganui Conservation Board* [2021] NZSC 127. Nonetheless it is excluded from domestic enforceability under the common law; *Te Heuheu Tukino v Aotea District Māori Land Board* [1941] NZLR 590 (Privy Council).

80 Mutu, above n 21, at 30.

81 Williams, above n 24.

in their seminal constitutional proposals, conceptualised constitutional authority as being based on both a concept and a site of power. A site of power is the practical expression of the philosophy that underpins the exercise of authority.[82] If mana wāhine is properly understood as a constitutional legal principle, it could act as one aspect of a tino rangatiratanga philosophy of authority, and thus be used to reshape the sites of power in Aotearoa in line with Te Tiriti. The State currently monopolises the site of power and uses that power to abuse wāhine Māori in prisons, for example. Mana wāhine provides the constitutional obligation to reshape state institutions in a way that upholds, instead of denigrates the hā of Hineahuone. Shaping sites of power can extend to acknowledgment that a western human rights legal framework is unable to truly uphold mana wāhine.

New legal frameworks based in tikanga could be embedded within reshaped sites of power. Systems and process that uphold mana wāhine itself would be embedded so that wāhine Māori are not left to battle for the space to exercise their constitutional and constituting power. The ability to self-determine their own world would be returned to wāhine Māori as a collective, as their mana dictates.

A constitution in which mana wāhine is appropriately embedded can allow for mana wāhine to find appropriate room to operate as law in the Crown-Māori relationship. Currently, the rights protected by the NZBORA are recognised as being of constitutional importance and are given special consideration in the formulation of laws and policy in this country.[83] If mana wāhine is given its proper constitutional recognition, it arguably ought to wield similar influence, and ensure that, within a reformulated constitutional structure that upholds tino rangatiratanga and kāwanatanga, law and policy is developed and applied through a lens that has considered how to uphold and enhance mana wāhine. This could have a powerful impact on our society in healing the denigration of mana wāhine which has resulted in consistent negative outcomes for wāhine Māori over the last two centuries. It would lift up the force of mana wāhine and bring it squarely to the forefront. In this way, it could be powerful to create appropriate legal frameworks that address State

82 Matike Mai Aotearoa "He Whakaaro Here Whakaumu Mo Aotearoa: The Report of Matike Mai Aotearoa – The Independent Working Group on Constitutional Transformation" (University of Auckland, Auckland, 2016) at 31.

83 New Zealand Bill of Rights Act 1990, s 7. See also Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) at 3.

abuse of wāhine Māori. It could also lead to policy and action that addresses the myriad of issues facing wāhine Māori, such as poverty, domestic violence and more, in a reshaped constitutional structure that centres the collective autonomy of wāhine Māori as active partners in that work. As Michael Reilly describes in relation to the powerful atua wāhine who featured in Māori cosmology and often faced adversity, such as Hinenuitepō, "[b]y taking control of their destiny, they countered any loss of mana".[84] This demonstrates the precise importance of giving "control of their destiny" to wāhine Māori in order to uphold mana wāhine. The work being undertaken in Wai 2700 may well be critical in understanding how these structural changes can be made.

VI THE COMMON LAW PATHWAY

The second option that arises is to consider whether mana wāhine could operate as a discrete legal principle informing the development of an endemic Aotearoa New Zealand common law under current constitutional arrangements.[85] There has always existed a relationship between the common law and tikanga since the arrival of British common law to Aotearoa.

This relationship between tikanga as law and English-derived common law was confirmed when the Supreme Court in *Takamore v Clarke* held that tikanga is part of the values of the common law of New Zealand.[86] Takamore left the exact boundaries of that relationship unclear, but a succession of later cases continued to affirm the relevance of tikanga. In *Ngāti Whatua Orakei v the Attorney-General*, the Supreme Court found that "rights and interests according to tikanga may be legal rights recognised by the common law".[87] In *Trans-Tasman Resources v Taranaki Conservation Board*, the Court of Appeal found that it is:[88]

> …axiomatic that the tikanga Māori that define and governs the interests of tangata whenua in the taonga protected by the Treaty is an integral strand of the common law of New Zealand.

Significantly, in *Ellis v R*, both the appellant and the respondent agreed that

84 Reilly, above n 9, at 29.

85 For the concept of an endemic law of Aotearoa New Zealand developing with reference to both tikanga and English common law see Ruru, above n 64, at 217, and Williams, above n 24, at 12.

86 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [94].

87 *Ngāti Whatua Orakei v the Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116, at [77].

88 *Trans Tasman Resources v Taranaki Conservation Board* [2020] NZCA 86, [2020] NZRMA 248, at [177].

tikanga was of relevance to the question of whether an appeal could continue after death, in order to potentially vindicate the mana of the appellant.[89] The Supreme Court judgment has not yet been released so it is unclear precisely how the bench has taken tikanga into account in *Ellis v R*. However, it is clear there is a growing acknowledgment that tikanga has a relationship with the common law derived from the English tradition in some form.

Precisely because the boundaries between tikanga and the English-derived common law are unclear, it is not certain how mana wāhine could act in conjunction with the common law of Aotearoa New Zealand. Nonetheless, there are already cases that are beginning to recognise in parallel both the indigenous and western frameworks in dealing with issues traditionally framed as human rights problems. In *Sweeney v The Prison Manager*, Spring Hill Corrections Facility,[90] Palmer J found that Mr Sweeney's NZBORA rights to natural justice had been breached by the unilateral revocation of his visitor pass at the Spring Hill Corrections Facility. While this is an orthodox application of the western rights framework, Palmer J then exercised his discretion to issue a formal declaration of unlawfulness as a remedy "in order to uphold Mr Paul Sweeney's mana and vindicate his rights".[91] Consequently, the Court recognised that Mr Sweeney's mana was important in a legal sense. This links back to the way mana was employed as a legal principle in *Ellis v R*. It would arguably be a small but impactful step to further recognise that mana itself can be unlawfully trampled, without the need to first mould a claim into the western framework of rights.

In this way, it is arguable that the endemic common law of Aotearoa New Zealand could support a cause of action that is based in mana wāhine. In considering this article's example of the State abuse of wāhine Māori in prisons, mana wāhine as a legal principle could be understood as contextualising and providing the legal framework for the relationship between the Department of Corrections and the wāhine in its custody. The rights framework traversed above focuses on the individual, whereas tikanga Māori is fundamentally about collectivity and one's connections as part of a wider kinship group. As Justice Joe Williams describes, whanaungatanga is central to tikanga and means that no one was ever just an individual.[92] He further explains that whanaungatanga

89 *Ellis v R* [2020] NZSC 89.

90 *Sweeney v The Prison Manager, Spring Hill Corrections Facility* [2021] NZHC 181.

91 At [76].

92 Williams, above n 24, at 4.

is "the fundamental law of the maintenance of properly tended relationships."[93] In this sense, where the Western worldview is largely premised on the concept of individual rights, tikanga Māori turns on a sense of obligation arising out of relationships. The relationship between the Department of Corrections and women in its care should be understood as framed by the tikanga of mana wāhine. In conceptualising the tikanga of mana wāhine as a legal force therefore, it could be understood to give rise to an obligation upon the Department of Corrections to treat wāhine Māori in its custody in a way that upholds and does not denigrate their mana and tapu. A failure to do so could therefore be conceptualised as a legal failure, breaching the obligations that the tikanga of mana wāhine gives rise to. This could therefore form the basis of a claim against Corrections, rather than requiring a wāhine to demonstrate breach of s 9 or s 23(5) of NZBORA, for example. In taking this relational approach, individual outcomes can be reached for particular women, while still appropriately setting Corrections obligations to wāhine Māori as a collective, in line with the collective nature of mana wāhine and the Māori worldview.

In addition, the explicit recognition of mana wāhine as a principle informing the common law could hold the potential to give rise to interpretive presumptions for statutory interpretation, so that contentious legislation would be required to be interpreted through a lens that would, as far as possible, be mana-enhancing for wāhine. Indeed, in the recent *Trans-Tasman Resources*,[94] the Supreme Court recognised an interpretive presumption of consistency with Treaty principles, stating that the constitutional significance of the Treaty means that "the courts will not easily read statutory language as excluding consideration of Treaty principles if a statute is silent on the question.", affirming previous authority[95] If it is accepted that mana wāhine is protected under Te Tiriti, as this article has argued, then an interpretive presumption in favour of mana wāhine may be a natural extension of the Trans-Tasman Resources position, tying back to the constitutional relevance of mana wāhine.[96] Such an avenue could aid in centring the collective nature of mana

93 At 4.

94 *Trans-Tasman*, above n 79.

95 At [151], citing *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 210 and 233; *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 (HC) at 184; *Tukaki v Commonwealth of Australia* [2018] NZCA 324, [2018] NZAR 1597 at [36]–[37]; and *Ngaronoa v Attorney-General* [2017] NZCA 351, [2017] 3 NZLR 643 at [46]

96 Although noting that the *Trans Tasman* presumption is for consistency with Treaty principles, rather than with Te Tiriti, under which mana wāhine is most strongly protected.

wāhine by contributing to the way statutory frameworks are interpreted and thus how they impact wāhine Māori. These possibilities require much further thought and development but this article touches on this to demonstrate that these are possibilities worth full exploration that can be considered when this conceptual shift is made to viewing mana wāhine as a legal force.

In this way, employing mana wāhine as the mechanism for redress in this way could create a necessary shift. Using mana wāhine to contextualise the boundaries of relationships of obligation between State actors and wāhine Māori, instead of attempting an argument under the NZBORA for example, places the hara (wrong) in context of the world that wāhine Māori inhabit. It does not homogenise the female experience with that of men, rather, it provides an avenue for protection that specifically recognises the cultural context of harm outside of the traditionally male driven, individualistic western rights framework. This approach operates at the interface of the relationship between the Crown and Māori, in some ways making it an appropriate site for engagement between these two legal systems.

However, there are risks in this approach, and it raises the broader question of whether it is desirable to weave tikanga principles such as mana wāhine into a common law that nonetheless operates under a Te Tiriti-inconsistent constitutional system. To do so imports the ideological difficulty that, without constitutional transformation, common law mechanisms remain embedded in the colonial constitutional construct.

One response is that the value in conceptualising mana wāhine as a principle informing the common law is that it requires the State to come into te ao Māori and engage on tikanga terms. It operates at the interface of the Crown-Māori relationship. The invocation of mana wāhine fundamentally invokes the entire Māori worldview, because mana wāhine is embedded in creation and is a holistic principle grounded in collectivism. Such engagement arguably upsets some of the underlying anchor points of the colonial constitutional construct by challenging the Western individualistic, liberal framework that underpins the English common law. This is emphasised when remembered that the legality of mana wāhine cannot be severed from its fundamental constitutional nature. As leading scholars of indigenous law, John Borrows and Leonard Rotman, suggest for the Canadian context:[97]

97 John Borrows and Leonard I Rotman "The Sui Generis Nature of Aboriginal Rights: Does it Make a Difference" (1997) 36 ALTA L REV 9, at 28. See also Natalie Coates' discussion of Borrows' and

> Clearing a site in the common law that respects Aboriginal perspectives only serves the limited purpose of providing a toehold to bridge out of colonial territory into one they can call their own. Therefore finding this place in the common law does not represent a consent to colonialism. The use of sui generis principles within the common law pours footings for a bridge that permits an exit from colonialism's hostile and confining thicket.

In this way, the consideration of mana wāhine as a legal principle informing the common law could represent a way to begin hacking out of the "hostile and confining thicket" that colonialism has captured mana wāhine within. It is a "limited purpose" but one that could have immediate practical effect.

There is also the risk that mana wāhine as a concept may be weakened, distorted or further denigrated by building its relationship with the common law. Mana wāhine as a metaphysical, social and legal force has already suffered denigration at the hands of the State and to invite it into conversation with the State-bound common law construct may continue this. It is evident that mana wāhine as a concept has been warped even within te ao Māori.[98]

Therefore, if such a path is followed, further, measured consideration will be required at each step so that it is utilised in a way that protects the integrity of the tikanga and the living mana of the wāhine in question.[99] This also requires consideration of broader practical issues, such as the willingness and ability of both the legal profession and the judiciary to properly engage with tikanga. This article does not consider the full breadth of those issues, but it seems inevitable that judicial engagement would require support from pūkenga (experts), should those with the relevant knowledge wish to support such a pathway. The use of pūkenga is already being deployed in other cases involving tikanga.[100]

The inverse to the risk of distortion, is that the centring of mana wāhine as

Rotman's perspective, for the New Zealand context of the recognition of tikanga in the common law in Natalie Coates "The Recognition of Tikanga in the Common Law of New Zealand" (2015) 1 NZLR 1.

98 See Mikaere, above n 10.

99 Other indigenous jurists have suggested that indigenous laws may be insulated from distortion through debate in non-indigenous spaces, because indigenous laws persist in their own world. See Val Napoleon "Did I Break It? Recording Indigenous (Customary) Law" (2019) 22 PER/PELJ 2. Napoleon suggests that, at least in the classroom setting, indigenous law will not be damaged by debate, because it has an existence outside of the classroom. This may apply in the judicial sphere, although the differing context requires caution because the official nature of judgments arguably provides greater scope for mischaracterisations to become entrenched.

100 *Re Edwards (No 2)* [2021] NZHC 1025.

applicable law may help to uphold mana wāhine, and begin to clear the thicket of misunderstanding that has warped it, by requiring both te ao Pākehā and te ao Māori to delve into the depths of its meaning (if done with appropriate support).[101] This is the power of the law. The law can shape our values as a society, as much as it is drawn from our values. As Te Kooti famously said "mā te ture anō te ture e akī"— only the law can strike back against the law. If the law is conceptualised as a broad force that belongs neither to te ao Māori nor to te ao Pākehā, the centring of mana wāhine as a legal force may act as the law that pushes back against the same legal structure that has historically side-lined the inherent mana of wāhine and imposed patriarchal values.

In summary, although the common law may offer one avenue for giving power to mana wāhine as a legal force, it is still the ultimate position of this article that mana wāhine is first and foremost a constitutional principle protected under Article Two of Te Tiriti. As earlier noted, the journey towards constitutional transformation is still ongoing. As such, the common law route may offer an alternative, a pragmatic stop gap measure to provide alternative solutions for wāhine Māori in the face of current mechanisms that are conceptually deficient. Annette Sykes has previously cautioned against "allowing the use of Māori values to advance a position of justice which would be denied Māori because of the institutional pitfalls that Māori confront in their quest for justice".[102] The recognition of mana wāhine as a legal principle may be able avoid this pitfall if approached with care, precisely because it can fill a justice gap for wāhine Māori in relationship with the State, that is not sufficiently covered by the current legal frameworks in place. It is not a path without risks, but it may be practically effective.

VII CONCLUSION

The constituting and constitutional power of wāhine Māori has been denigrated across time and must be afforded its proper place. Recognising that mana wāhine is a constitutional principle will be an important step in that ongoing journey. Understanding that mana wāhine is an active legal principle may have the potential to provide avenues to assert that constitutional importance and

101 This is not to say that Māori communities cannot carry out the recentering and rediscovery of aspects of mana wāhine within their own context, and indeed such work is already occurring. This is specifically in the context of discussion about the relationship between the Crown and wāhine Māori.

102 Annette Sykes "The Myth of Tikanga in The Pakeha Law" (Nin Thomas Memorial Lecture, Faculty of Law, University of Auckland, 5 December 2020).

to make progress. This article has discussed the mechanisms that exist currently and has concluded they are of limited assistance, although there are extant options. Two possible approaches grounded in tikanga have been explored, as a means of encouraging imagination and further conceptualisation of how mana wāhine could be employed.

Fundamentally, this article affirms the need for constitutional transformation based on the power-sharing vision of Te Tiriti. This must include embedding the principles of mana wāhine within constitutional institutions so that the unique constitutional and constituting power of women is explicitly provided for in the exercise of power in Aotearoa New Zealand. Current constitutional arrangements do not provide appropriate space for mana wāhine, as has been demonstrated by the various ways in which this force has been denigrated directly and indirectly by the Crown since 1840. Consideration is needed as to how this constitutional embedding might flow into influencing the very structure of law and policy, so that it is formulated and applied in a way that gives force to mana wāhine, just as fundamental human rights in the NZBORA are currently given constitutional precedence.

This article has also explored the possibility of empowering the legality of mana wāhine through the common law, as one way to seek better outcomes than the state law currently provides. This pathway presents risks and potential gains and should be approached with care.

Ultimately this article is intended to spark further conversation about the possibilities the law offers to respond to the unique challenges wāhine Māori face, sitting alongside the ongoing Mana Wāhine claim currently before the Waitangi Tribunal. It does not provide all the answers and represents only the continuation of a broader discussion. There are multiple ways in which mana wāhine as a legal force could be employed but what is evident is that it has untapped power. As the Mana Wāhine claim progresses through the Waitangi Tribunal process, it is timely to consider how that power can be utilised within the legal and constitutional sphere for the benefit of Aotearoa New Zealand society as a whole. We have the ability to turn to our unique historical, legal and social circumstances and recognise that these are values that have always existed in Aotearoa New Zealand. It is time to bring them squarely to the forefront once more.

KIA KAHA, KIA TOA, KIA MANAWANUI E
Mihi Bassett and the Auckland Women's Prison[†]

Mariah Hori Te Pa[*] **and Alex Gordon**[**]

"Kia kaha, kia toa, kia manawanui e" were the last words his Honour Judge McNaughton spoke to Mihi Bassett on the day of her sentencing, for arson she committed in prison. It was an encouragement to Mihi to "be strong, be brave, and be steadfast" on her journey through the corrections system, and to hold on to the vision of a fresh start outside of it. In the context of this article, it is also an encouragement to those working within the criminal justice system, and for all New Zealanders, to nurture an overarching vision for structural change, and for a more just, fair and equitable Aotearoa New Zealand.

I INTRODUCTION

In March 2021, Mihi Bassett appeared for sentencing on a charge of arson in the Manukau District Court. Mihi had been serving a ten-year prison sentence at the Auckland Region Women's Corrections Facility (ARWCF),[1] when she and two fellow inmates set a fire in protest of their mistreatment within the prison. What the prosecution did not realise when it proceeded with the charges was that it would be putting the Department of Corrections' own behaviour on trial. Mihi and her peers gave evidence of their treatment

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† The New Zealand Women's Law Journal undertakes a double-blind review process. For this article, although it has been double peer reviewed, only one of the peer reviewers was anonymous. This decision was made in recognition of the importance of the kaupapa and ensuring that the reviewers had the correct knowledge and expertise. Additionally, in the interests of whanaungatanga and ensuring the review process was mana enhancing, the second reviewer in this instance is not only a highly-regarded Māori academic, but is also a tuakana for one of the authors whose insight and support through the writing process was invaluable.

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1 The terms "wāhine" and "women" are used throughout this article to refer respectively to Māori individuals and to all individuals who are inmates at "female" designated prison institutions; however, the authors acknowledge that not all individuals incarcerated at such facilities may identify as wāhine or women.

inside prison; behaviour that the sentencing judge labelled "degrading" and "inhumane".[2]

The Judge's damning findings, coupled with Radio New Zealand's (RNZ) active reporting, drew significant public attention to Mihi Bassett's case. This prompted a Special Investigation by Corrections' Inspectorate office, and an announcement from the Minister of Corrections, Kelvin Davis (the Minister), that the Department would undergo an overhaul as to the way it treats and manages women in prison. He said such changes were necessary because it was "inappropriate for women in prison to be treated as if their needs were the same as male prisoners".[3] Since that time, Corrections has launched its updated Women's Strategy, which has refreshed its approach to how it works with women in its care.

This article highlights the importance of Mihi Bassett's story coming to light. Her case gives rise to important questions about the way we treat some of the "most vulnerable and disadvantaged citizens" in our society—wāhine Māori.[4] While the Minister and the Department's response to her case was positive, in that the proposed changes were, and are, necessary, they must also be understood in the historical and contemporary context of the New Zealand corrections system. The history of patchwork and ad hoc reforms, coupled with little change over time, demonstrates why the proposed changes are merely a continuation of the past 181 years.

This article begins with Mihi's story, set out in Part II in more detail. It canvasses her background that led to her incarceration; the facts of her life in prison; what caused her and the other women to set a fire outside their cells; and the criminal charges against her in the District Court. In order to analyse Mihi's story in its entirety, Part III canvasses the development of the corrections system in Aotearoa New Zealand. It discusses the substitution of Māori approaches to justice with the British criminal justice system; and the current picture for Māori and for women, and in particular for Māori women, inside the corrections system today. Part IV discusses the use of segregation and pepper spray in New Zealand prisons (especially ARWCF) and the disproportionate and increasing use of both against Māori women. Part V outlines the official response to Mihi Bassett's case, from the Minister,

2 *R v Bassett* [2020] NZDC 24454 at [92].

3 Radio New Zealand "Corrections Minister orders urgent overhaul, review of women's prisons" (22 March 2021) <www.rnz.co.nz>.

4 *R v Bassett*, above n 2, at [20].

Department of Corrections and the Office of the Chief Inspectorate; and Part VI analyses that response.

In particular, Part VI describes two camps of critique to the Minister and the Department's response to Mihi's case. The first camp argues that the corrections system, and the wider criminal justice system that it sits within, requires transformative, structural change—the long term vision for which the Department and the Minister currently lack. On the other hand, the second camp argues that the Minister's directions and Corrections' actions in the short to medium term are positive steps to improving the care of Māori women, but they could go much further and implement a "Mana Wāhine" approach. A Mana Wāhine approach is one that is grounded in Kaupapa Māori, and places wāhine Māori, and the mana and primary concerns of wāhine Māori, at its centre. The framework for these two camps is informed by an informal whakaaro and kōrero, among Māori working with and within the law, that there must be progressive change within current systems, as well as an overarching vision for structural change. Ultimately, this article explains why legislation, policies and practices relating to wāhine in the criminal justice and corrections systems need to be informed by Mana Wāhine theory, in order to better recognise and address the complex needs and realities of wāhine in New Zealand prisons today.

II MIHI BASSETT'S CASE

Mihi Bassett's story has been part of a catalyst for wider change at ARWCF and in all women's prisons. This Part sets out her story in more detail: her background that led to her being incarcerated at ARWCF; the facts of her life in prison; and what caused her and the other women to set a fire outside their cells—the push and pull cycles of violence that swirled between prisoners and staff at ARWCF. It also outlines the court proceedings, where Mihi was allowed the opportunity to tell her side of the story in court, and was ultimately sentenced by Judge McNaughton. It was through Mihi's courage and the efforts of her lawyer, the Judge and a journalist, that her story was also brought to light in the New Zealand public.

A Background

Mihi Isibella Bassett is a young wāhine Māori of Tūhoe descent. She grew up in Ōpōtiki in the Eastern Bay of Plenty, with hard-working parents, and in

a gang environment.[5] As a young teenager, she suffered through the loss of two close members of her whānau, and gradually became involved in minor offending. At age 16, she appeared in the Ōpōtiki Youth Court for unlawfully entering a building. She committed three burglaries by her 17th birthday. Around that time, in 2010, Mihi was raped by a gang member at a party.[6] She now suffers Post Traumatic Stress Disorder (PTSD) as a result. A psychiatrist's report described other significant trauma in her past, including physical and emotional abuse, exposure to violence, and drug and alcohol abuse.[7]

In October 2016, at about 23 years old, Mihi was convicted in the Whangārei District Court of aggravated burglary, kidnapping, wounding, and injuring with intent to cause grievous bodily harm. She was sentenced to ten years' imprisonment and sent to ARWCF.[8] Mihi committed other offences during her time in prison, including assault and three incidents of arson, resulting in another year being added to her original sentence.[9] As a result of this and other disruptive behaviour, Mihi has been classified as a maximum-security prisoner, which is for women with "extremely disruptive behaviour", for the majority of her sentence.

Despite all of that, offender notes obtained from Corrections have shown another side to Mihi.[10] There were notes describing her as smiling, positive, cheerful and settled, and of her discussing her whakapapa and links to her marae and Maungapōhatu, the sacred mountain of Tūhoe. Mihi's psychiatrist noted that "Ms Bassett is a young woman with significant potential…determined to have a fresh start".[11]

B Facts of the offending

Maximum security prisoners at ARWCF are held in the "Prison Management Unit".[12] Inside, "C Wing", with 16 beds, is known by the prisoners as "maxi", and the more prohibitive "D Wing", with 6 beds, is known as "the pound".[13]

5 Guyon Espiner "Gassed in their cells, 'begging' for food at Auckland Women's Prison" Radio New Zealand (24 November 2020) <www.rnz.co.nz>.

6 *R v Bassett*, above n 2, at [110].

7 At [110].

8 At [6].

9 At [7]; *Police v Bassett* DC Manukau CRI-092-012895, 28 August 2020 at [6]–[7].

10 Guyon Espiner "Prison guards threaten pepper-spray moments after suicide attempt" Radio New Zealand (4 March 2021) <www.rnz.co.nz>.

11 Espiner (24 November 2020), above n 5.

12 *R v Bassett*, above n 2, at [8].

13 Espiner (24 November 2020), above n 5; *R v Bassett*, above n 2, at [8].

The conditions in D Wing have been described as "spartan", with very few in-cell facilities.[14]

At various points in time, Mihi was joined in C Wing by her partner Karma Cripps, her cousin Paris Reed, and her friend Tarina McClutchie. During their stay, the women felt their basic needs were not being met. They acted out in protest, for example by setting off the shower sprinklers in their prison cells. Given the sprinklers can cause flooding, Corrections staff would request the women to relocate "peacefully" from their cell.[15] If they refused, staff would undertake a "cell extraction". This involved hoses pumping "Cell Buster" pepper-spray gas under the cell door from a fire extinguisher-like canister, allowing up to six officers in full body armour to enter and forcibly remove the woman once she was incapacitated.[16] The women experienced "an intense burning sensation" and "struggled to breathe", sometimes forcing them to place their heads in the toilet bowl to get air.[17] Mihi suffered four such cell extractions during her time in the Prison Management Unit.[18]

On 14 October 2019, Mihi, Paris and Tarina were in their respective cells inside C Wing. They were "fishing"; that is, tying blankets and clothing together to create a line to attach items to, and moving items from cell to cell.[19] Using that fishing technique, in what was described as "a spontaneous act of protest",[20] Mihi started a fire from inside her cell and lit part of the fishing line. Paris pulled the line toward her cell and used the fire to set clothing, bedding and documents alight. Then Tarina pulled on the line, moving the fire into the middle of the foyer. A fire alarm sounded and Corrections staff responded quickly; in less than two minutes the fire was extinguished. The floor was damaged—at an estimated cost of repair of around $20,000—but no person was physically injured.[21]

A few days after the arson, Mihi and Paris were sent to D Wing (the pound) with no explanation for the transfer.[22] Paris thought she was going for a "time out", and Mihi thought she would be there for 14 days and then returned

14 *R v Bassett*, above n 2, at [11].
15 At [90].
16 At [24]–[27] and [90].
17 At [26].
18 At [86].
19 At [3]–[4].
20 At [14].
21 At [3].
22 At [13]–[14].

to maxi.[23] About two weeks later, Karma and Tarina followed.[24] Mihi and Paris were eventually told their transfer was a management decision taken by the Prison Director, and that they were to remain there until further notice.[25] The women's complaints about being held in the pound without justification, and about their minimum entitlements being withheld, went unanswered.[26]

Inside the pound and diagnosed with PTSD, Mihi's mental health deteriorated. A psychiatrist report provided to the court observed that Mihi's experience inside D Wing seemed to have compounded her past trauma and led to a major depressive disorder.[27] "I just felt like dying," Mihi said in court. "I was just waking up, dark, going to sleep, dark, waking up crying, going to sleep crying, it was just, nah, it was pretty hard out."[28] She voiced suicidal thoughts to the manager, the officer and other staff.[29] "Like they were asking me, 'How are you?' and I was like, 'Bro, I just wanna die'".[30] In January 2020, about three months into her stint, Mihi attempted suicide in her cell. She was resuscitated and sent back the next day. Corrections ultimately held Mihi in the pound for four months. RNZ obtained a copy of her management plan, and reported that it showed the prison planned to hold her there "indefinitely".[31]

C Sentence indication

Criminal proceedings were brought against Mihi, Paris and Tarina in the Manukau District Court, on charges of arson. Mihi sought a sentence indication, which the sentencing judge, his Honour Judge McNaughton, gave on 28 August 2020.[32] The Judge indicated a starting point of 18 months' imprisonment.[33] This took into account the considerable amount of damage to the floor, given the cost to repair it, but also that there was no real danger to any person. His Honour indicated he would uplift the sentence to 20 months for Mihi's previous arson convictions, and allow a full 25 per cent discount if

23 At [14].
24 At [13]. Karma had volunteered to move to D Wing so she could be closer to Mihi and the other women.
25 At [14].
26 At [16]–[18], [60] and [107].
27 At [110].
28 Espiner (24 November 2020), above n 5. Also see *R v Bassett*, above n 2, at [30].
29 *R v Bassett*, above n 2, at [98].
30 Espiner (24 November 2020), above n 5. See *R v Bassett*, above n 2, at [33].
31 Espiner (4 March 2021), above n 10.
32 See *Police v Bassett*, above n 9. Sentence indications are governed by Part 3, Subpart 4 of the Criminal Procedure Act 2011.
33 *Police v Bassett*, above n 9, at [24].

she accepted the indication and pleaded guilty.[34] This would result in an end sentence of 15 months' imprisonment.

What set Mihi's case apart was that her lawyer argued that Mihi's mistreatment at ARWCF should be taken into account as personal mitigating factors. Judge McNaughton was prepared to accept that, given the conditions in which Mihi was serving her sentence, "what motivated this arson was a protest rather than any intention to cause massive property damage or injure other inmates or staff".[35] However, in order to determine whether her treatment warranted a further discount, or a concurrent (as opposed to a cumulative) sentence, his Honour invited further evidence about the treatment at the prison.[36] The Department of Corrections would have the opportunity to offer evidence in reply before any findings were made.[37]

D Disputed facts hearings

Mihi accepted the sentence indication and pleaded guilty to arson. Disputed facts hearings were held on 4 September and 20 November 2020.[38] Mihi, Paris and Karma gave evidence.[39] Judge McNaughton said the women's evidence was "powerful and compelling" and entirely consistent; "I have no reason to doubt their evidence."[40]

Although Corrections had "ample notice" of the allegations at the first hearing, it chose not to answer them in any substantive way at the second.[41] The only witness from Corrections was Alison Fowlie, the newly appointed Deputy Prison Director at ARWCF. However, Ms Fowlie was not in her role when the events took place (she was seconded to the role in March 2020)[42] and so could only speak to how the prison was supposed to work, rather than what actually happened.[43] None of the prison staff who were actually involved

34 At [25]–[26].
35 At [24].
36 At [27].
37 At [28].
38 At [17].
39 At [18].
40 *R v Bassett*, above n 2, at [53].
41 *R v Bassett* [2021] NZDC 5067 at [18]. The Police Prosecution Service had transferred the charges to the Crown Solicitor at the disputed facts hearing stage on the basis that the matter had become complex.
42 *R v Bassett*, above n 2, at [6].
43 At [37].

were called and, as a result, the women's evidence about their treatment was not disputed.[44]

On 4 February 2020, Judge McNaughton issued his reserved decision. The Judge's findings, among other things, included unlawful cell confinement, which in Mihi's case was four months; cell extractions by means of pepper spray and excessive use of force; failure to provide minimum requirements under the Corrections Act 2004 and its regulations; and failure to monitor "what was in [Mihi's] case an obvious suicide risk".[45] Judge McNaughton said it was "difficult to see all of these examples of the mistreatment of prisoners as anything other than a concerted effort to break their spirit and defeat their resistance".[46]

Having reached his findings on the disputed facts, Judge McNaughton invited further submissions regarding the extent to which Mihi's treatment should mitigate her penalty, and whether any sentence imposed should be cumulative or concurrent.[47]

E Sentence

Judge McNaughton sentenced Mihi on 22 March 2021. In light of his findings of fact, and after hearing from Mihi's lawyer and the Crown, Judge McNaughton was persuaded that a cumulative sentence would be "disproportionately severe",[48] and that:

> Given the length of your cell confinement without lawful justification, given the severe psychological impact leading up to your attempt at suicide, and all the other instances of mistreatment, in short you have suffered enough.[49]

His Honour therefore imposed the 15-month sentence of imprisonment as indicated, but concurrent with Mihi's existing sentences. As a result, she did not receive any additional prison time from her new conviction.

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44 At [53].
45 *R v Bassett* [2021], above n 41, at [19].
46 *R v Bassett*, above n 2, at [95].
47 At [111].
48 At [28]. Concurrent sentences are governed by section 8H of the Sentencing Act 2002.
49 At [29].

Before handing down the sentence, Judge McNaughton spoke to the pain and mamae[50] of the prison environment becoming a place of further punishment and abuse for the wāhine, and what that means at a societal level:[51]

> The measure of a civilised society is how it treats its most vulnerable and disadvantaged citizens, and we judges know from experience that Māori women prisoners are amongst our most vulnerable and disadvantaged and damaged citizens, particularly those women who have grown up in a gang environment as you and Karma did.
>
> …
>
> So to learn that the serious physical and psychological abuse is occurring in a women's prison is profoundly disturbing, and that it is happening, or that it was happening, here in our own backyard in Manukau just a few minutes' drive from this court is especially disturbing for a judge who sits here.

After handing down the sentence, his Honour continued to address Mihi directly:[52]

> … Mihi, what I would like to say to you now at the end is how impressed I was by your evidence, not just you but all three of you. … There was a dignity and a strength of character coming through from all of you. You are resilient. You are a survivor. … So despite everything that has happened to you in prison and despite everything that has happened to you in your life before that, and despite the crimes you have committed, underneath all of that there is a good person. … You deserve a better life than this. … He mihi nui ki a koe. Kia kaha, kia toa, kia manawanui e.

Paris and Tarina were sentenced prior to Mihi, and without the benefit of a disputed facts hearing to determine mitigation. Paris was sentenced by Judge Patel to 17 months' imprisonment, to be served cumulatively on her original

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50 "Mamae" is a culturally-specific concept to describe hurt or pain in Māori culture. The word can be used to describe physical, mental, spiritual and emotional injury or trauma. Mamae can be an individual, or a shared or collective, experience (for example, in ritualistic grieving). Mamae can also be felt temporarily (for example, a bump to the elbow) or on an ongoing basis (for example, intergenerational trauma).

51 *R v Bassett*, above n 2, at [20] and [22].

52 At [31]–[35].

sentence.[53] Tarina was sentenced by Judge Johns to six months' imprisonment, also to be served cumulatively on her original sentence.[54]

The Crown's case against Mihi Bassett ended with her sentencing on 22 March 2021, but the ripple effects continue. RNZ's active reporting and Judge McNaughton's findings of fact drew significant public attention to the case from justice and prison advocates and academics. Responses were pressured from the Department of Corrections and its Minister, and the Office of the Chief Inspectorate was prompted to conduct a Special Investigation into the women's care.

While writing this article, the Chief Inspector released the final findings of her Special Investigation, and Corrections launched its updated Women's Strategy for the management of women in its care. Although that strategy was not updated in response to Mihi's case, it was surely drafted with Corrections' "lessons learned" from her case in mind.

III THE NEW ZEALAND CORRECTIONS SYSTEM

Mihi and the other women's mistreatment at ARWCF did not take place in a vacuum. Before we can fully analyse the response to her case, we must understand the historical and contemporary context of the New Zealand prison environment that informed it. This Part explores the implementation of the British criminal justice and corrections systems in Aotearoa, and the substitution of traditional Māori approaches to justice. It then outlines the framework of the current New Zealand corrections system, and the current picture for Māori and women in the system today. In particular, this Part begins to hone in on the place of Māori women living in a system that was not designed to account for them or their distinct and complex needs in contemporary Aotearoa, and set the scene for a proposed Mana Wāhine approach for wāhine in Corrections' care.

A A clash of cultures: traditional approaches to justice

Prisons, and the concept of imprisonment, have been part of Aotearoa's approach to justice for a relatively short period of time—only 181 years. Moana Jackson has explained that, prior to first contact, Māori had an established

53 *Police v Reed* DC Manukau CRI-2019-092-012895, 19 June 2020, cited in *Police v Bassett*, above n 9, at [8]–[11]; and *R v Bassett*, above n 2, at [6]–[9].

54 *Police v McClutchie* DC Manukau CRI-2019-092-012895, 7 October 2020, cited in *Police v Bassett*, above n 9, at [12]; and *R v Bassett*, above n 2, at [10].

system for identifying wrongdoing and repairing harm.[55] The ultimate aim was to restore whakapapa, in its broadest sense of an interrelationship between peoples, and between people and their environment. Guided by the principles and values of tikanga Māori, reconciliation was the logical conclusion of the process, as was rehabilitation for a person who had committed harm. But as for the concept of incarceration, "the idea of confining a wrongdoer in something like a prison would have been culturally incomprehensible".[56]

When the British first arrived in Aotearoa, incarceration had only been part of their law for a comparatively short time too. Prisons had not long before originated in urban Britain as "poorhouses" or "houses of correction": working institutions designed to teach people a skill, usually in the form of hard labour.[57] Places of confinement for people accused or found guilty of crime initially existed only to house them before they were subjected to their ultimate punishments: transportation to penal colonies or execution; such places were not for incarceration as a punishment per se.[58] In the longer term, however, transportation became increasingly expensive and the death penalty was failing to deter offenders.[59] Imprisonment thus grew in popularity and utilisation as a punishment, and by the early nineteenth century had become the logical conclusion of the criminal justice process.[60]

When the British settlers introduced their cultural values and systems to Aotearoa, they brought with them the "punitive will to contain and reprimand those who caused harm to people or property".[61] They regarded their European concepts as universal constructs, and dismissed established Māori systems as inferior.[62] Naturally, this colonising mindset applied to concepts of justice, and the British "corrections" system, complete with the British common law

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55 Moana Jackson "Why did Māori never have prisons?" (JustSpeak New Zealand Lecture Series, Wellington Girls' College, 17 November 2017); and Moana Jackson "Moana Jackson: Prison should never be the only answer" E-Tangata (14 October 2017) <www.e-tangata.co.nz>.

56 Jackson (14 October 2017), above n 55.

57 Leonard A Roberts "Bridewell: The World's First Attempt at Prisoner Rehabilitation Through Education" (1984) 35 Journal of Correctional Education 83 at 83.

58 David Wilson *Pain and Retribution: A Short History of British Prisons 1066 to the Present* (Reaktion Books, London, 2014) at 13.

59 Tim Hitchcock, Robert Shoemaker, Sharon Howard and Jamie McLaughlin et al "Background—Houses of Correction" London Lives 1690 to 1800 (24 April 2012) <https://www.londonlives.org/static/Punishment.jsp#Imprisonment>; Wilson, above n 58, at 76.

60 Wilson, above n 58, at 13.

61 Jackson (14 October 2017), above n 55.

62 Moana Jackson "Moana Jackson: How about a politics that imagines the impossible?" E-Tangata (23 September 2017) <www.e-tangata.co.nz>.

and structure of prison institutions, were introduced and quickly established throughout New Zealand.

New Zealand's first prisons were built in 1840, only weeks after the signing of Te Tiriti o Waitangi and the Treaty of Waitangi.[63] By 1878, there were 30 small prisons throughout the country—all underfunded and under-resourced.[64] Prisoners were crammed together regardless of their age, crimes or gender. Following Victorian penal philosophy, it was thought that harsh conditions would act as a deterrent to future offending. Prison was seldom regarded as a way to rehabilitate offenders back into society.[65]

B Framework of the current New Zealand corrections system

Today, the New Zealand corrections system is administered by the Department of Corrections. The Department was founded in 1995,[66] and its role and functions defined and clarified under the Corrections Act 2004 (Act) and in the Corrections Regulations 2005 (Regulations).

The Act also established the modern Office of the Inspectorate, which is led by the Chief Inspector. The Office is independent of prison management and plays an integral role in our modern prison system as a dedicated office for complaints resolution, investigation and assurance. It regularly inspects each New Zealand prison, on both notified and non-notified bases, and reports each prison's performance based on a set of standards informed by the Act, the Regulations, and best practice prison management.

C New Zealand women in the corrections system

There are three women's prisons operating in New Zealand today: Arohata Women's Prison, in Tawa, Wellington (Arohata); the Christchurch Women's Prison (CWP); and ARWCF, in Wiri, Manukau, where Mihi Bassett was held at the time of her offending. ARWCF is the only women's prison to hold maximum security prisoners.[67] As at 24 May 2021, there were 111 women at

63 Peter Clayworth "Early prisons, 1840–1879" Te Ara — the Encyclopaedia of New Zealand (20 June 2012) <www.TeAra.govt.nz>.

64 Clayworth, above n 63.

65 See, for example, the comments of Inspector of Prisons, Colonel Arthur Hume about women prisoners being long past "all possibility of reform" in 1897, cited in Department of Corrections *Change Lives Shape Futures: Wahine – E rere ana ki te pai hou: Women's Strategy 2017–2021* (June 2017) [*Women's Strategy*] at 3.

66 Pursuant to the Department of Justice (Restructuring) Act 1995.

67 Office of the Chief Inspectorate *Auckland Region Women's Corrections Facility Announced Inspection June 2020* (January 2021) at [150]–[153]. ARWCF was not purpose-built to hold maximum security women, as this classification was only introduced for women in 2009. Only 2 per cent of women are

Arohata Prison, 340 at ARWCF, and 88 at CWP (539 women in prison in total).[68] Men comprised roughly 93.6 per cent of the total prison population (7,896) and women comprised 6.4 per cent.

Throughout the 19th century, women made up a small percentage of the prison population. Jared Davidson's research suggests that women were not catered for in an "overwhelmingly male-dominated and male-designed prison system".[69] In contemporary times, however, and in recognition of the increasing women's prison population, Corrections seeks to operate according to its specific strategy for women in prison. *Wahine – E rere ana ki te Pae Hou: Women's Strategy 2017–2021* (*Women's Strategy 2017*) was the version of this strategy in place at the time of Mihi's offending and District Court case.[70] In light of the Māori name of the strategy, meaning "Women – Rising above a new horizon", one might be forgiven for thinking that the *Women's Strategy 2017* may have been informed by Mana Wāhine theory, or was specifically directed toward the care of Māori women, or had been drafted on the basis of a Kaupapa Māori framework. Neither of those were the case. The *Women's Strategy 2017* was fundamentally a monocultural strategy for all women, with a Māori name, and with three small isolated pockets directed toward wāhine Māori (which are discussed further below).

At the time of its launch, the *Women's Strategy 2017* sought to implement a new approach for women prisoners over five years that would help curb recidivism and reduce offending generally by 25 per cent.[71] Then-Chief Executive of Corrections, Ray Smith explained the basis of the new strategy:[72]

> The increase of women offenders demands attention and a fresh approach… Our corrections system has largely been built around the needs of male offenders, but research has shown that women respond differently to treatment and management. Our women's strategy redresses that imbalance, based on international best practice and our own research into what works

classified as maximum security, and 6 per cent of women are classified as high security (*R v Bassett*, above n 2, at [7]).

68 Letter from Rachel Leota (Department of Corrections) to Mariah Hori Te Pa regarding Official Information Act 1982 request (15 June 2021) (Obtained under the Official Information Act 1982 Request to Department of Corrections) [OIA Request].

69 Jared Davidson "Making women's prisons more gender conscious won't solve anything much" The Spinoff 24 March 2021) <www.thespinoff.co.nz>.

70 *Women's Strategy*, above n 65.

71 At 7.

72 At 3.

> best. It recognises that women have different needs to men and sets out a new approach for Corrections that will give women the treatment, encouragement, counselling, skills and support they need to shape better futures for themselves, their children and families…

The *Women's Strategy 2017* recognised that women in prison required a "gender-responsive approach" based on the root causes of women's offending and what works to reduce women's re-offending—both of which research had shown were distinct from those of men.[73] Women prisoners were more likely than men prisoners to have experienced mental health disorders, PTSD, and alcohol and other drug dependence disorders, and 68 per cent of women in prison had been victims of family violence. Generally, women's offending was often driven by these marginalised experiences and problems, and women committed less serious crimes than men overall.[74] Therefore, rehabilitation and reintegration processes designed around how men offend were inappropriate for women. In order to address these differences, the *Women's Strategy 2017* placed a "women-specific lens" over Corrections' overall goal to reduce re-offending.

The strategy noted at the outset that "over half" of the women in prison identified as Māori.[75] It explained that in addition to the high prevalence of PTSD among women in prison generally, Māori women also suffered historical and intergenerational trauma;[76] that 70 per cent of Māori women in prison had literacy and numeracy levels lower than NCEA level 1 (compared to 60 per cent for all women in prison);[77] and that Corrections needed to be "culturally responsive to meet women's needs".[78] The strategy then set out three isolated initiatives specifically for the benefit of Māori women.[79] There did not appear to be any clear strategy toward the implementation of the initiatives, and it was not clear if or how the initiatives would work in conjunction, or whether they were designed as part of an overarching plan at all. As a result, the *Women's Strategy 2017* left the reader wondering whether Corrections had thought about

73 At 6.

74 At 4–5.

75 At 3 and 11.

76 At 5.

77 Tertiary Education Commission *Literacy and Numeracy Adult Assessment Tool* (2017) cited in *Women's Strategy*, above n 65, at 13.

78 At 11.

79 At 11, 16 and 20. Note this paragraph of this article represents all 14 instances of the word "Māori" being used throughout the Women's Strategy. The word "wāhine" is not used in the strategy other than in the title.

the fact that if Māori women were overrepresented in prison, an effective, targeted approach toward their care and rehabilitation would significantly impact its overall goal to reduce re-offending; about its place in the systematic oppression of Māori women; or conversely about its unique opportunity to empower and whakamana[80] the Māori women in its care, at all.

While writing this article, Corrections launched its updated *Women's Strategy for 2021–2025 (Women's Strategy 2021)*.[81] The latest version of the strategy seeks to build on the foundations of the *Women's Strategy 2017*, and further refresh Corrections' approach to working with women in its care.[82] In the authors' view, the *Women's Strategy 2021* improves significantly on the promises of the *Women's Strategy 2017* to be "culturally responsive" to (Māori) women's needs. This is discussed further below in Parts V and VI.

D Māori in the corrections system

Throughout the 19th century and into the early 1900s, Māori were also a negligible percentage of the prison population.[83] From the 1950s onwards, however, the total prison population increased rapidly alongside the increasing crime rate and incarceration of Māori men. This occurred in correlation with the rapid urbanisation of rural Māori to cities and town centres. By the mid-1970s, the percentage of Māori in prison was sitting at just under 40 per cent and surged through the 1980s, peaking at nearly 60 per cent in the late 1990s.[84] As at 30 September 2021, the prison population was 8,034 people, and Māori comprised 52.5 per cent of that total.[85]

The demographics of our Māori prisoners and our women prisoners have changed dramatically in a lifetime. Reflecting on his thirty years of research, Moana Jackson noted that the percentage of Māori women in prison had risen from less than 1 per cent to over 64 per cent in 2017.[86] As at October 2021, Māori women comprised 66 per cent of the total women's prison population.[87] This makes Māori women, per capita, the most imprisoned indigenous women

80 To "whakamana" a person is to recognise, uphold and uplift the mana of that person.
81 Department of Corrections *Wāhine – E rere ana ki te pai hou: Women's Strategy 2021–2025* (October 2021) [*Women's Strategy 2021*].
82 At 6.
83 Peter Clayworth "Prisons – Māori imprisonment" Te Ara – the Encyclopedia of New Zealand (2012) <www.TeAra.govt.nz>.
84 Clayworth, above n 83.
85 Department of Corrections "Prison facts and statistics – September 2021" <www.corrections.govt.nz>.
86 Jackson (17 November 2017), above n 55.
87 *Women's Strategy 2021*, above n 81, at 7.

in the world.[88] By way of comparison, Māori men comprise about 52 per cent of the men's prison population.[89]

Corrections launched "*Hōkai Rangi: Ara Poutama Aotearoa Strategy 2019–2024*" in 2019 (*Hōkai Rangi*). *Hōkai Rangi* outlines the long-term plan for working with Māori in the corrections system, and reducing their disproportionate recidivism rates[90] (and has since also been described as the Department's overarching strategy toward all people in its care).[91] The strategy identifies that the corrections system prioritises risk management at the expense of kaupapa Māori and tikanga Māori.[92] Other Māori-specific systemic issues include the denial of any whānau-orientated response, and that institutionalised Māori struggle to reintegrate into society.[93] It identified that all of these factors contribute to Māori prisoners' poor quality of rehabilitation and high rates of recidivism.

Drawing from these key concerns, *Hōkai Rangi* created six key strategic areas, each with a set of short-term and long-term actions. Among other things, *Hōkai Rangi* pledged to uphold the mana of all those in Corrections' care, promised to incorporate a te ao Māori worldview, and recognised that Corrections was "a key system player in achieving positive intergenerational outcomes for Māori".[94]

Hōkai Rangi constitutes important context for this article, given the disproportionate representation of Māori women in New Zealand prisons. It broadly states that wāhine Māori have "specialised needs" which need to be addressed within Corrections,[95] and that one of its 37 actions is to commission research looking at how Corrections would achieve that.[96] In addition to this broad commitment to undertake further research, *Hōkai Rangi* outlined three initiatives that would directly impact the management of wāhine prisoners.[97]

88 Aaron Smale "Rough justice: Māori and the criminal justice system" Radio New Zealand <www.shorthand.radionz.co.nz>.
89 Department of Corrections *Hōkai Rangi: Ara Poutama Aotearoa Strategy* 2019–2024 (2019) [*Hokai Rangi*] at 8.
90 At 4.
91 *Women's Strategy 2021*, above n 81, at 3 and 4 (per Minister Davis and Chief Executive Jeremy Lightfoot, in their respective forewords to the *Women's Strategy 2021*).
92 At 11.
93 *Hōkai Rangi*, above n 89, at 11.
94 At 18.
95 At 20.
96 At 21.
97 At 31, 33 and 34.

Like the *Women's Strategy 2017*, there did not appear to be any clear strategy toward the implementation of the three initiatives for wāhine, and it was not clear if or how the initiatives would work in conjunction, or in line with the *Women's Strategy 2017*, or whether they were designed as part of an overarching plan at all.

Given *Hōkai Rangi* was published in 2017 after the *Women's Strategy 2017*, it is questionable why it did not adopt a more "intersectional" approach to the management of wāhine Māori, for example in the way that the *Women's Strategy 2017* placed a "women-specific" lens over Corrections' goals and priorities. If not to create a more aspirational approach specifically for wāhine Māori that was informed by Mana Wāhine theory, *Hōkai Rangi* should have better articulated how its mahi would interweave with, support, or supplement the proposals set out in the *Women's Strategy 2017* for Māori women. Encouragingly, the *Women's Strategy 2021* does articulate how it will align with the aims and aspirations of *Hōkai Rangi* as the Department's overarching strategy.[98]

Although the *Women's Strategy 2021* was not created in response to Mihi Bassett's case (the 2017 strategy was already due to be refreshed in 2021), its content will be further discussed in Parts V and VI of this article, alongside the response and actions of the Department and its Minister. In particular, Part VI explains why legislation, policies and practices relating to wāhine in the corrections system need to be informed by Mana Wāhine theory, and the extent to which the *Women's Strategy 2021* does or does not incorporate a Mana Wāhine approach already. Prior to that analysis, this next Part further considers how wāhine Māori are treated differently in prison to non-Māori women, to the extent that a specific strategy for wāhine Māori is justified at all.

IV TREATMENT OF WĀHINE IN NEW ZEALAND PRISONS

Judge McNaughton found that ARWCF broke its own rules by sending Mihi to the pound and keeping her there without proper authorisation, and in the prison's use of "Cell Buster" pepper spray against her four times. This oppressive use of segregation and pepper spray were arguably two of the most perturbing features of Mihi's case—but this treatment was not particular to Mihi, and nor did it happen in isolation. Statistics obtained from Corrections show that the number of directed segregation orders and the use of pepper

98 See, for example, *Women's Strategy 2021*, above n 81, at 3, 17 and 20.

spray have both increased rapidly in the last five years.[99] This Part outlines the disproportionate and increasing use of both against Māori women, especially at ARWCF. It then situates these statistics within the broader findings of the Office of the Inspectorate from its notified inspection of ARWCF in June 2020, in particular in respect of discipline and management of prisoner behaviour.

A Segregation

Corrections can hold prisoners in "segregation" for a number of prescribed reasons—mostly for health and safety. Prisoners can be held in segregation on a "directed" or "voluntary" basis.[100] Segregation is different to "cell confinement", which is used for discipline, because, according to Corrections: [101]

> "[t]he option to place people on directed segregation is a preventative measure to a known or potential risk. Being placed on directed segregation does not serve as a punishment. Rather, it is to ensure the safety of themselves and others".

Of the three women's prisons, ARWCF has consistently imposed the greatest number of directed segregation orders over the last five financial years.[102] This is likely attributable to ARWCF being the only women's prison to hold maximum security prisoners. Reviewing the number of directed segregation orders at the women's prisons at the beginning and end of the last five financial years, broken down into ethnicity, shows that:[103]

i) of the 70 orders at ARWCF in the 2016/17 financial year:

   a) 62 per cent were for Māori women (44);

   b) 26 per cent were for European women (18);

   c) 9 per cent were for Pacific women (6); and

   d) this compares to six orders (54 per cent) for Māori women at

99 OIA Request, above n 68.

100 OIA Request, above n 68. For voluntary segregation, prisoners can request to be placed in segregation for the purpose of protective custody if they fear for their own safety, or if it is deemed to be in their best interests. Such prisoners are accommodated in units with other people on voluntary segregation, who they can associate with, and they can withdraw from the units at any time.

101 OIA Request, above n 68, at 5; see also Prison Operations Manual, M.07.01-02.

102 OIA Request, above n 68, at 6.

103 OIA Request, above n 68, at 6. The terminology for ethnicities is Corrections' own.

Arohata (out of 11 total), and 22 orders (68 per cent) for Māori women at CWP (out of 32 total) in the same year; and

ii) of the 142 orders at ARWCF in the 2020/21 financial year to 24 May 2021:

a) 82 per cent were for Māori women (117);

b) 12 per cent were for Pacific women (17);

c) 4 per cent were for European women (6); and

d) this compares to 31 orders (56 per cent) for Māori women at Arohata (out of 55), and 31 orders (49 per cent) for Māori women at CWP (out of 63) in the same year.

The comparison shows that the number of orders against Māori women has been increasing over the last five years at ARWCF disproportionate to the other two women's prisons: while the total number of orders has doubled at ARWCF, the proportion of those orders against Māori women has nearly tripled.[104] At Arohata, the proportion of orders against Māori women was relatively stable, and at CWP it decreased.

The disproportion exists not just between the prisons but between women inside ARWCF. As at 21 May 2021, Māori women comprised approximately 66 per cent of the prison population but were subject to 82 per cent of directed segregation orders.[105] By comparison, European women comprised 21 per cent of the prison population at ARWCF but were subject to 4 per cent of directed segregation orders; and Pacific women comprised 6 per cent of the population but were subject to 12 per cent of directed segregation orders.[106]

B Pepper spray

Pepper spray was first authorised for use as a non-lethal weapon under the Regulations in 2010. At that time, however, the Regulations restricted when pepper spray could be issued to Corrections officers to wear on their hip for ordinary use. Perhaps due to pepper spray not being immediately available, it was not used in any women's prisons in the 2016 and 2017 calendar years.[107]

104 The number of directed segregation orders at ARWCF against Pasifika women has also more than doubled, while the number for Pākeha women has more than halved; OIA Request, above n 68.

105 OIA Request, above n 68.

106 OIA Request, above n 68.

107 OIA Request, above n 68.

From July 2017, as a result of a policy shift and accompanying amendments to the Regulations,[108] all officers around the country started carrying pepper spray on their hip.[109] The Corrections Association (the union that represents front-line prison staff) told RNZ that this policy shift was due to increased threats to prison guards' welfare.[110] Consequently, from 2018 all three women's prisons began to use ordinary pepper spray, and from that year onwards its use increased exponentially, especially at ARWCF.[111]

With the normalisation of ordinary pepper spray, the use of "Cell Buster" (the brand of pepper spray that was sprayed under the women's prison cell doors) increased with it. Cell Buster was first authorised as a delivery method in 2012,[112] but was first used (in a men's prison) in 2016. It is only used in planned response incidents, and requires the Prison Director's approval. From 2016 to today, it has only been used 27 times across all New Zealand prisons (including the 15 men's prisons and the three women's prisons). Seven of those incidents were at ARWCF.[113]

The number of pepper spray incidents at ARWCF by year peaked in 2019. In that year it was used in 33 incidents: 27 in "individual carry" incidents, and six in "planned use" incidents (meaning the Cell Buster extractions). To put this in context of all women's prisons, this compares with three "individual carry pepper spray" incidents at Arohata and one at CWP, and no "planned use" incidents at those prisons, in the same year. In 2020 there were only two "planned use" incidents: one at ARWCF and one at CWP. In that year, ARWCF's "individual carry" incidents decreased to 12, and in the year to 21 May 2021 this figure further decreased to three.

Corrections was unable to provide information pertaining to pepper spray use against women prisoners broken down by ethnicity, as this information is not centrally recorded.[114] The exact extent to which pepper spray is used

108 From "Restrictions on carrying pepper spray" (reg 123A, Corrections Regulations 2005 (reprint as at 21 October 2015)) to "Issue of pepper spray" (new reg 123B, Corrections Regulations 2005 (reprint as at 28 April 2020)).

109 Tom Kitchin, "Pepper spray use rises in prisons around the country, Corrections figures show" Radio New Zealand (7 September 2020) <www.rnz.co.nz>.

110 Kitchin, above n 109.

111 OIA Request, above n 68.

112 Letter from Rachel Leota (Department of Corrections) to redacted regarding C129626 Summary of cell buster pepper spray delivery system events (12 April 2021) (Obtained under the Official Information Act 1982 Request to Department of Corrections) [Letter C129626].

113 Appendix One C129626 to Letter C129626, above n 112.

114 OIA Request, above n 68. Corrections explained that in order to provide this information, staff would

against Māori versus non-Māori women is therefore unknown. However, it is noted that Judge McNaughton found that Cell Buster was used against Mihi four times,[115] Karma has alleged it was used against her three times,[116] and the planned use of pepper spray was only carried out at ARWCF seven times in the last five years (in 2019 and 2020).[117] In a summary of the 27 times that Cell Buster has been used in all New Zealand prisons, five of them mention sprinklers being set off in the prisoner's cell,[118] which matches the circumstances in which Mihi said she and the other women were pepper sprayed with Cell Buster at ARWCF.[119] Even without clear statistics then, it appears that Cell Buster may have been disproportionately used against Māori women in prison.

Karma and Mihi have brought an application for judicial review, alleging that Cell Buster was not validly authorised under the Regulations, and that even if it was, its use is in breach of the New Zealand Bill of Rights Act 1990.[120] Specifically, they claim its use breaches s 9, the right not to be subjected to torture or cruel treatment, and s 23(5), the right of detained person to be treated with humanity and with respect for their inherent dignity.[121] On 23 December 2020, in a decision declining interim relief pending resolution of the substantive claim, Ellis J said there might be "some real concerns" about the Regulations,[122] and warned Corrections that "[i]t is to be hoped that the resultant uncertainty might be regarded as a relevant consideration in any future decision about whether to deploy the Cell Buster".[123]

C Office of the Inspectorate's notified inspection of ARWCF

The Office of the Inspectorate regularly reviews the compliance of New Zealand prisons with the legislative and regulatory requirements canvassed

be required to manually review a large number of files to complete a verification check, and a manual review of each individual's profile to determine how their ethnicity was recorded at the time of the incident.

115 *R v Bassett*, above n 2, at [86].

116 Claire Eastham-Farrelly "'Cell Buster' pepper spray okay for now, but Corrections put on notice" Stuff (23 December 2020) <www.stuff.co.nz>.

117 There were no planned uses of pepper spray at ARWCF in 2016–2018 or 2021; OIA Request, above n 68.

118 Appendix One C129626, above n 113.

119 *R v Bassett*, above n 2, at [90]; Espiner (24 November 2020), above n 5.

120 *Cripps v Attorney General* [2020] NZHC 3523. See also Guyon Espiner "Prisoner sues to stop pepper spray bombs that 'make grown men cry'" Radio New Zealand (10 December 2020) <www.rnz.co.nz>.

121 Claire Eastham-Farrelly "Corrections signals pepper spray review on eve of prisoner's court case" Stuff (17 March 2021) <www.stuff.co.nz>.

122 *Cripps v Attorney General*, above n 120, cited in *R v Bassett*, above n 2, at [86].

123 Eastham-Farrelly (23 December 2020), above n 116.

above. In June 2020, the Office conducted a notified inspection at ARWCF, and it released a report of its findings in January 2021 (2020 Report).[124]

At the time of the inspection, the Prison Management Unit was accommodating ten women: five classified as maximum security, who had recently become subject to directed segregation orders for the purpose of maintaining safety and good order;[125] and five other women who were subject to directed segregation orders for their own protection.[126] Just prior to the inspection, a Visiting Justice had reviewed the length of time two of the women had been held on directed segregation (which was for more than three months). The Visiting Justice returned at least three-monthly for further reviews. The remaining women had been held in segregation for less time, and the Regional Commissioner's Office was maintaining oversight of their management and approving their directed segregation status. In short, the Office found that the Act and its Regulations in respect of directed segregation were being appropriately followed.

In addition, the Office found that "[e]ach maximum security prisoner had an up-to-date, tailored management plan",[127] and that the plans for these women were "particularly good". Staff told the Office that work had recently been undertaken to improve the standard of record-keeping and the management of women in the unit.

The Office did not conduct any inquiry or make any findings in respect of the use of pepper spray, but it did make findings in relation to "discipline". It found that "the administration of the misconduct process was not working effectively at the site",[128] and that in the high security and remand units, some custodial staff "did not communicate effectively with wāhine nor actively manage what we identified were demanding and confrontational prisoner behaviours".[129] For the period September 2019 to February 2020, ARWCF staff had filed 496 misconduct charges.[130] Of these, 60 per cent were later withdrawn and 10 per cent cancelled. Custodial staff were aware of and "somewhat frustrated" by the high levels of withdrawn or cancelled misconduct charges,

124 Office of the Chief Inspectorate, above n 67.
125 Under the Corrections Act 2004, s 58(1).
126 Section 59(1).
127 Office of the Chief Inspectorate, above n 67, at 58.
128 Finding 57 at 8.
129 Office of the Chief Inspectorate, above n 67, Finding 58 at 8 and at [210].
130 At [205].

and felt the prosecutors only prioritised the more serious charges.[131] On the other side, prosecution staff told the Office that at times it felt like staff were laying misconduct charges rather than actively managing women's behaviour.[132]

Relevantly, in early 2020, Corrections conducted its own Operational Review into lockdown hours at ARWCF. The Operational Review found that the prison may have developed a culture over the years whereby "many staff take a 'punitive' approach to their work, rather than a 'humanising' approach".[133] For example, staff addressed women by their surnames rather than first names; applied use of force rather than first attempting to resolve issues with "more appropriate tactical communications"; and the Custodial and Health teams not always working together or in the best interests of the women. The Operational Review recorded that the "humanising aspect of *Hōkai Rangi*, which is also due to be rolled-out on site, will further assist the re-set and go some way to changing the "punitive" culture which currently exists in pockets" at ARWCF.[134]

V THE WAKE OF MIHI BASSETT'S CASE

So far, this article has canvassed the facts of Mihi Bassett's case and the wider context in which it sits. This included the historical and contemporary context of our prisons; the place of wāhine Māori in our prison system; and the increasing use of segregation and pepper spray against women in prison, and in particular Māori women at ARWCF where a "punitive culture" existed in pockets. Those factors are integral components to the story of Mihi's life in prison. This Part now returns to that story: to the preliminary findings of the Chief Inspector's Special Investigation; the Minister and Department of Corrections' response in the immediate aftermath of Mihi's case; and the events since, including Corrections' launch of the *Women's Strategy 2021* and the release of the Chief Inspector's final Special Investigation report.

A Preliminary findings of the Chief Inspector

After the significant interest in Mihi Bassett's case, the Chief Inspector conducted a Special Investigation into ARWCF's management of Mihi, Karma

131 At [209].

132 At [208].

133 Department of Corrections *Operational Review: Focus on various areas of custodial practice across Auckland Region Women's Correctional Facility (ARWCF) over a four-month period (January–April 2020)* (25 May 2020) [Operational Review] at [12].

134 At [12].

and Tarina in the Prison Management Unit. On 17 March 2021, the Chief Inspector released a preliminary indication of her investigation findings and recommendations to the Minister (preliminary findings).[135] The preliminary findings "confirm[ed] the criticisms" that Judge McNaughton made of ARWCF in the District Court, although the Chief Inspector indicated she was focussed on the factual position and did not intend to make findings or comments about the cruelty or inhumanity of the management regime.[136]

The Chief Inspector found that the three women were initially managed according to the Prison Operations Manual and the Regulations, but that management of the women gradually departed from some of these requirements from April 2019.[137] This culminated in a regime that was highly restrictive and contrary to minimum entitlements. Overall, the Chief Inspector considered that unit staff lacked proper oversight and guidance, and noted: "[t]heir behaviour appears to be reactive rather than strategic: dealing with issues locally and informally instead of ensuring that procedure was followed."[138]

The preliminary findings canvassed four broad themes that essentially reflected those canvassed by Judge McNaughton. First, the women were being housed in confinement cells for reasons not directly connected to disciplinary matters.[139] Prisoners were effectively kept segregated without following the process for directed segregation.[140]

Second, use of force became "frequently necessary", but was not being reviewed as required by policy.[141] The Chief Inspector found that staff generally used force only as a last resort, and, contrary to Judge McNaughton's findings, "there was no evidence of any deliberate cruelty from staff, or efforts to break the spirits of wāhine".[142]

Third, staff began dealing with issues more informally than was appropriate.[143] For instance, prisoner complaints were not being elevated, even where serious (for example, a complaint from Karma that a staff member had

135 Office of the Inspectorate *Special Investigation into the management of three prisoners at Auckland Region Women's Corrections Facility: Preliminary indication of investigation findings and recommendations* (17 March 2021) [Preliminary Findings] at 2.
136 At 5–6.
137 At 7–8.
138 At 17.
139 At [8.1]
140 At [11]
141 At [8.2]
142 At [16].
143 At [8.3].

choked her).[144] As another example, misconduct charges were not routinely filed. This meant an absence of proper consideration and appropriate remedial steps,[145] whereas initiating the proper disciplinary process may well have made clear that the women were already effectively under disciplinary confinement.[146]

Fourth, while prison management plans were in place, some elements were inappropriate or unnecessary, and the plans seemed to be rolled over without consideration.[147] This is despite the plans being signed off by the Residential Manager and Deputy Prison Director, and discussed at multidisciplinary team meetings.[148] Although a number of unit staff were clear that they did not like the plans or consider them appropriate, they lacked the confidence to challenge them.[149]

Importantly, the Office found that the management plans were "based on maximum security male prisoners". They required, for example, that:[150]

> i) At least three staff were required to unlock a cell. "Corrections officers would often arrive in large numbers, which tended to escalate prisoner behaviour."
>
> ii) Prisoners stand at the back of the cell before the door is opened. "This may be unnecessary for women, and appears in this case to have exacerbated tensions."

Prisoners needed to follow precise instructions when food was delivered, including to kneel on the floor before the cell was opened. The management plans stated that not following instructions should be taken as a refusal to eat, so if the women did not comply then food would often be withheld and not re-offered. In addition, the plans were being implemented in a way that "went beyond reasonable management".[151] In one video, staff had withheld food from Karma because she was sitting at the opposite end of the cell but refused to kneel when instructed.

The Chief Inspector indicated her likely recommendations to Corrections

144 At [8.3] and [25.1].
145 At [8.3]. Also see [27].
146 At [28].
147 At [21]–[23].
148 At [22].
149 At [22]–[23].
150 At [21.1]–[21.3].
151 At [21.3].

would be to address the findings and confirm that no prisoners are subject to a similar management regime throughout the prison network, and review the use of management plans across the prison network generally;[152] consider the staffing, management and oversight of ARWCF in order to provide assurance that no other systemic issues persist;[153] and review the use of the maximum security classification for women.[154] As to this last recommendation, the Chief Inspector questioned whether the maximum security classification for women, which was only introduced in 2009, was appropriate for women at all given the low numbers at any one time to allow socialisation.[155]

B Response of the Minister and Department of Corrections

It is clear from the Minister's response to Mihi Bassett's case that the Chief Inspector's preliminary findings hold significant sway. On 22 March 2021, the day that Mihi was sentenced, a media release on the Parliament website announced that Minister Davis had received the preliminary findings.[156] He was quoted as saying that the "failings highlighted in the Chief Inspector's report are unacceptable. The lack of oversight and leadership has had a major impact on prisoners… I want and expect better from Corrections...".

Significantly, the Chief Inspector's observation that the women's management plans were "based on maximum security male prisoners" appeared to have struck a chord with the Minister. Addressing reporters in Parliament, Minister Davis made various comments about the treatment of women prisoners versus men prisoners, including that "[i]t's inappropriate for women in prison to be treated as if their needs were the same as male prisoners", and that:[157]

> "It is important that the management of women is appropriate to women. And the system has basically been designed around managing men, and I just don't think in this day and age – and it has probably never been appropriate that women and their needs have been treated as if they are men."

152 At [31.1] and [31.4].

153 At [31.2].

154 At [31.3].

155 At [31.3].

156 Hon Kelvin Davis "Minister directs Corrections to overhaul processes and management of women in prison" Beehive (22 March 2021) <www.beehive.govt.nz>.

157 *Radio New Zealand*, above n 3.

The Minister set out his expectations for Corrections in a letter to the Chief Executive, to immediately improve processes and overhaul the management of women in prison, "to ensure prisoners are treated in a way that fulfils the aims of… *Hōkai Rangi*".[158] The Minister's expected actions of Corrections included (among other things):[159]

i) accepting the Office of the Inspectorate's preliminary findings and recommendations;

ii) outlining in a detailed plan how Corrections would address systemic issues raised about ARWCF;

iii) overhauling the maximum-security classification for women, the development of management plans for women, and commencing a review of all women's prisons; and

iv) ensuring that additional training was provided to frontline custodial staff with a focus on use of force, segregation, use of cells and searches, and management of difficult situations.

Overall, Minister Davis told the media that Corrections was "looking at many things to make life more bearable for prisoners," and expressed confidence that the proposed actions in response would go "some way in helping to address these issues".[160] He said that it was now appropriate for Corrections to apologise to the women, and that as the Minister, "I will also apologise for the harm caused, given the system I am responsible for failed to treat them in line with what is right, what is good and what is promised in Hōkai Rangi".[161]

In a statement, Corrections said representatives met with each of the women on 19 March 2021, after the Chief Inspector provided the Department with the preliminary findings, and had acknowledged and apologised to the women for the way they were managed at ARWCF between February 2019 and February 2020.[162] Corrections said that it would await the Inspectorate's final

158 Hon Kelvin Davis, above n 156.

159 Letter from Minister of Corrections Kelvin Davis to Chief Executive of the Department of Corrections, Jeremy Lightfoot (22 March 2021) cited in Justin Giovanetti "Review, apologise, overhaul: Kelvin Davis dramatically changes tune on women's prison abuses" The Spinoff (22 March 2021) <thespinoff.co.nz>.

160 Tumamao Harawira "Corrections told to buck up its ideas on the treatment of prisoners" Te Ao Māori News (24 March 2021) <www.teaomaori.news>.

161 *Radio New Zealand*, above n 3.

162 Department of Corrections "Media release from the Department of Corrections" (23 March 2021) [Media Release].

findings to determine its full response, but that all recommendations would be accepted. It had already acted on the various recommendations of the preliminary findings and the directions from the Minister in the meantime, and began to implement those changes at ARWCF.

C Final findings of the Special Investigation

While writing this article, the Chief Inspector released the final findings into her Special Investigation (final findings).[163] The final findings mirrored and expanded on the preliminary findings, but importantly the Chief Inspector was able to incorporate the women's own perspective into the narrative of the final report. (The Office had interviewed two of the women in person, and reviewed the court's evidence transcript for Mihi's disputed facts hearing for the third.)[164]

The Chief Inspector explained that the timing of the Special Investigation ran in parallel with the Office's notified inspection of ARWCF in June 2020.[165] She acknowledged that the 2020 report did not deal directly with some of the matters dealt with in the Special Investigation, given the Special Investigation was the more appropriate forum to go into detail about those matters. Clear inconsistencies, for example, can be seen in the Office's different findings about the legality of the women being held in de facto segregation, and the quality of their management plans. The 2020 report failed to identify that "wāhine were being housed in confinement cells for reasons not directly connected to disciplinary matters", and that "prisoners were effectively kept segregated without following the process for directed segregation".[166] In the 2020 report, the Office had found that "each maximum-security wāhine had an up-to-date, tailored management plan",[167] and that the plans for the maximum-security women were "particularly good".[168] This is a long way from the Chief Inspector's view in the preliminary findings that the management plans were inappropriately "based on maximum-security male prisoners", and

163 Office of the Chief Inspectorate *Special Investigation: Report of investigation into the management of three wāhine at Auckland Region Women's Corrections Facility* [Final Findings] (9 September 2021).
164 At 10 and 17–22.
165 At 13.
166 Preliminary Findings, above n 135, at [8.1] and [11]; and see the Final Findings, above n 163, at 84–86.
167 Office of the Chief Inspectorate, above n 67, finding 54 at 8.
168 Media Release, above n 162.

that Corrections should review the use of the maximum-security classification for women more broadly.[169]

Disappointingly, neither report inquired into the use of pepper spray or the use of Cell Buster more specifically—both of which, it is clear from the publicly-available statistics, had increased at ARWCF since 2018. Coupled with Corrections' own identification of a "punitive culture" at ARWCF,[170] the statistics should have been especially concerning to the Office. The Chief Inspector explained that her Final Findings deliberately avoided conclusions about the authorisation and use of pepper spray, in light of [Karma and Mihi's] application for judicial review against Corrections, challenging the authorisation and use of Cell Buster.[171]

D Women's Strategy 2021

On the same day the Chief Inspector's final findings were publicly released, Corrections launched its updated *Women's Strategy 2021*. As noted in Part III above, the *Women's Strategy 2021* improves significantly on the promises of the 2017 Strategy to be "culturally responsive" to (Māori) women's needs—both substantively and by the process in which the 2021 Strategy was formulated. For example, the *Women's Strategy 2021* begins to hone in on some of the marginalised experiences of Māori women compared to non-Māori women.[172] It applies tikanga Māori values and concepts, such as viewing wāhine both as individuals and as part of their collective (for example their family, whānau, hapū and iwi),[173] and demonstrates how those values and concepts can be applied practically, and in a healing way for the benefit of women in Corrections' care.[174] It sets out initiatives specifically for wāhine Māori, such as "Te Waireka", which is "an innovative 'by Māori for Māori' residential therapeutic

169 Final Findings, above n 163, at 7.

170 Operational Review, above n 133, at [12].

171 Final Findings, above n 163, at 5.

172 *Women's Strategy 2021*, above n 81: For example, by referencing the effects of colonisation (at 6), and the cyclical effects on tamariki Māori (Māori children) of having generations of māmā Māori (Māori mothers as primary caregivers) in prison (at 8).

173 At 14. More broadly, one of the four "focus areas" in the 2021 Strategy is "Holistic approaches –see the whole of me", which envisages that women in prison will be "seen in the context of [their] whole" (at 14 and 18).

174 *Women's Strategy 2021*, above n 81: For example, by contextualising tikanga Māori principles such as manaakitanga ("staff I work with are welcoming and encouraging", at 19), whanaungatanga ("staff take the time to get to know me and my circumstances", at 19), and whānau, whakapapa and whare tangata (family connections, lineage and women as the sacred house of humanity, at 15).

community that provides reintegrative support for Māori women";[175] as well as other initiatives that may not be specifically for wāhine but are nonetheless informed by tikanga and kaupapa Māori, such as the "Te Pae Oranga" pilot that will support women to transition out of prison.[176] It also acknowledges the role of the Crown in the disproportionate imprisonment rates of Māori, as found by the Waitangi Tribunal in its failure to prioritise the reduction of the high rate of Māori reoffending.[177]

Importantly, the *Women's Strategy 2021* was formulated in close consultation and engagement with "predominantly" wāhine Māori, including those with lived experience of the corrections system.[178] Corrections stated that this engagement represented its ongoing commitment to Te Tiriti o Waitangi and partnering with Māori to achieve better outcomes.[179]

However, while the *Women's Strategy 2021* incorporated these, and other aspects of te reo, tikanga and the history of Māori, it does not appear to be informed by Mana Wāhine theory and did not seek to implement a Mana Wāhine approach. Especially in light of the Waitangi Tribunal's findings, this is a significant missed opportunity for Corrections to revolutionise, rather than just improve, its treatment and care of Māori women. The next Part advocates for a Mana Wāhine approach toward Māori women in Corrections' care in the short to medium term, and fully analyses the extent to which the *Women's Strategy 2021* does or does not incorporate a Mana Wāhine approach already.

VI ANALYSIS

There is whakaaro and kōrero, among Māori working with and within the law, that there must be progressive change within current systems, as well as an overarching vision for structural change. The objectives are multi-faceted. In the long term, structural and transformative change is necessary to create a more fair, just and equitable society, and to realise the vision for Aotearoa under Te Tiriti and the Treaty of Waitangi. In the meantime, Kaupapa Māori approaches are necessary to address the consequences of inequality as a result of colonisation, and to create better outcomes for Māori. One cannot work

175 At 10.

176 At 20.

177 At 8; see Waitangi Tribunal "Tu Mai te Rangi! Report on the Crown and Disproportionate Reoffending Rates" (WAI 2540, 2017).

178 *Women's Strategy 2021*, above n 81, at 2.

179 At 2.

without the other, and those working within the system cannot lose sight of the overall vision, otherwise they risk becoming part of the problem.

This thinking provides a framework for analysing the two camps of critique of the response to Mihi Bassett's case. The first camp would hold that the corrections system, and the wider criminal justice system that it sits within, requires transformative, structural change—the long-term vision for which the Department and the Minister currently lack. The second camp would hold that the Minister's directions and Corrections' actions in the short to medium term are insufficient, because they do not go far enough to put wāhine Māori at the centre of the proposed solutions. Both critiques are valid. Both tell us that while the response to Mihi Bassett's case has been positive—in the sense that the Department and the Minister have apologised to the women personally for their treatment, and that what happened to Mihi has become a catalyst for change—it has also been underwhelming, and is simply not enough.

A Structural and transformative change is necessary

As has been canvassed above, the New Zealand corrections system is just one part of the broader criminal justice system inherited from Britain. Since its inception in Aotearoa, these systems have failed Māori and have failed women, and in particular have failed Māori women—as demonstrated by the exponential increase in their incarceration, disproportionately harsh treatment, and lack of any cultural and gender-specific response for Māori women. So although what happened to Mihi was horrifying, it was perhaps not so shocking as to defy belief. As Justspeak director Tania Sawicki-Mead said about the focus on punishment in prisons, "it is not an accident that horrific stories like [Mihi's] keep being unearthed from prisons across the country – it's a feature of an outdated colonial system that needs to be radically transformed".[180]

As Jared Davidson has pointed out, the State's response to Mihi Bassett's case is typical.[181] He says that as long as prisons in New Zealand have existed, there have been countless commissions, reviews and reports drawn up, tabled and then quietly filed away. Moana Jackson's *He Whaipaanga Hou*,[182] and Sir Clinton Roper's *Te Ara Hou: The New Way*,[183] which both proposed fundamental

180 Alex Braae "The Bulletin: pepper-spray, solitary confinement incidents show prison culture" The Spinoff (25 November 2020) <www.thespinoff.co.nz>.

181 Davidson, above n 69.

182 Moana Jackson *The Maori and the Criminal Justice System – A New Perspective – He Whaipaanga Hou* (Department of Justice, Wellington, February 1987) [He Whaipaanga Hou].

183 Sir Clinton Roper *Prison Review: te ara hou = the new way* (Ministerial Committee of Inquiry into Prisons System, Wellington, 1989) [Te Ara Hou].

transformative approaches to justice, were heralded as landmark reports over thirty years ago. But in the decades since, reforms to criminal justice have been ad hoc, with only minor improvements made "to a system that is inherently broken".[184] The inadequacies of the prison system and its proposals for reform are noted by the government of the day, "only for another report some years down the track to make exactly the same criticisms".[185]

The authors note, for example, that Minister Davis' promise to "look at what is appropriate for the management of women in prisons"[186] was already promised in the *Women's Strategy 2017*, which proclaimed that "our corrections system has largely been built around the needs of male offenders... Our women's strategy redresses that imbalance, based on international best practice and our own research into what works best".[187] Belying the Minister's statement about wanting to "make life more bearable for prisoners", there also appears to be some reliance on, and acceptance of the same prison institutions that have failed Māori, women, and Māori women since their implementation. It is this lack of insight into the genealogy of the corrections system and its failings that has earned the critique that the proposed steps to make women's prisons "more gender-conscious" is only "a band-aid solution to a systemic issue".[188] This is not to say that the response so far, or the impending changes, are not necessary or important, just that these proposed changes cannot be the only changes. Change will also take a lot more than the effort of the Department of Corrections alone. The Department and its Minister should look to independent experts for guidance on reforming—not just improving—the corrections system. One such independent group of experts is Te Uepū Hāpai i te Ora.

In 2018, Te Uepū Hāpai i te Ora – the Safe and Effective Justice Advisory Group (Te Uepū) was tasked with leading public discussion to develop proposals that addressed the failures of the criminal justice system.[189] The resounding call in its first report, *He Waka Roimata*, was one of no confidence in the criminal justice system, and for urgent transformative change.[190] Te

184 Te Uepū Hāpai I te Ora – Safe and Effective Justice Advisory Group *Turuki! Turuki! Transforming our criminal justice system* (2019) [*Turuki! Turuki!*] at 3.

185 Davidson, above n 69.

186 Radio New Zealand, above n 3.

187 *Women's Strategy*, above n 65, at 3.

188 Davidson, above n 69.

189 *Turuki! Turuki!*, above n 184, at 9.

190 Te Uepū Hāpai i te Ora—Safe and Effective Justice Advisory Group *He Waka Roimata – Transforming our criminal justice system* (2019). "He Waka Roimata" translates to "a vessel of tears".

Uepū's recommendations for transformation were outlined in its second report, *Turuki! Turuki!*[191] Te Uepū said it was not advocating for minor measures but laying out a pathway for transformation. It presented the challenge not just to those in Government and Parliament, but to everyone involved with the criminal justice system, and to all New Zealanders.[192]

Of particular importance to the discussion about structural change, *Turuki! Turuki!* made tangible recommendations for reformation of the prison system, and for an increased focus on the rehabilitation of offenders rather than punishment per se.[193] Among other things, these recommendations included the gradual replacement of most prisons with community-based "habilitation" centres—clearly contrary to the system's current reliance on prison institutions. The report acknowledged that it was Sir Clinton Roper who first recommended community-based therapeutic centres thirty years prior, when New Zealand's prison population was at 30 per cent of today's levels. At that time, Sir Clinton wrote that prisons "have failed both as a deterrent and as a rehabilitative measure, [and] it follows that their central role in the criminal justice system must be displaced".[194] It was his vision that habilitation centres would be places where people who had harmed could be held to account and supported to address their offending.[195] According to Te Uepū, the term "habilitation" differs from "rehabilitation" in that the focus is on supporting a person to learn, retain and enhance skills and ways of living in the world that they had never had the opportunity to learn previously.[196] The idea of habilitation implies a therapeutic rather than punitive setting, enabling offenders to examine their lives and, with support, find the motivation to cease offending and start a new life. The authors consider there are important symmetries in this approach with traditional Māori approaches to justice, for example by focusing on rehabilitation and reintegration rather than punishment, including a lesser reliance on confinement as a means of that punishment, as the logical conclusion of the criminal justice process.

In the context of transformation for New Zealand's constitution, Moana

191 *Turuki! Turuki!*, above n 184. "Turuki! Turuki!" is a traditional call to the crew of a waka or canoe being portaged, or anyone trying to move a large inert object or create a forward motion with urgency – it was a call for collective action.

192 *Turuki! Turuki!*, above n 184, at 7.

193 At 53.

194 *Te Ara Hou*, above n 183, cited in *Turuki! Turuki!*, above n 184, recommendation 11 at 53.

195 *Te Ara Hou*, above n 183, at 4, cited in *Turuki! Turuki!*, above n 184, recommendation 11 at 53.

196 *Turuki! Turuki!*, above n 184, endnote 91 at 58.

Jackson has written that Te Tiriti and the Treaty of Waitangi suggested a constitutional framework "that could be unique to this land".[197] He said it is always difficult to change what is seen as the reality, especially when the current reality is experienced as an entrenchment and privileging of power and wealth for some in our society. But:[198]

> …the idea of a different constitutional arrangement as a way of doing politics differently has always been present… It is certainly not diminished because it has been denied by others or by the fact that the challenge to exercise it seems too hard or unrealistic. Instead, it is the imaginative and very real hope for something different that has remained alive, like the flickering flame of ahi kaa.

Similarly, it may be said that Te Tiriti and the Treaty of Waitangi envisaged something greater than the current reality of our corrections system; something greater than simply substituting Māori approaches with British systems—especially when the majority of people who are forced to traverse those systems are Māori. The *Turuki! Turuki!* recommendations are mere examples of what the overarching vision for structural change could entail; the full picture will be much more complex. Decarceration certainly is not so simple as "opening the doors and letting prisoners free and run wild",[199] as Te Uepū recognises in its challenge not just to those in Government and Parliament, but to all New Zealanders.[200] So while the Minister and Department of Corrections must absolutely focus on the short-term and medium-term recommendations and actions in response to Mihi Bassett's case, those proposed changes cannot be the only changes. And those working with and within the system cannot become complacent with the current system and lose sight of the overall vision for structural change, otherwise we risk becoming part of the problem rather than the solution.

197 Jackson (23 September 2017), above n 62, writing about Matike Mai Aotearoa, the Independent Working Group on Constitutional Transformation (2012–2015).

198 Jackson (23 September 2017), above n 62.

199 As per Minister Davis's offhand comments about the goals of People Against Prisons Aotearoa, quoted in Tumamao Harawira "Corrections told to buck up its ideas on the treatment of prisoners" Te Ao Māori News (24 March 2021) <www.teaomaori.news>.

200 *Turuki! Turuki!*, above n 184, at 7.

B Wāhine Māori-centred solutions are necessary in the meantime

Structural and transformational change to the criminal justice system is absolutely necessary. In the meantime, wāhine Māori-centred solutions are required to create better outcomes for Māori women in prison, and to address the consequences of their inequality as a result of colonisation. Corrections should do this by employing not only a Kaupapa Māori approach, but a "Mana Wāhine" approach—one that puts wāhine Māori and their interests at the centre of decision making.[201]

Mana Wāhine theory, as a theoretical framework or approach, derives from Kaupapa Māori.[202] Kaupapa Māori is a "decolonising methodology" that can be described as a method, framework or approach that places Māori people and Māori practices at the centre of a given initiative or project.[203] Mana Wāhine, then, as a "daughter" of Kaupapa Māori, is an approach to an initiative or project that places Māori women, and the primary concerns of Māori women, at its centre.[204] The theory integrates the priorities of Kaupapa Māori, which are te reo Māori me ona tikanga (Māori language, practices and culture), with more feminist theory-oriented interests of gender, class, race and sexuality.[205] Western feminist theory alone could never capture the unique position of Māori women, at the intersection of "being Māori, female... and living with the legacy of colonisation,"[206] just as theories founded on asserting collective Māori autonomy and sovereignty are not specifically designed to focus on the experiences of Māori women.[207]

To take a Mana Wāhine approach goes much further than intersectional

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201 Elisabeth McDonald, Rhonda Powell, Mamari Stephens and Rosemary Hunter "Introducing the Feminist and Mana Wahine Judgments" in *Feminist Judgments of Aotearoa New Zealand Te Rino: A Two-Stranded Rope* (Oxford and Portland, Oregon, 2017) 25 at 42.

202 J Hutchings "Mana Wahine me Te Raweke Ira: Māori Feminist Thought and Genetic Modification" (2005) 19 Women's Studies Journal 48, cited in McDonald, Powell, Stephens and Hunter, above n 201, at 41.

203 McDonald, Powell, Stephens and Hunter, above n 201, at 41.

204 At 42.

205 Kuni Jenkins and Leonie Pihama "Matauranga Wahine: Teaching Maori Women's Knowledge Alongside Feminism" in Leonie Pihama, Linda Tuhiwai Smith, Naomi Simmonds, Joeliee Seed-Pihama and Kirsten Gabel (eds) *Mana Wahine Reader: A Collection of Writings 1999-2019, Volume II* (Te Kotahi Research Institute, Hamilton, 2019) 38 at 39.

206 McDonald, Powell, Stephens and Hunter, above n 201, at 42.

207 Leonie Pihama "Mana Wahine Theory: Creating Space for Maori Women's Theories" in Leonie Pihama, Linda Tuhiwai Smith, Naomi Simmonds, Joeliee Seed-Pihama and Kirsten Gabel (eds) *Mana Wahine Reader: A Collection of Writings 1999-2019, Volume II* (Te Kotahi Research Institute, Hamilton, 2019) 60 at 61.

feminism. Being intersectional means understanding how women's gender and ethnic identities (as well as other identities such as class, education, ability, sexuality, etc) combine to create different modes of discrimination and privilege. There are glimmers of this in the *Women's Strategy 2017* and *Women's Strategy 2021*, with both versions promising that Corrections will be "culturally responsive to meet women's needs",[208] and the 2021 Strategy acknowledging (among other things) the intergenerational trauma of wāhine as a result of colonisation,[209] and the Crown's failure in addressing reoffending rates of Māori;[210] and in *Hōkai Rangi*, recognising that wāhine have "specialised needs" that need to be addressed within Corrections.[211] But to take a Mana Wāhine approach to the corrections system would go further. It is more than just seeing wāhine Māori as a distinct identity with distinct needs in a diverse contemporary New Zealand—but seeing them, as individuals and as a collective, in their true light and potential as promised in te ao mārama.[212] It means an explicit recognition and understanding of the inherent mana and tapu of wāhine Māori in te ao Māori. It requires acknowledgement and definition of the specific effects of colonisation suffered by wāhine (including as distinct from those of tāne),[213] and of the challenges and needs of wāhine in prison in a colonised Aotearoa. It requires a distinct and targeted plan for the treatment and rehabilitation needs of wāhine Māori that is rooted in te ao Māori and traditional Māori views of justice such as those described by Moana Jackson, as well as trauma-informed practices to best respond to the complex realities of contemporary Māori women's lives. It requires an attitudinal shift in Corrections leadership, officers and staff based on traditional Māori values such as whakamana, manaakitanga and aroha. And it requires the Department

208 *Women's Strategy*, above n 65, at 11; *Women's Strategy 2021*, above n 81, at 4, 6, 10, 13 and 20.

209 *Women's Strategy 2021*, above n 81, at 6

210 At 8.

211 *Hōkai Rangi*, above n 89, at 20.

212 "Te ao mārama" means "the enlightened world" or "world of light", and in Te Ao Māori can represent opportunity and potential. See Chief Judge Heemi Taumaunu's media release on the District Court's new "Te Ao Mārama model" for an explanation of the potential of an approach based on te ao mārama being implemented in the criminal justice system: Chief District Court Judge for New Zealand, Judge Heemi Taumaunu "Transformative Te Ao Marama model announced for District Court" (press release, 11 November 2020) <www.districtcourts.govt.nz>.

213 The Waitangi Tribunal's "Mana Wāhine Kaupapa Inquiry" is underway, relevantly inquiring into "the alleged denial of the inherent mana and iho of wāhine Māori and the systemic discrimination, deprivation and inequities experienced", as distinct from Māori men, as a result of Crown breaches of the Treaty of Waitangi. See: Waitangi Tribunal Mana Wāhine Kaupapa Inquiry (Wai 2700, in progress) <waitangitribunal.govt.nz>.

of Corrections to further acknowledge the role of it and its predecessors, as an arm of the Crown, in perpetuating inequalities, such as the disproportionately harsh treatment and intergenerational trauma of Māori women in prison.[214]

It should be obvious then, why, although the *Women's Strategy 2021* significantly improves upon the *Women's Strategy 2017*, it does not go far enough to put wāhine at the heart of its solutions. It is not a Māori women's strategy but remains a strategy for all women, albeit with several key improvements for the care of wāhine Māori. Not creating a Mana Wāhine strategy was a significant missed opportunity for Corrections to revolutionise, rather than just improve, its treatment and care of Māori women. This is especially so in light of the Waitangi Tribunal finding that the Crown breached its obligations under Te Tiriti and the Treaty of Waitangi by failing to specifically address the overrepresentation of Māori,[215] and in circumstances where wāhine Māori still comprise 66 per cent of the women's prison population (which has increased from 62 per cent in May 2021).[216] The fact that Corrections acknowledged both of these realities for wāhine, but chose to update the *Women's Strategy* rather than create a Mana Wāhine strategy for them, is disappointing.

Similarly, although *Hōkai Rangi* is a strategy deliberately designed to implement "overarching" and "systemic" change for all Māori prisoners, it is not a "Māori women's" strategy. The fact that Māori women are covered by both strategies, but there is no specific space in the corrections system carved out for them, is a fundamental feature of our corrections system creating amendments to the system that are only minor and ad hoc, like patchwork. Instead, applying a Mana Wāhine approach, Corrections should implement a strategy specifically for wāhine Māori that puts their experiences, needs and interests at the centre.

It is envisaged that the overarching goal of a Mana Wāhine approach would be a better *quality of care* for wāhine in the corrections system, rather than a target for a reduction in reoffending or similar—just as tikanga is about the correct *way* of doing things, rather than arriving at one correct answer or solution. It is envisaged that tangible outcomes such as better engagement in rehabilitation and a decrease in recidivism, and over time breaking cycles

214 The Department of Corrections' role in failing to the disproportionate reoffending rates of Māori was canvassed in the Waitangi Tribunal report "Te Mai te Rangi! Report on the Crown and Disproportionate Reoffending Rates" (WAI 2540, 2017).

215 *Women's Strategy 2021*, above n 81, at 8; also see Waitangi Tribunal, above n 210.

216 Compare *Women's Strategy 2021*, above n 81, at 7 and OIA Request, above n 68.

such as the intergenerational trauma of whānau members in prison, would flow organically from this creation of a fairer, more understanding, trauma-informed and quintessentially Mana Wāhine approach for wāhine that is embedded in the values of te ao Māori.

These changes may require legislative and regulatory reform, for example to the Corrections Act and its Regulations,[217] and changes to internal policies and practices (including monitoring practices) such as the Prison Operation Manual. Most importantly, it will require Corrections to openly commit to addressing the inequality of Māori women in the corrections system by taking positive steps toward reforming itself of its own systemic, racist treatment of Māori women. In the authors' view, the creation of a Mana Wāhine approach in the corrections system is certainly a goal that can be met in the medium term, provided appropriate resourcing is allocated and counsel sought on the creation and implementation of such an approach. This would certainly be warranted in light of 66 per cent of women in prison being Māori, and treating the fact that wāhine Māori are the most incarcerated indigenous women in the world as the crisis that it is.

VII CONCLUSION

Prisons are such an accepted part of the criminal justice system today that their relatively recent introduction, both in Britain and Aotearoa New Zealand, is forgotten.[218] Incarceration is accepted as a natural, inevitable and necessary part of managing crime. But if the history of the British justice system in Aotearoa tells us anything, it is that the approaches and policies within the corrections system have not evolved very much over the last 181 years, and the deficiencies of a system not designed for women, or for indigenous people, have exacerbated over time. Today, Māori women are significantly overrepresented in the prison population and are the subject of disproportionately harsh treatment—such as the punitive use of segregation and pepper spray—and stories like Mihi Bassett's are just "a feature of an outdated colonial system".[219] The Minister

217 Section 6 of the Correction Act 2004 ("principles guiding corrections system") could be amended to be more aspirational, for example, similar to the aspirational operating principles in sections 12 and 14 of the Kāinga Ora-Homes and Communities Act 2019 that govern the functions and powers of the Crown's social housing provider (for example, "to contribute to sustainable, inclusive and thriving communities.." in section 12 of that Act).

218 Jackson (23 September 2017), above n 62.

219 Per Tania Sawicki-Meda, Director of JustSpeak, quoted in Alex Braae, above n 180.

and the Department's proposed changes as a response to her case do not go far enough, and are merely a continuation of the past 181 years.

Mihi's story gives rise to important questions about the way we treat some of the "most vulnerable and disadvantaged and damaged citizens" in our society— wāhine Māori.[220] So while the Crown's case against Mihi ended with her sentencing on 22 March 2021, the ripple effects continue. While the Minister and the Department of Corrections' actions taken in response to Mihi's case have been positive, necessary and important, they could also go significantly further to achieve better outcomes for wāhine Māori in the corrections system. Adopting a Mana Wāhine approach to the care of wāhine in the short to medium term is a relatively simple suggestion for improvement, that would create a significant impact.

In the long term, the corrections system requires fundamental overhaul. With calls for "transformative change" loud and clear from justice and prison advocates, from advisory and independent working groups such as Te Uepū Hāpai i te Ora, and as early as thirty years ago from Moana Jackson and Sir Clinton Roper, perhaps now we are mature enough as a country to accept that the current corrections system—and the criminal justice system as a whole—is ineffective, harmful and requires urgent structural change. The vision for a new system of justice is not diminished by those who seek to deny or oversimplify the concept of decarceration, or by the fact that the challenge seems difficult at this point in time. Aotearoa must continue to challenge the current reality, and keep the vision for structural, transformative change alive "like the flickering flame of ahi kaa".[221]

On our journey toward structural change, we remember the words of Judge McNaughton to Mihi on her final day in court, encouraging her to "be strong, be brave, and be steadfast" on her journey through prison, and for a fresh start outside of it: Kia kaha, kia toa, kia manawanui e.

220 Per Judge McNaughton's sentencing notes, *R v Bassett*, above n 2, at [20].
221 Jackson (23 September 2017), above n 62.

CLIMATE CHANGE AND THE CLAIMING OF TINO RANGATIRATANGA

Mihiata Pirini* **and Rhianna Morar****

This article considers what it means to exercise tino rangatiratanga in a climate change context. To date, the involvement of Māori in Crown-led, climate change mitigation law and policy has largely been based on consultation and negotiation. This article invites consideration of a new, Māori-led approach towards climate change; one that is based around explicit acts of tino rangatiratanga. The defining feature of such acts is that they seek to trouble, disrupt, and unsettle established colonial orthodoxies. We describe two specific actions or initiatives that can be framed and claimed as acts of tino rangatiratanga: the establishment of climate-resilient, marae-based hubs; and the bringing of legal proceedings in tort. With these examples, and with our conception of acts of tino rangatiratanga, we hope to encourage reflection on the manner in which Māori can lead in climate change mitigation and adaptation.

This article does not emphasise a gendered approach towards the issue of climate change, however, through the journey of authoring this article together we reflected on our own status as wāhine Māori. We each have legal training, and are each familiar in different ways with the spaces that this article claims as locations for acts of tino rangatiratanga – the marae, and the courtroom. Climate change has a direct impact on Papatūānuku, leading us to consider the significant role that wāhine Māori have played in Māori creation stories that recount the emergence of Te Ao Mārama. This connects with the role that we believe wāhine Māori will play in the acts of tino rangatiratanga we describe. Ultimately, and as we point out in this article, climate change is a collective issue and we have chosen to emphasise this. However, we wish to explicitly stake our claim in the issue as wāhine Māori, who will be looking for ways to exercise tino rangatiratanga in the ways that we have outlined in this article.

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** He uri a Rhianna nō Ngāti Porou, Te Arawa me Inia hoki. I te taha o tōna māmā ko Te Whānau a Ruataupare tōna hapū. I te taha o tōna pāpā ko Tapuika rāua ko Gujarati ōna hapū. The authors wish to thank the peer reviewers for their helpful comments on an early draft of this article.

I INTRODUCTION

Climate change in this article refers to the global warming of the earth and consequent large-scale weather pattern shifts. The scientific consensus is that human activity, in particular the emission of greenhouse gases, is the primary cause of this warming.[1] As a result, we are experiencing shifts in weather, rising sea temperatures and climatic changes that seriously impact the ability of the earth to support many forms of life. Globally, there is consensus among the international community that dangerous and irreversible anthropogenic climate change is insurmountable if global increases in temperature are not kept below two degrees.[2] More urgent and more concerted efforts than ever are required, both to mitigate further temperature increases and to prepare for climate change impacts that are already being felt. In this article we describe some of the ways Māori have been involved in climate change mitigation to date. We argue that, despite some positive developments, Māori do not yet occupy a "seat at the table" when it comes to successive governments' decision-making on climate change mitigation. With that in mind, this article considers an approach towards climate change that is based around explicit acts of tino rangatiratanga, both in climate change mitigation and adaptation. We outline two specific actions that could constitute expressions of tino rangatiratanga: the establishment of climate-resilient, marae-based hubs; and the bringing of legal proceedings in tort. Whilst these two activities appear ostensibly quite different in nature, in this article we argue that both can be seen as acts of tino rangatiratanga, because they challenge and unsettle established colonial orthodoxies.

1 Naomi Oreskes "Beyond the Ivory Tower: The Scientific Consensus on Climate Change" (2004) 306 Science 1686 at 1686.

2 *United Nations Framework Convention on Climate Change* UN Doc A/AC.237/18 (Part II) (9 May 1992); *Kyoto Protocol to the United Nations Framework Convention on Climate Change* UN Doc FCCC/CP/1997/7/Add.1 (11 December 1997); *Paris Agreement* UN Doc FCCC/CP/2015/10/Add.1 (12 December 2015); and see further Richard Allan and others "Summary for Policymakers" in V Masson-Delmotte and others (eds) *Climate Change 2021: The Physical Science Basis* (Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Cambridge University Press, Cambridge, 2021) 1, which confirms that we must limit the world's temperature increase to 1.5°C if we are to avoid the impacts of catastrophic climate change.

II CLIMATE CHANGE AND ITS IMPACTS ON MĀORI RELATIONALITY WITH THE ENVIRONMENT

A recent research report prepared for Ngā Pae o te Māramatanga – the Centre for Māori Research Excellence describes a range of ways in which climate change affects Māori society, culture, and interactions with the natural environment.[3] The interests of Māori in climate change and responses to it are also complex. For example, billions of dollars of the Māori economy are invested in both forestry and agriculture.[4] Forests play a critical role in helping Aotearoa New Zealand meet its emissions targets,[5] whilst agriculture is a prime contributor to emissions.[6] It follows that Māori will be deeply impacted by how these two sectors will shift or adapt in light of climate change concerns.

One way of understanding the particular impact of climate change on Māori is to consider the cosmological narratives that underpin Māori belief systems. In these belief systems, the universe evolved in three stages, from Te Kore (realm of potential being), through Te Pō (realm of becoming) and on to Te Ao Mārama (realm of being). Prominent Māori scholar Ani Mikaere likens these three stages to "an ongoing cycle of conception, development within the womb, and birth".[7] This enduring cycle reminds humanity of the origins of our existence, in what Dr Rangimārie Rose Pere has described as "the union of the primeval parents", Papatūānuku (earth mother) and Ranginui (sky father).[8] The Kaupapa Māori-based writer and former academic Andrea Tunks describes how the offspring of Papatūānuku and Ranginui play critical roles in "the creation and control of the natural world", including the climate.[9] These include Tāne, responsible for plant, bird and tree life; Tangaroa, responsible for the oceans; and Tawhiri Matea, representing meteorological changes in the atmosphere. All are bound together by whakapapa, or kin relationships. As noted by Mikaere, humans are also bound by whakapapa to the spiritual forces

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3 Shaun Awatere and others *He huringa āhuarangi, he huringa ao: a changing climate, a changing world* (Ngā Pae o te Māramatanga and Manaaki Whenua - Landcare Research, LC3948, October 2021).

4 Figure 6: Financial asset base of Te Ōhanga Māori by sector, 2018: Reserve Bank of New Zealand – Te Pūtea Matua T*e Ōhanga Māori 2018: The Māori Economy 2018* (January 2021) at 15; and He Pou a Rangi Climate Change Commission *Ināia tonu nei: a low emissions future for Aotearoa* (May 2021) at 385.

5 He Pou a Rangi Climate Change Commission, above n 4, at 315.

6 At 304.

7 Ani Mikaere *The Balance Destroyed: The Consequences for Maori* (Te Wānanga o Raukawa, Otaki, 2017) at 27.

8 Rangimarie Rose Pere *Ako: Concepts and Learning in the Māori Tradition* (Working Paper, University of Waikato, 1982) at 7, cited in Mikaere, above n 7, at 26.

9 Andrea Tunks "Tangata Whenua Ethics and Climate Change" (1997) 1 NZJEL 67 at 71.

that created the world.[10] Tunks observes that human-induced climate change upsets the balance achieved by the offspring of Papatūānuku and Ranginui, and the web of whakapapa that binds them, and us, together. She writes:[11]

> The presence of polluting substances changes the roles and dynamics amongst the atmospheric entities. Each descendant of Rangi and Papatuanuku is forced to absorb the excess emission of pollutants. This impacts upon their abilities to fulfil their functions within the overall web.

In this way, Tunks demonstrates how creation stories are a lens through which to understand climate change. We can look to other scholars' descriptions of creation stories for similar understanding. In *The Balance Destroyed*, Mikaere draws on a range of sources in her description of one of the Māori creation stories for humankind.[12] In the creation story recounted by Mikaere, Tāne Mahuta's attempts to create life proved unsuccessful until Papatūānuku showed him the necessary female element, the uha (essence of femaleness), which he used to breathe life into Hineahuone.[13] It is from the sexual encounters of Tāne and Hineahuone that men and women draw their names.[14] Hinetītama was the first human life, named for the Dawn, the connection between night and day.[15] Upon learning that Tāne was not only her husband but also her father, Hinetītama left Tāne to care for their children in their earthly life and journeyed to Rarohenga where she prepared a place to care for her children in death.[16] Hinetītama has been known as Hine-nui-te-pō, the ancestress to whom all human descendants go upon death. With this creation story Mikaere highlights the significance of he whare tangata (house of humanity, womb, uterus) and makes clear that deities and ancestresses have a role that is embedded in the consciousness of all their descendants.[17] Another example is the important and oft-repeated kōrero that it was Kuramarotini, Kupe's wife, who was the first to identify the cloud cover known to all Polynesians as the

10 Mikaere, above n 7, at 25.
11 Tunks, above n 9, at 81.
12 Mikaere, above n 7, at 28 and 75–81.
13 At 28.
14 At 30.
15 At 30.
16 At 30.
17 At 30.

sign of a large, forested land mass. It was Kuramarotini that said: "He ao! He ao! He Ao-tea-roa! (A cloud! A cloud! A long white cloud!)".[18]

To further demonstrate storytelling as a Māori practice, and the centrality of whakapapa in Māori cosmology, we can look to the Waitangi Tribunal (the Tribunal) inquiry that led to the *Muriwhenua Land Report*.[19] The inquiry related to whether particular land transactions between 1856 and 1865 transferred absolute and exclusive ownership to the Crown, or whether the transactions conferred a limited type of authority over lands according to Māori custom.[20] The validity of the land transactions turned upon whether or not, according to Māori law, the rangatira had authority to transfer absolute ownership to the Crown severing the whakapapa from the land.[21] Ngāpuhi and Muriwhenua leader, Rima Edwards, began his evidence with the creation story of Ranginui and Papatūānuku—tracing his whakapapa to Kupe and the waka Matawhaorua that brought him, Kuramarotini and their children (among others) to Aotearoa New Zealand.[22] In doing so, Edwards discussed the history of how his ancestors arrived in Muriwhenua, the naming of the lands in their rohe and pointed over to the area in which Panakareao met with missionaries to discuss the land which they might use.[23] It was at this point that, according to Justice Joseph Williams (now a Supreme Court Justice, and acting at the time as counsel before the Tribunal), the Tribunal had understood that those land transfers could not possibly have had the legal effect of permanently alienating those interests according to Māori legal traditions.[24] It would be impossible, according to Māori understandings of the world, for Panakareao to

18 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) at 2.

19 Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997).

20 At 4.

21 Chapter 3 of the *Muriwhenua Land Report*, above n 19, at v and [3.1] deals with pre-Treaty transactions and sets out "[w]hy the first land transactions were not sales, but arrangements securing a personal relationship between Europeans and the hapu — a relationship between land user and the associated community".

22 Joseph Williams "Ka kuhu au kit e ture, hei matua mō te pani" (2018) November Māori LR 3 at 7.

23 At 7–8.

24 At 8. See also Waitangi Tribunal (Wai 45, 1997), above n 19, at 68. Referring to submissions made by Rima Edwards, the Tribunal stated "[w]e substantially agree also with Maori witnesses before this Tribunal who, speaking on different marae at separate times, were consistent in their view that the land transactions with the missionaries, beginning with the Kaitaia mission station and the farm at Te Ahu, were not sales, and could not have been sales. We refer particularly to the Reverend Maori Marsden, Ross Gregory, and Rima Edwards. All three maintained that Panakareao could give no more than he had, and as a rangatira he had no more than the right to allocate land with the intention that the missionaries become part of the local community under his care, protection, and mana."

severe the whakapapa connections from the land. The centrality of whakapapa in Māori relationality shows that authority *derives from* our connections with one another and the land. Once this is understood, we can begin examining how authority is exercised and who has the status to exercise it.

In short, Māori have social, cultural and economic interests in climate change and climate change responses. These interests are complex, varied and interconnected. This interconnectedness is governed by what former Chair of the Waitangi Tribunal and former High Court Justice, Eddie Durie (now Tā Eddie Durie), has described as "conceptual regulators of tikanga", sourced in distinctly Māori legal traditions.[25] Durie and Williams identify a range of these conceptual regulators or core values, including whanaungatanga (kinship and the obligations flowing from it); mana (spiritually sanctioned authority; leadership); and utu (reciprocity or harmony and balance, and the need to maintain it).[26] Williams also includes kaitiakitanga, which he describes as the obligation to care for one's own,[27] and tapu, described as "a social control on behaviour and evidence of the indivisibility of divine and profane".[28] The dynamic and complex relationality indigenous peoples have with land and natural resources cannot be divorced from the cultural context in which they derive.

The ability to exercise authority and control in relation to land derives from the whakapapa relationship between a group and the particular area. This is best expressed through the following whakataukī: "Ka wera hoki i te ahi, e mana ana anō … While the fire burns, the mana is effective".[29] However,

25 ET Durie *Custom Law* (Waitangi Tribunal, 1994) at 4–5 (republished by Treaty of Waitangi Research Unit, May 2013).

26 Durie, above n 25, at 4–8; and Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Waikato L Rev 1 at 3. A valuable resource for further discussion of the various meanings that the concepts can carry is found in Richard Benton, Alex Frame and Paul Meredith *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) at 154 (mana); 467 (utu); and 524 (whanaungatanga).

27 Williams, above n 26, at 3; and for further discussion of the concept of kaitiakitanga in particular see Māori Marsden "Kaitiakitanga: A definitive introduction to the holistic worldview of the Māori" in Te Ahukaramū Charles Royal (ed) *The Woven Universe: Selected writings of Rev Māori Marsden* (Estate of Rev Māori Marsden, Otaki, 2003) 54.

28 Williams, above n 26, at 3.

29 Benton, Frame and Meredith, above n 26, at 180 in which the authors describe this whakataukī as emphasising the link between mana and an active relationship to the land. See further Hirini Moko Mead and Neil Grove (eds) *Ngā Pēpeha a ngā Tīpuna: The Sayings of the Ancestors* (Victoria University Press, Wellington, 2001) at 197 in which Moko Mead describes this whakataukī as from that relationship to the land, the person or group referred to derives mana.

the interrelated aspects of mana and whakapapa encompass rights to exercise control over land, as well as responsibilities to care and provide for the land as an ancestor. Durie uses the term "take" to describe the ancestral source of a right.[30] This may be characterised as a residual right over the lands based on whakapapa. Conversely, Durie uses the term "use rights" to refer to access and use rights which were granted to other groups who did not have ancestral connections to the particular area.[31] These rights are conditional upon the relationship of the particular group with those who possess ancestral rights (as outlined above).[32] The centrality of whakapapa means that descent rights are stronger than purely associational or occupational rights. Nevertheless, Durie cautions that these rights should not be equated with absolute ownership or exclusive possession over land.[33] The complex layers of rights in relation to land should not be divorced from the relational protocols in which they operate according to those conceptual regulators that comprise Māori legal traditions.[34]

However, the recognition of multi-jurisdictional approaches to climate change within the state legal system requires examining the relationship between Māori and state legal traditions. The concept of self-determination, for example, is based on the denial of indigenous sovereignty and therefore the implications of Crown sovereignty without corresponding recognition of Māori law requires careful scrutiny.[35] Our relationality with the land differs depending on how these legal traditions are reconciled with one another, in particular how "rights" of dominion according to state legal traditions can be exercised in accordance with reciprocal "responsibilities" through concepts such as kaitiakitanga and mana.[36]

30 Durie, above n 25, at 66.

31 At 66.

32 At 66–67. Durie explains that use rights were conditional upon contribution to the "common good", such as participation in collective operations, and assistance in making and repaying gifts and tributes, hosting visitors or succoring migrants or refugees. He further explains that these relationships illustrate how tenure is linked to kinship obligations and the principles of reciprocity.

33 At 67.

34 See Rhianna Eve Morar "Kia Whakatōmuri te Haere Whakamua: Implementing Tikanga Māori as the Jurisdictional Framework for Overlapping Claims Disputes" (2021) 52(1) VUWLR 197 for further commentary on the harmonious existence of overlapping rights and interests under Māori law.

35 Claire Charters "A Self-Determination Approach to Justifying Indigenous Peoples' Participation in International Law and Policy Making" (2010) 17(2) Int J Minor Group Rights 215 at 230; and John Borrows "Sovereignty's Alchemy: An Analysis of *Delgamuukw v British Columbia*" (1999) 37(3) Osgoode Hall L J 537 at 576.

36 This critique is based on Locke's basis for natural rights as the preservation of property, see John

One of the consequences of territorial sovereignty being the dominant mode of jurisdiction is that it denies the existence of other jurisdictions, particularly those of indigenous peoples.[37] Conceptualising jurisdiction as territorial sovereignty reduces the need to think about where indigenous legal traditions meet state legal traditions. Therefore, exercises of indigenous jurisdiction are mere considerations to be incorporated within the prevailing state legal system as something less than law, such as custom or culture.[38] As a result, Māori have been displaced from key sites of power which include prevailing political systems and governments, jurisdiction over land and natural resources, economic development, as well as ecosystem-based and sustainable environmental management.[39] However, Māori cosmology shows us the distinct constitutional status of indigenous peoples, particularly in relation to the environment. Māori possess inherent jurisdiction which confers legal and political authority over an area by virtue of inheritance or connection to the land – of being indigenous peoples.[40] Authority is embedded in whakapapa to indigenous culture, place and political systems.[41]

Moreover, state legal traditions recognised the continuation of Māori jurisdictional autonomy in He Whakaputanga o Te Rangatiratanga o Niu Tireni | the Declaration of Independence of the United Tribes of New Zealand 1835 and Te Tiriti o Waitangi 1840. Although declarations and treaties are not strictly binding unless incorporated into domestic law, both are constitutional covenants which are renewed over time, influencing how the Crown recognises indigenous rights codified internationally.[42] For instance, the modern

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Locke *Second Treatise of Government* (C B Macpherson (ed), Hackett Publishing, Indianapolis, 1980); and see also Roger Merino "The Land of Nations: Indigenous Struggles for Property and Territory in International Law" (2021) 115 AJIL Unbound 129 at 130–131 in which Merino outlines the ways in which the right to exploitation is essential to Locke's conception of sovereignty in that property rights are only granted where that land is cultivated or improved therefore producing the "maximum value" for their property.

37 Shaunnagh Dorsett and Shaun McVeigh *Jurisdiction* (Routledge, London, 2012) at 103.

38 At 104.

39 Robert Joseph and others *Stemming the Colonial Environmental Tide: Shared Māori Governance Jurisdiction and Ecosystem-Based Management over the Marine and Coastal Seascape in Aotearoa New Zealand – Possible Ways Forward* (National Science Challenge Sustainable Seas Ko Ngā Moana Whakauka and Te Mata Hautū Taketake the Māori and Indigenous Governance Centre, Te Piringa Faculty of Law, University of Waikato, 2020) at 14–15.

40 At 46.

41 See generally Durie, above n 25; and Hirini Moko Mead *Tikanga Māori (Revised Edition): Living by Māori Values* (3rd ed, Huia Publishers, Wellington, 2019) at 303–317.

42 Robert A Williams Jr *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600–1800* (Routledge, New York, 1999) at 61; and Claire Charters "Māori and the United Nations" in Maria

concept of self-determination is concerned with the legitimacy of exclusive jurisdictional authority.[43] The Waitangi Tribunal in *He Whakaputanga me te Tiriti/The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* found that He Whakaputanga was entered into to protect Māori jurisdictional authority.[44] It follows that article two of Te Tiriti o Waitangi 1840 preserves Māori jurisdictional authority through the guarantee of tino rangatiratanga.[45] The recognition of Māori jurisdiction therefore implied the continuation of Māori legal traditions and dispute resolution processes.[46]

It is with this legal and spiritual consciousness in mind that Māori seek recognition of their own jurisdiction in responses to climate change, therefore disrupting established colonial orthodoxies. This article considers tikanga Māori as an independent jurisdiction with an established legal order that is capable of governing areas, such as climate change, exclusively governed by the state legal system. The exclusivity of the state law jurisdiction requires Māori to become more dynamic in exercising diverse forms of rangatiratanga. We explore specific examples of disruption in Part IV.

III CLIMATE CHANGE, MĀORI AND THE CROWN

Across the globe, nation states are taking steps to respond to the threat posed by climate change; at the time of writing, many of these steps are being discussed at the United Nations 2021 Climate Change Conference hosted in Glasgow. In Aotearoa New Zealand, the Crown's response to climate change commenced in 1988 with the establishment of the New Zealand Climate Change Programme, a group of government agencies that would research, consult and publish on climate change.[47] Three working groups were established. They focused on climate change predictions, impacts and policy.[48] A fourth group was established in 1990, "to advise the Programme of Maori concerns and matters relevant to Maori and ensure that the Programme is in accordance with its

Bargh (ed) *Resistance: An Indigenous Response to Neoliberalism* (Huia Publishers, Wellington, 2007) 147 at 151.

43 Joseph, above n 39, at 164.

44 Waitangi Tribunal *He Whakaputanga me te Tiriti/The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 520–521.

45 At 526–527.

46 Joseph, above n 39, at 91.

47 Vernon Rive "New Zealand Climate Change Regulation" in Alastair Cameron (ed) Climate Change Law and Policy in New Zealand (LexisNexis, Wellington, 2011) 165 at 167.

48 Tunks, above n 9, at 86.

obligations under the Treaty of Waitangi".[49] That group emphasised the need for Māori participation, but also suggested that establishing a viable economic base and achieving constitutional change might be more pressing priorities for Māori than the impacts of climate change.[50]

Over the decades since, the Crown has considered and implemented a range of regulatory measures to address climate change. The legislative framework for many of these measures is located in the Climate Change Response Act 2002. Measures have included setting targets for carbon dioxide emissions;[51] proposals to tax emissions;[52] encouraging the use of renewable energy;[53] and the introduction of the Emissions Trading Scheme, through which emissions can be priced as units and traded.[54] The Crown has established agencies tasked with working in the area, such as the Energy Efficiency and Conservation Authority in 1992[55] and, more recently, the independent Climate Change Commission.[56] The Crown has remained involved in the international community, ratifying international climate change agreements such as the United Nations Framework Convention on Climate Change and the Kyoto Protocol.[57]

In 1997, Tunks reviewed Māori participation in climate change policy at the domestic level and found it severely lacking. There had been no formal

49 B Williams *Climate Change: the New Zealand Response* (Ministry of Environment, 1988) at 218, as cited in Tunks, above n 9, at 87; and see also Naomi Johnstone "Negotiating Climate Change: Māori, the Crown and New Zealand's Emissions Trading Scheme" in Randall S Abate and Elizabeth Ann Kronk (eds) *Climate Change and Indigenous Peoples: The Search for Legal Remedies* (Edward Elgar, Gloucestershire, 2013) 508 at 516.

50 B Williams, above n 49, at 215 as cited in Tunks, above n 9, at 88. As Tunks notes, the Māori Working Group produced a summary of the impacts of climate change on Māori.

51 Rive, above n 47, at 177.

52 At 171.

53 At 191–199.

54 See Alistair Cameron and Vernon Rive "Emissions Trading: Setting the Scene" in Alastair Cameron (ed) *Climate Change Law and Policy in New Zealand* (LexisNexis, Wellington, 2011) 215 at 227–238 for an overview of the New Zealand Emissions Trading Scheme.

55 Rive, above n 47, at 199. Sections 20–22 of the Energy Efficiency and Conservation Act 2000 gave the Energy Efficiency and Conservation Authority an expanded role.

56 Climate Change Response (Zero Carbon) Amendment Act 2019, s 5A established the Climate Change Commission. Section 5B provides that the purposes of the Climate Change Commission are to provide independent, expert advice to the government on mitigating climate change (including through reducing emissions of greenhouse gases) and adapting to the effects of climate change; and to monitor and review the Government's progress towards its emissions reduction and adaptation goals.

57 Vernon Rive "International Framework" in Alastair Cameron (ed) *Climate Change Law and Policy in New Zealand* (LexisNexis, Wellington, 2011) 49 at 51–53.

Crown–Māori dialogue on the issue of climate change since 1990.[58] In her assessment:[59]

> the Government has not brought Tangata Whenua on board as meaningful participants in the climate change debate; nor has it adequately ascertained the impacts upon Maori communities and subsequently attempted to empower them to avoid the negative effects of climate change.

Naomi Johnstone's 2013 review of Crown–Māori engagement in the climate change space indicated some shifts in the preceding years.[60] For example, political negotiations between the National Party and the Māori Party within the 2009 government resulted in some changes to climate change policy: the Climate Change Response Act 2002 was amended to include a legislative provision referring to the Treaty of Waitangi,[61] and Māori formed part of the New Zealand delegation to international climate change negotiations during the term of the coalition National Party/Māori Party government.[62] The Crown also engaged in high-level discussions with the Iwi Leaders Group.[63] Iwi have also pursued action at local government level, for example through iwi management plans.[64]

We have also seen the filing of claims with the Waitangi Tribunal seeking to challenge particular aspects of the Crown's approach to climate change. In 2011, a claim (Wai 2347) was filed with the Waitangi Tribunal, focusing on a specific aspect of the emissions trading scheme (namely, the processes for Māori landowners to obtain an exemption from scheme).[65] The Tribunal declined to inquire into the claim urgently, in part because the claimants had a reasonable alternative available to them, which meant an urgent Tribunal inquiry was not necessary.[66] Another claim was filed in 2016 (Wai 2607), this time of a

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58 Tunks, above n 9, at 89.

59 At 89.

60 Johnstone, above n 49, at 515–520.

61 At 519; and see the Climate Change Response Act 2002, s 3A.

62 Johnstone, above n 49, at 519.

63 At 518–519.

64 See for example Ngāi Tahu *The Cry of the People: Te Tangi a Tauira* (Ngāi Tahu ki Murihiku Natural Resource and Environmental Iwi Management Plan, 2008), cited in Johnstone, above n 49, at 518; and see Te Rūnanga o Ngāi Tahu *Te Tāhū o te Whāriki: Anchoring the Foundation – He Rautaki mō te Huringa o te Āhuarangi, Climate Change Strategy* (August 2018).

65 Statement of claim (21 November 2011) Wai 2347, Doc #2.5.5, cited in Johnstone, above n 49, at 525.

66 Waitangi Tribunal "Decision on Application for Urgency" (Wellington, 2012) Wai 2347, Doc #2.5.5, cited in Johnstone, above n 49, at 525. Johnstone observes that, in its decision declining urgency, the

more global nature. There, the claimants asserted that the Crown had failed to implement adequate policies to respond to climate change, and this would have a detrimental impact on Māori and their use of land and resources.[67] Again, the Tribunal declined to inquire urgently, on two main grounds. First, Crown policy was in development, with opportunities for Māori participation, rendering an urgent inquiry unnecessary.[68] Secondly, the issues raised would be of interest to many parties, and were complex. Accordingly, it would be better to hear them with other claims as part of the Tribunal's kaupapa inquiry into environmental issues.[69]

In 2019, the claimants in Wai 2607 tried again: they applied to the Tribunal for their claim, and others relating to climate change, to be given priority for hearing during or soon after 2020.[70] However, by that stage, legislation had been introduced that touched on a key plank of the Wai 2607 claim.[71] Under its establishing statute, the Tribunal does not have jurisdiction to inquire into issues that are the subject of a Bill before the House of Representatives.[72]

In effect, the claims will likely not be heard for many years, because of the large queue of claims waiting to be heard by the Tribunal. The indication is that the claims will be heard as part of the Tribunal's kaupapa inquiry into "Economic development", which will examine "Carbon taxation, emissions trading scheme, impact on Māori forestry".[73] That inquiry is not a priority; as

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Tribunal noted that the claimants could make a late application for exemption from the scheme. Also, the issues raised by the claim had been examined by an independent panel, to which the government was shortly to respond; the Tribunal said it would be premature for it to inquire into the claim before that had happened: at 525–527.

67 Statement of claim (30 May 2016) Wai 2607, Doc #1.1.1. The claimants filed their claim in 2016, and in 2017 filed an application for it to be heard urgently: Application by claimants for an urgent inquiry (16 June 2017) Wai 2607, Doc #3.1.3.

68 Waitangi Tribunal "Decision on Application for an Urgent Hearing" (17 October 2017) Wai 2607, Doc #2.5.4 at [47].

69 At [48].

70 Application by Claimants for Priority Hearing (19 December 2019) Wai 2607, Doc #3.1.11.

71 Waitangi Tribunal "Memorandum-Directions of the Chairperson on an Application for a Priority Hearing of a Claim Concerning Climate Change Mitigation and the Emissions Trading Scheme" (18 June 2020) Wai 2607, Doc #2.5.6 at [8]–[9].

72 Treaty of Waitangi Act 1975, s 6(6).

73 Waitangi Tribunal "2021 kaupapa inquiry programme – appendix" (January 2021). The Tribunal's kaupapa inquiry programme groups together thematically similar claims that are currently with the Tribunal and will hear them over the coming years. For the current approach to groupings and the order of hearings see Waitangi Tribunal "Memorandum of the Chairperson Concerning the Kaupapa Inquiry Programme" (27 March 2019).

at January 2021, it is listed tenth in the queue of 13 kaupapa inquiries (five of which have been completed or are underway).[74]

Johnstone observes that, Tribunal claims notwithstanding, Crown–Māori engagements on climate change have proceeded primarily on the basis of direct dialogue, high-level discussions and consultations, particularly with iwi representatives.[75] The Climate Change Commission's recent recommendations promote a continuation of this consultative and discussion-based approach; it has recommended that government, both central and local, work in "partnership with Iwi/Māori" to develop strategies and mechanisms that ensure "an equitable transition" to low emissions.[76]

A consultative approach has no doubt achieved some gains in terms of recognition of Māori interests, as described above. We also note the references made in some recent government reports to Māori creation stories, values and perspectives.[77] However, it is still far from clear that we have reached a point where "Maori and their ethics [are] having a *meaningful* and *effective* role in forming climate change policy."[78] The Wai 2607 claim filed in 2019 focused on the Crown's failure to involve Māori in decision-making on climate change.[79] Recent work on the National Climate Change Risk Assessment makes clear that the Crown is pursuing a consultative approach, rather than enabling Māori to lead on identifying matters of concern to Māori.[80]

In short, the Crown's approach to climate change has not engaged with questions of power, authority and control. This can be contrasted with those areas of law and policy where the Crown–Māori conversation is shifting to include questions of power, authority and control, such as in the provision of health services,[81] in the design of a system for care and protection of tamariki

74 "2021 kaupapa inquiry programme – appendix", above n 73.

75 Johnstone, above n 49, at 516; and see also Linda Te Aho "Crown Forests, Climate Change and Consultation – Towards More Meaningful Relationships" (2007) 15 Wai L Rev 138.

76 Climate Change Commission, above n 4, at 326 and ch 19.

77 See for example Ministry for the Environment and Statistics New Zealand *New Zealand's Environmental Reporting Series: Our atmosphere and climate 2020* (2020) at 6.

78 Tunks, above n 9, at 68 (emphasis added).

79 Waitangi Tribunal "Memorandum of counsel in support of application by claimants for priority hearing" (19 December 2019) Wai 2607, Doc #3.1.12.

80 Ministry for the Environment National Climate Change Risk Assessment for New Zealand: Main report (August 2020) at 33.

81 See the Crown's recent announcements about the establishment of a Māori Health Authority and associated reforms that will "empower Māori to shape care provision, and give real effect to Te Tiriti o Waitangi": Department of Prime Minister and Cabinet *Our health and disability system: Building a stronger health and disability system that delivers for all New Zealanders* (April 2021) at 7.

Māori,[82] and in the control of freshwater.[83] Those conversations are not occurring in respect of the status and involvement of Māori in, or alongside, Crown climate action. And, despite the urgency of climate change as an issue, the Waitangi Tribunal has thus far declined to prioritise inquiring into how the Crown is responding to it. The Tribunal's decision in 2017 to decline to inquire urgently into Wai 2607 is particularly disappointing. Arguably, the Tribunal's rationale for declining to inquire urgently into Wai 2607 could be made in respect of other claims into which the Tribunal has, nonetheless, proceeded to inquire under urgency.[84]

In this context, we argue in favour of Māori taking an approach towards climate change adaptation and mitigation that is based around explicit acts of tino rangatiratanga. The acts we discuss in the next section challenge and unsettle established colonial orthodoxies, while also seeking to stem global temperature increases and build Māori capacity to withstand the impacts of those increases.

IV TINO RANGATIRATANGA AND CLIMATE CHANGE

Tino rangatiratanga carries a variety of meanings.[85] Here, we focus on our conception of "acts" of tino rangatiratanga in the climate change space. Our starting point is the conceptualisation of two spheres of authority, one of tino rangatiratanga (Māori authority and control) and one of kāwanatanga (the Crown's authority and control). The idea of these two spheres of authority is referred to by the Waitangi Tribunal.[86] The spheres have been visually represented

82 See the statements of the Waitangi Tribunal recommending the establishment of a Māori Transition Authority that will transition care and protection of tamariki into the hands of Māori: Waitangi Tribunal *He Pāharakeke, He Rito Whakakīnga Whāruarua: Oranga Tamariki Urgent Inquiry* (Wai 2915, 2021) at 187–192.

83 See the statement of claim lodged recently by Ngāi Tahu in the Christchurch High Court, seeking recognition of rangatiratanga over freshwater in the Ngāi Tahu takiwā: Ngāi Tahu "Ngāi Tahu Rangatiratanga over Freshwater" (2 November 2020) <www.ngaitahu.iwi.nz>.

84 Compare, for example, the Tribunal's decision in 2020 to urgently inquire into Crown legislation, policy and practice concerning Māori children in state care. Although the inquiry would involve many parties and the filing of much evidence, and in a context where other inquiries into the same issues were concurrently underway, the Tribunal decided to conduct an urgent inquiry given this was "a pressing national issue for many Māori and there is a risk of significant and irreversible prejudice to whānau, hapū and iwi": Waitangi Tribunal "Decisions on Application for an Urgent Hearing" (25 October 2019) Wai 2915, Doc #2.5.1 at [123]. The same point can be made about climate change.

85 For a sense of these different meanings, see Mason Durie "Tino Rangatiratanga" in Michael Belgrave, Merata Kawharu, and David Williams *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Oxford University Press, Oxford, 2005) 3.

86 For a recent reference, see Waitangi Tribunal (Wai 2915, 2021), above n 82, at 19; and see also Waitangi Tribunal *He Whakaputanga me te Tiriti – The Declaration and the Treaty* (Wai 1040, 2014) at 527.

in various indicative constitutional models created by the independent Māori constitutional working group Matike Mai.[87]

The spheres have also been taken up by He Puapua, the Crown-established working group tasked with developing a pathway towards the realisation of the United Nations Declaration of the Rights of Indigenous Persons in Aotearoa New Zealand.[88] The common theme across He Puapua and Matike Mai is the call for the two spheres of tino rangatiratanga and kāwanatanga to be put on an equal footing. This requires an expansion of the tino rangatiratanga sphere, as visually represented within the report of He Puapua drawing from the work of Matike Mai:[89]

Diagram 1: Rangatiratanga/Joint/Kāwanatanga Spheres

The claiming of tino rangatiratanga by Māori is not new. But the models put forward by Matike Mai provide a powerful, concrete visualisation of power-sharing between the Crown and Māori. They provide a useful starting point as we begin to unpack what the tino rangatiratanga sphere might look like when it comes to the issue of climate change.

Dr Maria Bargh's discussion of how tino rangatiratanga is practised in relation to water is helpful here.[90] Dr Bargh points out that many in Māori

87 Matike Mai Aotearoa *The Report of Matike Mai Aotearoa – The Independent Working Group on Constitutional Transformation* (2016) at 104–112.

88 Claire Charters and others "He Puapua: Report of the Working Group on a Plan to Realise the UN Declaration on the Rights of Indigenous Peoples in Aotearoa/New Zealand" (November 2019) (Obtained under the Official Information Act 1982 Request) at vi.

89 At vi. The report was released by the Government only in response to a request under the Official Information Act 1982. There does not appear to be a publicly accessible version of the report that does not contain a watermark on each page noting that the report was released under that Act.

90 Maria Bargh "Tino Rangatiratanga: Water under the Bridge?" (2007) 8(2) He Pukenga Kōrero 10 at 10.

communities are already actively engaged in acts of tino rangatiratanga. Tino rangatiratanga is evident within "a plethora of diverse hapū and iwi activities".[91] This is so even though that fact may be unknown to many in Aotearoa New Zealand.[92] Dr Bargh describes hapū and iwi involvement in water management, and water restoration projects led principally by hapū and iwi and based on Māori conceptions of water and the environment.[93] Importantly, these activities occur within the modern state system. This fact does not render them non-expressions of tino rangatiratanga. Rather, as Dr Bargh notes, it demonstrates the dynamic nature of tino rangatiratanga itself, which has had to evolve to take account of a colonising power.[94] We suggest that it follows, therefore, that acts of tino rangatiratanga can employ the mechanisms and tools of the state for their own ends.

When we combine Dr Bargh's conception with the model above, we find therefore that the tino rangatiratanga sphere is made up not of one circle, but of many circles, representing a number of actors exercising tino rangatiratanga. While Dr Bargh focuses on hapū and iwi, we would argue that other social communities, not bound by kin, can also be included – for example, urban marae. This view finds support within the Waitangi Tribunal, which has previously found that the application of the Tiriti principle of rangatiratanga is not limited to tribes and that rangatiratanga can be exercised by Māori groups or within Māori communities.[95] We suggest that, by emphasising the multiplicity of actors in the tino rangatiratanga sphere, we can better account for the range of interests and identities within Māori communities. Relatedly, we suggest that it may not serve us to try and reproduce, in the tino rangatiratanga sphere, the monolithic authority that the Crown exercises in its kāwanatanga sphere.

The point that acts of tino rangatiratanga can occur within the purview of the state also bears making explicitly. Indigenous scholars have pointed out both the possibilities and limits of indigenous action through state structures and have queried whether such action serves merely to reinforce the coloniser's power.[96] We see this as a legitimate and worthwhile inquiry, while also making

91 At 15.
92 At 10
93 At 13.
94 At 10.
95 Waitangi Tribunal *Te Whanau o Waipareira Report* (Wai 414, 1998) at xxiv.
96 See for example Glen Sean Coulthard *Red Skin, White Masks* (University of Minnesota Press, Minneapolis, 2014) at 25–49; and Borrows, above n 25.

clear that our approach is based on Dr Bargh's analysis that acts of tino rangatiranga can take place within the purview of the state.

Finally, and perhaps most significantly, we raise for consideration the unsettling or disruption of established colonial orthodoxies as a requisite feature of an act of tino rangatiratanga. We draw here, for example, on commentary by Dr Tyler McCreary and Jerome Turner, and Dr Leah Temper, about the resistance of indigenous communities to pipeline development.[97] The authors describe how enactments of indigenous authority through resistance camps and blockades may serve to disrupt, unsettle and complicate the settler state's authority in this space. At the Unist'ot'en Camp, for example, before people could enter Talbits Kwah territory they had to say who they were, where they were from, how long they planned to stay if allowed to enter, and what was the purpose of their visit and how it would benefit Unist'ot'en.[98] Dr Temper observes:[99]

> In this newly reclaimed space, the Unist'ot'en camp members have been able to assert their own legal understandings, and to live their concept of justice through practice, through enactment and through antagonistic politics that disrupt the economic and social logic and production of settler-colonial power.

The assertion of control by the act of regulating and, in some cases, excluding entry was recently evident in Aotearoa New Zealand, when some Māori communities set up COVID-19 checkpoints to monitor who was coming into and out of the community.[100] Dr Bargh and Luke Fitzmaurice characterise these as acts of rangatiratanga.[101] In effect, they can be seen as assertions of hapū control over territory, and as such, they trouble the orthodoxy within

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97 Tyler McCreary and Jerome Turner "The contested scales of indigenous and settler jurisdiction: Unist'ot'en struggles with Canadian pipeline governance" (2018) 99(3) Stud Political Econ 223; and Leah Temper "Blocking pipelines, unsettling environmental justice: from rights of nature to responsibility to territory" (2019) 24(2) Local Environ 94.

98 McCreary and Turner, above n 97, at 224.

99 Temper, above n 97, at 107.

100 See for example Donna-Lee Biddle "Coronavirus: Tourists turned away at Far North checkpoints" Stuff (26 March 2020) <www.stuff.co.nz>; and Catherine Groenstein and Paul Mitchell "Coronavirus: Isolated East Cape community takes matters into its own hands" Stuff (22 March 2020) <www.stuff.co.nz>.

101 Luke Fitzmaurice and Maria Bargh *Stepping Up: COVID-19 checkpoints and rangatiratanga* (Huia Publishers, Wellington, 2021).

Aotearoa New Zealand that territorial authority cannot be shared by more than one entity.[102]

The examples given just above exhibit assertions of authority over territory, and the concomitant ability to exclude people who wish to enter, or to regulate their entry. This troubles the orthodoxies that tell us this role is the exclusive prerogative of the colonial state. When it comes to climate change, however, we suggest that territorial assertions of authority are not the most productive direction to focus our efforts. Climate change creates lands that are overheated, underwater, constantly flooded and besieged by storms, and otherwise unable to sustain agriculture and people. Unlike pipeline development, or COVID-19, the negative impacts of climate change cannot be avoided by excluding or regulating the physical entry of individuals or corporations. As we will explore in the next section, this suggests that acts of tino rangatiratanga to address climate change may need to look somewhat different and be undertaken on a range of fronts.

In summary, our conception of an act of tino rangatiratanga is one that seeks to unsettle established colonial structures and orthodoxies. Such acts can be undertaken by many different social actors, including those not bound by kinship. Further, acts of tino rangatiratanga are no less so because they occur within the purview of the state, or because they use the mechanisms of the state to achieve a particular goal. In the remainder of this article, we apply this conception of tino rangatiratanga to the climate change space. We look at a form of community-based action that challenges the dominant conception of private property, and we consider the potential of court proceedings that challenge established aspects of tort law, in order to sheet back responsibility to large greenhouse gas emitters.

V CLIMATE-RESILIENT MARAE COMMUNITIES

Marae have been described as sitting "at the heart of climate change problems and solutions".[103] That is, marae will be some of the hardest hit by the impacts of climate change but may also be in a strong position to help people deal with those impacts. In this section we consider why this might be, and we explore the idea of climate-resilient marae-based hubs, positioned deliberately as a place for climate action and response. We suggest in this section that the

102 Andrea Tunks "Pushing the sovereign boundaries in Aotearoa" (1999) 4 ILB 15 at 16.

103 Merata Kawharu et al "Submission: Climate Change Commission 2012 Draft Advice for Consultation" at 3-8.

ongoing establishment of such hubs is an act of tino rangatiratanga because it is a rejection of (and therefore a challenge to) the liberal concept of private property.

The concept of the marae is both *social* and *physical*. Ngahuia Te Awekotuku observes that "wherever Maori people gather for Maori purposes and with the appropriate Maori protocol, a marae is formed at that time, unless it is contested".[104] Hence, a marae may conceivably be any space where Māori are embracing values, such as manaakitanga (care and hosting of others), whanaungatanga (kinship, sense of familial connection), and similar kinds of values that support "Māori ways-of-being".[105] The term marae is also frequently used to describe the collection of buildings that might also be called the pā or papakāinga (such as the wharenui – meeting house, wharekai – dining hall, and wharepaku – ablution block).[106] Hence, as Aikman notes, the marae includes both the physical complex and the people who are bound to it by whakapapa.[107]

Marae are distinctively Māori. They "provide the paramount focus to every tribal community throughout the country."[108] They are a "dynamic, Māori-ordered, metaphysical space".[109] In addition marae perform different roles, for different kinds of community. As noted, they form the focal point of identity for the whānau and hapū that affiliate by whakapapa to the specific marae. In the form of "urban marae", they provide a space in towns and cities where Māori with diverse whakapapa affiliations can "be Māori".[110] Marae may typically also perform a wider community role in terms of the provision of social services and physical spaces for community gatherings.[111] Another key role of marae becomes evident during times of disaster or difficulty; marae played a critical disaster relief and response role during the 2004 Manawatū flooding[112]

104 Ngahuia Te Awekotuku "Maori: People and Culture" in Dorota Starzecka (ed) *Maori Art and Culture* (British Museum Press, London, 1996), cited in Pita King and others "When the Marae Moves into the City: Being Māori in Urban Palmerston North" (2018) 17 City & Community 1189 at 1196.

105 King and others, above n 104, at 1196.

106 Pounamu Jade William Emery Aikman "Within the fourfold: Dwelling and being on the marae" (2015) 12(2) SITES: New Series 1 at 7–8.

107 At 8.

108 Paul Tapsell "Marae and Tribal Identity in Urban Aotearoa/New Zealand" (2002) 25 Pacific Studies 141 at 141.

109 At 142.

110 King and others, above n 104, at 1197.

111 See for example the range of services provided by Kōkiri Marae in Lower Hutt, Wellington: Kōkiri Marae "About Us" <www.kokiri.org.nz>.

112 J Hudson and E Hughes *The role of marae and Maori communities in post-disaster recovery: a case study*

and the 2010 Christchurch earthquakes.[115] Hence, we can conceive of marae as community hubs, serving communities that take shifting forms depending on the circumstances, but with the work they do is always underpinned by Māori values such as manaakitanga and whanaungatanga.

Work is already underway in Aotearoa New Zealand to explore and increase the capacity of marae to become more resilient in the face of a changing climate. Project Kāinga is a five-year research project working with seven marae across te Ika a Māui (the North Island), to help those marae build resilience to climate change impacts such as flooding, droughts, changing biodiversity and rising seas.[114] Its goal is to build "tikanga-based, economic and community-relevant responses to climate change."[115] Consistent with the role of the marae, Project Kāinga emphasises community, and considers the ways in which marae can help build community resilience. The work is ongoing and funded until 2024.[116]

It has not been possible to engage in detail with the emerging research outcomes of Project Kāinga, since that work is still underway. But we suggest that this work sets the foundations for what we would describe as an act of tino rangatiratanga in the climate change space: specifically, the growth and expansion of climate-resilient, marae-grounded community hubs. These hubs, with the marae at their centre, would be positioned as a focal point for shifting and diverse forms of community action. Without necessarily being prescriptive about what such hubs might do, they could equip families and whānau with knowledge and skills relating to climate change, its impacts, and actions that can be taken to mitigate or avoid those impacts. These kinds of hubs, that operate on a local scale and emphasise collective, local knowledge and capabilities, enact a form of what Dr Steele and others have coined "quiet activism".[117] Far from being viewed as conservative or ineffective, quiet activism

(GNS Science Report 2007/15, April 2007).

113 Hudson and Hughes, above n 112; and Christine Kenney and Suzanne Phibbs "Shakes, rattles and roll outs: The untold story of Māori engagement with community recovery, resilience and urban sustainability in Christchurch, New Zealand" (2014) 18 Procedia Econ 754.

114 Project Kāinga "Home" <www.projectkainga.co.nz>.

115 Project Kāinga, above n 114.

116 "Kainga and climate change – Project Kainga and climate change team" University of Otago <www.otago.ac.nz>.

117 Wendy Steele and others *Quiet Activism: Climate Action at the Local Scale* (Palgrave Macmillan, Cham (Switzerland), 2021) at 3.

emphasises the transformative potential of "intimate and embodied acts of collective disruption, subversion, creativity and care at the local scale."[118]

Climate change is an issue that can *only* be addressed by a collective response. The ethic of inclusiveness and generosity that underpins the marae has the potential to knit together the wider community in ways that are critically important in the climate change context. Because marae are socially and physically situated within the community, they are well-positioned to lead local action. Local action on climate change, rather than state-led or internationally negotiated initiatives, is the focus of growing interest among those who study social responses to climate change.[119] Marae can take advantage of their local positioning as a forum through which it is possible to implement these adaptive, localised, collective acts across the community. Notably, marae also act as repositories of knowledge, handed down through generations. In many cases this will include the kind of "indigenous environmental knowledge" that is increasingly being appealed to, as a form of knowledge that can help communities adapt to climate change impacts.[120]

There are constraints and caveats to this approach. Not all marae will wish to be involved. Adequate resourcing will be critical. Financial support will be needed from the community and from local and central government. In addition, care must be taken not to conflate the various roles of a marae, which will and should always remain spaces for Māori to "be Māori", and to operate according to Māori values. This latter fact was emphasised in the aftermath of the Manawatū flooding, by participants in Dr Hudson's and Dr Hughes' research. There, the marae had to balance its civil defence role, and its relationship with the local "official" civil defence, with the need to ensure its response was consistent with its own values and practices.[121]

In what way is the establishment of marae-based, climate change-resilient hubs an act of tino rangatiratanga? First, this work connects to the guarantee of tino rangatiratanga over kāinga, the ancestral home, within article two of Te Tiriti o Waitangi. The Waitangi Tribunal has recently said that it considers

118 At 2.

119 Susie Moloney, Hartmut Fünfgeld and Mikael Granberg "Climate change responses from the global to local scale: an overview" 1 at 1-9 in Susie Moloney, Hartmut Fünfgeld and Mikael Granberg (eds) *Local Action on Climate Change: Opportunities and Constraints* (Routledge, Abingdon, 2018).

120 Maxine Burkett "Indigenous environmental knowledge and climate change adaptation" in Randall S Abate and Elizabeth Ann Kronk *Climate Change and Indigenous Peoples: The Search for Legal Remedies* (Edward Elgar, Gloucestershire, 2013) 96 at 96.

121 Hudson and Hughes, above n 112, at 30.

this guarantee to be "nothing less than a guarantee of the right to continue to organise and live as Māori", fundamental to which is "the right to care for and raise the next generation."[122] Secondly, and returning to our conception of an act of tino rangatiratanga discussed earlier in the article, we posit that such hubs act as a direct challenge to the liberal orthodoxy of private property. As many scholars have pointed out, the notion of private property is built on the ability to exclude others and exercise control over chattels or realty, and property can be problematised as giving rise to the nation-state and its assertion of dominion over land and people.[123] Marae-based values and practices operate in direct contrast to this, being drawn from ideas of care, connectedness, and community, in the form of kaitiakitanga, manaakitanga, and kotahitanga. Thus, a marae-based response to climate change, which is based on these values, can itself be seen as a challenge to the pervasive orthodoxy of private property.

Furthermore, the very concept of private property may be said to lie at the heart of climate change, because of the way it enshrines choice:[124]

> Private property, through securing choice to its holders, instantiates a physical-spatial relationship, … playing a role in climate change for which it was not designed and with which it is therefore ill-equipped to cope. Seen in this way, choice – enshrined by law in the concept of private property – lies at the heart of human-caused climate change.

Thus, it can be argued that challenging the orthodoxy of private property amounts to an act of tino rangatiratanga. But also, we must challenge the idea of private property, and reformulate the ways we live, if we are to actually *address* climate change.

This section has given only a brief sketch of what it might look like to take action in this space, and it is clear that issues of resourcing and capacity will need to be addressed. Our overarching argument is that directing our efforts

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122 Waitangi Tribunal (Wai 2915), above n 82, at 12.

123 See for example James Tully "Aboriginal Property and Western Theory: Recovering a Middle Ground" in Ellen Frankel Paul, Fred D Miller and Jeffrey Paul (eds) *Property Rights* (Cambridge University Press, Cambridge, 1994) 153; Joel Colón-Rios "On the Theory and Practice of the Rights of Nature" in Paul Martin and others (eds) *The Search for Environmental Justice* (Edward Elgar Publishing, Gloucestershire, 2015) 120; and Klaus Bosselmann "Environmental trusteeship and state sovereignty: can they be reconciled?" (2020) 11 TLT 47.

124 Paul Babie "Idea, Sovereignty, Eco-colonialism and the Future: Four Reflections on Private Property and Climate Change" (2010) 19 Griffith LR 527.

towards establishing these kinds of community marae-based hubs would be a legitimate and potent form of climate action and an act of tino rangatiratanga.

VI LEGAL PROCEEDINGS IN TORT

In this section of the article, we suggest that another act of tino rangatiratanga in the climate change space would be the bringing of legal proceedings in tort. Such proceedings, when it comes to the tort of negligence, would seek to unsettle, and raise for inquiry, the orthodoxy of the "but for" connection when it comes to the actions of large greenhouse gas emitters. Moves have already been made in this direction in common law jurisdictions, including in Aotearoa New Zealand in the recent High Court proceedings in *Smith v Fonterra Cooperative Group* (discussed further below).[125] Recent legal developments in the area, plus the increasingly pressing need for effective legal responses to major greenhouse gas emitters, mean that we should not resile from this approach.

Critical to any successful claim in the tort of negligence is for the plaintiff to establish a connection or relationship between the conduct of the defendant and the harm suffered by the plaintiff. This link is an important part of what, conceptually, makes it appropriate to hold the defendant liable. To date, in the common law of Aotearoa New Zealand, the courts have traditionally relied upon the "but for" test to establish this link. Wylie J has described this test as follows:[126]

> The but for test poses the question whether the plaintiff would have suffered the damage without the alleged negligence. If it is more likely than not that, absent the negligence, the plaintiff would have avoided the damage, then there will be causation in fact.

This traditional "but for" analysis is a hurdle to successful climate change litigation. Even if a large greenhouse gas emitter was to cease its emissions, this alone would not be enough to stop climate change, and the damage complained of will still occur. Successful claims in negligence depend, therefore, on taking aim at, and unsettling, the traditional "but for" analysis within the tort of negligence.

Māori have led in this space already. In the 2020 proceeding, *Smith v*

125 *Smith v Fonterra Cooperative Group* [2020] NZHC 419, 2 NZLR 394.
126 At [83].

Fonterra Cooperative Group, Mike Smith (Ngāpuhi, Ngāti Kahu) brought a claim in tort against seven large corporations which either emit greenhouse gases or supply products that emit gases when burned.[127] Mr Smith claimed on behalf of his whānau in Northland, who own coastal land that will be flooded by climate change-induced rising sea levels. The claim in negligence was struck out by the High Court, with Wylie J adopting an orthodox analysis to the causal relationship between the defendant's conduct and the harm alleged by Mr Smith:[128]

> the defendants cannot protect Mr Smith from [the damage of climate change]. Even if they stop emitting greenhouse gases … the science (on which Mr Smith relies) suggests that it is likely that the damage will nevertheless eventuate.

Whilst the claim in negligence was struck out,[129] this ought not to be the end of Māori efforts to hold climate change emitters responsible via the common law. As noted earlier in this article, measures adopted by the Crown to date have provided little space for Māori to lead on identifying matters of concern to Māori. Hence, acts founded in tino rangatiratanga are required on all fronts, including through the courts.

Dr Maria Hook and others note that tort law *evolves* to find solutions to new problems.[130] Unfortunately, the approach of many courts to date, when confronted with the issue of causation in the climate change and negligence context, has been to fall back on the orthodox "but for" test, rather than engaging with what might be framed as the core question: Can, and should, the law develop to hold emitters liable for an issue to which they are *clearly* contributing?[131] There is reason to take heart, however, that courts, in certain overseas jurisdictions, may be increasingly willing to approach the issue in a new way. Most significantly, the environmental group Friends of the Earth

127 At [1]–[2].

128 At [82].

129 At [103]. The High Court struck out the causes of action founded in nuisance and negligence, but allowed the third cause of action to proceed, which was based on what the High Court described as an "inchoate duty" that "makes corporates responsible to the public for their emissions". However, the third cause of action was struck out on appeal: *Smith v Fonterra Co-operative Group Ltd and Others* [2021] NZCA 552 at [126].

130 Maria Hook and others "Tort to the environment: a stretch too far or a simple step forward? Smith v Fonterra Co-operative Group Ltd and Others [2020] NZHC 419" (2021) JEL 195 at 203.

131 At 205.

Netherlands recently mounted a successful argument based in duty of care, targeted at the greenhouse gas giant Royal Dutch Shell.[132] The court ordered that Shell must reduce its carbon output immediately to bring it into line with the Paris climate agreement, in order to avoid being in "imminent violation of the reduction obligation".[133]

There are also recent, helpful obiter comments from the United Kingdom Supreme Court about the *involvement* of a person or entity in harm someone has suffered:[134]

> it seems appropriate to describe each person's involvement as a cause of the loss. Treating the 'but for' test as a minimum threshold which must always be crossed if X is to be regarded as a cause of Y would again lead to the absurd conclusion that no one's actions caused the [relevant outcome].

While these statements were made in a context of numerous entities' responsibility for financial loss, it is clear how they could be applied to the climate change context: many emitters are each involved in the loss that we will all suffer, as a result of climate change.

There is additional, local context to our argument in favour of bringing proceedings in negligence to destabilise orthodox approaches to causation; namely, the general move towards greater recognition and incorporation of Māori values and concepts into the common law. A recent and prominent example is *Ellis v R*, in which the Supreme Court is considering the extent to which Māori values ought to shape the law on continuance of appeals after the death of the appellant.[135] Another recent example is Palmer J's reference to mana when delivering a judicial review remedy. In *Sweeney v Prison Manager*, Palmer J (without providing a definition of mana) observed that:[136]

> [u]pholding a successful plaintiff's mana, to vindicate their rights as is fundamental to the rule of law, can be a good reason for New Zealand courts to make a declaration in a judicial review case.

132 *Milieudefensie v Royal Dutch Shell* (C/09/571932 / HA ZA 19-379) (26 May 2021) (English translation from the Dutch).

133 At [4.5.8].

134 *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1 at [184].

135 *Ellis v R* [2020] NZSC 89. The appellant in the case, who is now deceased, was not Māori. The relevance of Māori values to the law, if any, was raised by the Supreme Court itself, which asked counsel to make submissions on the matter: see *Ellis v R* [2020] NZSC Trans 19.

136 *Sweeney v Prison Manager* [2021] NZHC 181 at [76].

Courts' "taking seriously" of Māori law can be understood as a complicating of the foundations of our legal system and the settler colonial authority that established them.[137] References to tikanga within the courts are described as influencing the development of state law,[138] which has been said to hold tikanga Māori as "part of [its] values".[139] More recently, the Supreme Court has unanimously affirmed that tikanga must be taken into account as "other applicable law" by the Environmental Protection Authority in deciding whether or not a marine consent application should be approved under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012.[140] It has been argued that tikanga is *transforming* the nature of state law itself.[141] With that in mind, we argue that the tortious law of negligence provides an excellent space to explore this further unsettling. This can be done, in particular, by drawing on tikanga Māori concepts. Tikanga is a source of law that has the ability to change how state law responds to global and complex issues such as climate change. The underpinning ethos of tikanga Māori is essentially relationship; as humans we are all in relationship with each other, as well as with the natural and spiritual worlds. Might we encourage the court to take this as its starting point, when considering the relationship between the defendant's acts and the harm suffered?

Several critiques could be made about climate change litigation as a strategy to achieve change. Rogers describes the "awfulness of lawfulness" in the climate change context, which might be said to reinforce the very systems that enable and facilitate climate change, and can be contrasted with the power of direct action (such as protest).[142] There will also be those who say that the problem of climate change is more appropriately left to Parliament, and sits outside

137 McCreary and Turner, above n 97, at 237.

138 Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (Victoria University Press, Wellington, 2016) at 131.

139 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [94] per Elias CJ.

140 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 at [9]. Reasons are given at [169] per William Young and Ellen France JJ, [237] per Glazebrook J, [296]–[297] per Williams J and [332] per Winkelmann CJ. Williams J at [297] (with whom Glazebrook J agreed at n 371) wished to make explicit that these questions must about what is meant by "existing interests" and tikanga as "other applicable law" must be considered not only through a Pākehā lens, as those interests of iwi with mana moana in the specified area are the "longest-standing human-related interests in that place".

141 Williams, above n 26.

142 Nicole Rogers "Climate Change Litigation and the Awfulness of Lawfulness" (2013) 38(1) Alt LJ 20 at 20, cited in Nicole Rogers "'If you obey all the rules you miss all the fun': Climate change litigation, climate change activism and unlawfulness" (2015) 13(1) NZJPIL 179 at 180.

the purview of the courts. The point was made by the High Court in *Smith v Attorney-General*; Wylie J observed that recognising a liability in negligence would "require the Courts to engage in complex polycentric issues, which are more appropriately left to Parliament".[143] Nonetheless, recent common law developments both locally and abroad suggest that the ground is shifting more than usual, in terms of what courts will be prepared to consider in the climate change litigation space. Furthermore, it has been noted even unsuccessful climate litigation action can have power to shift debate around key concepts in the legal system.[144] The bringing of proceedings may also have value in terms of keeping the issue of climate change in the public consciousness and on the political agenda.[145] Māori ought to be prepared to bring proceedings that push the court to reflect on its role in the climate change area, and that test the feasibility of fit-for-purpose, carefully scoped legal tests to make the tort of negligence (or other relevant torts) ones that serves us in the climate change space. We might speculate, for example, on how the courts might approach these issues if tort proceedings were brought on behalf of Te Awa Tupua (the Whanganui River), which has the status of a legal person.[146] Also, bringing court proceedings is expensive. Pro bono assistance is likely to be needed, including from organisations such as Te Hunga Roia Māori (The Māori Law Society) and Lawyers for Climate Action NZ.[147]

Pursuing litigation for climate change mitigation purposes is undoubtedly challenging, and those who do so will grapple with the limitations of the law in its current form. However, such litigation is necessary to draw attention to these limitations, so that they might be addressed. Furthermore, climate change litigation provides a space for Māori to lead on these matters, in a way

143 *Smith v Fonterra Cooperative Group*, above n 125, at [98(f)].

144 Rogers, above n 142, at 185.

145 Peter A Buchsbaum "The role of judges in using the common law to address climate change" in Fennie van Straalen, Thomas Hartman and John Sheehan (eds) *Property Rights and Climate Change: Land Use under Changing Environmental Conditions* (Routledge, London, 2017) 132 at 142.

146 Te Awa Tupua (Whanganui River Claims Settlement) Act 2017. We wish to thank one of our anonymous peer reviewers for raising Te Awa Tupua for consideration. We have not had scope in this article to reflect on this matter in depth. But one question we might ask is whether, by bringing a tortious claim in nuisance on behalf of Te Awa Tupua, it becomes easier to establish the "special damage" element of that tort: see relevant discussion in *Smith v Fonterra Cooperative Group*, above n 125, at [64].

147 See Māori Law Society "Our People" <www.maorilawsociety.co.nz>; and Lawyers for Climate Action "About Us" <www.lawyersforclimateaction.nz>.

that we suggest amounts to an act of tino rangatiratanga, conducted through the vehicle of the courts.

VII CONCLUSION

In this article, we made the case for Māori-led acts of tino rangatiratanga, aimed at both mitigating and adapting to climate change. The defining feature of such acts is that they seek to trouble, disrupt and unsettle established colonial orthodoxies. Aotearoa New Zealand's current constitutional arrangements do not recognise tino rangatiratanga as an equal sphere of authority over issues such as climate change. It is worth noting explicitly that the examples we have discussed aim to reconceptualise how power and authority is located and exercised within the prevailing state legal system. We have provided two examples, one focused on the marae and one that would take place in law courts, each constituting acts of tino rangatiratanga that we argue are necessary to mitigate, and adapt to, climate change impacts.

Climate change has been described as "a collective action problem so pervasive and so complicated as to render at once both all of us and none of us responsible."[148] It would be easy, in the face of such a problem, to feel hopeless, or to feel that the scale and nature of the problem is beyond one that we can address as Māori working both individually and in community, with our whānau, hapū and iwi. With this article, we hope to encourage reflection on the manner in which we as Māori can frame, and claim, diverse forms of conduct, both as acts of tino rangatiratanga and as acts that address climate change.

148 Douglas A Kysar "What Climate Change Can Do About Tort Law" (2011) 41(1) Env'l L Rep 1 at 4.

WOMEN DELIVERING JUSTICE
A Call for Diverse Thinking – Address at the 65th Session of the Commission on the Status of Women

Justice Susan Glazebrook DNZM*

Tihei mauri ora

Te whare e tū nei, tēnā koe

Te papa i waho nei, tēnā koe

Te mana whenua o tēnei rohe, tēnā koutou

Te hunga mate ki te hunga mate, haere haere haere

E ngā mana, e ngā reo, e rau rangatira mā

Tēnā koutou, tēnā koutou, tēnā tatou katoa

I have greeted you in te reo Māori, the language of the indigenous people of Aotearoa New Zealand. I acknowledged the building we are in and the land on which it stands. I paid tribute to the indigenous custodians of this land and recognised and remembered our ancestors. Finally, I greeted all of you as distinguished guests.

Why did I do this? One reason is that te reo Māori is one of the three official languages of New Zealand, along New Zealand sign language and English.[1] But more importantly in this forum about diversity in the judiciary, I greeted you in te reo Māori because it is essential that modern judiciaries attempt to

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* Judge of the Supreme Court of New Zealand and President of the International Association of Women Judges. This paper has been adapted from a speech given at the International Development Law Organization side-event "Women Delivering Justice" at the Commission on the Status of Women, 63rd session (New York, 2019). Some of the statistics and documents relied on have been updated for publication. Thanks to my clerk, Rebecca McMenamin, and to Supreme Court intern, Kathryn Garrett, for their assistance.

1 See Māori Language Act 1987 and New Zealand Sign Language Act 2006. English, unlike te reo Māori and New Zealand sign language, has never been formally recognised as an official language of New Zealand (although Clayton Mitchell MP's bill, still waiting to be drawn, attempts to give it that status: Clayton Mitchell "English an Official Language of New Zealand Bill" (13 February 2018) New Zealand Parliament <www.parliament.nz>).

understand not just the law but the societies they serve. This includes reflecting on and recognising the effects of colonisation on the indigenous peoples of the world.

Colonisation robbed indigenous peoples of their system of laws, their lands, their control over their resources and often their language.[2] All this has led to disproportionate social and economic deprivation. For example, in 1840 Māori collectively controlled the majority of the land in New Zealand. In 2004, even with modern redress for past injustices,[3] collectively owned Māori land accounted only for some six per cent of New Zealand's total land area.[4]

Māori have worse health outcomes than the rest of the population[5] and lower educational achievements.[6] They are more likely to be taken from their

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2 In New Zealand, the loss of te reo Māori has been attributed to government policies designed to encourage assimilation of Māori into European society and to the rapid urbanisation of the Māori population in the 1950s and 1960s: Ministry of Social Development *The Social Report 2016 – Te pūrongo oranga tangata* (June 2016) at 175. Steps have been made to revive te reo Māori since the passing of the Māori Language Act 1987, including kōhanga reo (full reo and tikanga immersion early childhood education), Māori immersion and bilingual schools, and Te Taura Whiri i Te Reo Māori (the Māori Language Commission). The Waitangi Tribunal has called for more action to protect the reo from the New Zealand Government: Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) at [5.9].

3 See "Settling historical Treaty of Waitangi claims" (2019) New Zealand Government <www.govt.nz>. The Treaty of Waitangi was signed on 6 February 1840 by about 40 Māori chiefs and by Lieutenant Governor William Hobson for the British Crown (and by the end of 1840, about 500 chiefs had signed the Treaty). The Waitangi Tribunal, established by the Treaty of Waitangi Act 1975, has the authority to hear grievances related to breaches of the Treaty of Waitangi. For more on the Tribunal, see <www.waitangitribunal.govt.nz>. For more information on the Treaty see Claudia Orange *The Treaty of Waitangi* (3rd ed, Bridget Williams Books, Wellington, 2011) and Matthew Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008).

4 "Part 2: Māori Land – What Is It and How Is It Administered?" (2004) Controller and Auditor-General <www.oag.govt.nz> at [2.12]. In the past year, there has been a substantial increase in Māori freehold land, particularly in the Waikato-Maniapoto rohe from 124,176 ha to 2,177,327 ha (compare the June 2021 and June 2020 Māori Land Updates): Te Kooti Whenua Māori/Māori Land Court "Māori Land Data Service" <maorilandcourt.govt.nz>. Overall, Māori freehold land increased from 1,402,885 ha in June 2020 to 3,456,647 ha in June 2021. Māori customary land remained the same at 1204 ha.

5 Māori have a lower life expectancy at birth than non-Māori: Statistics New Zealand "National and subnational period life tables: 2017-2019" (20 April 2021) <www.stats.govt.nz>. Māori also have higher rates of mental illness, suicide and diabetes: see Ministry of Health *Tatau Kahukura: Māori Health Chart Book 2015* (3rd edition, 8 October 2015) at 38–39, 42–43 and 47. An inquiry into the treatment of Māori in the health system is currently underway: Waitangi Tribunal *Health Services and Outcome Kaupapa Inquiry* (Wai 2575). The Tribunal's Stage One Report was released on 1 July 2019 and found multiple breaches of the Treaty of Waitangi regarding the primary health care system in response to funding, accountability, performance and partnership: Waitangi Tribunal *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2019) at [5.9].

6 In 2020, Māori had the lowest rate of students leaving secondary education with the highest level of school qualification, NCEA level three: 40.3 per cent of Māori obtained level 3, compared to European/Pākehā rates of 60.4 per cent: Education Counts *School leavers with NCEA level 3 or above*

families and put into state care,[7] a system which is claimed to have exposed large numbers of vulnerable children to abuse.[8] Māori are generally more likely to live in straitened financial circumstances.[9] They also generally have poorer labour market outcomes compared to the rest of New Zealanders.[10]

Māori make up some 16 per cent of New Zealand's population, but over half of the prison population is Māori.[11] The position is particularly bad for Māori women, who make up 66 per cent of female prisoners.[12] Some of these prison figures will be related to relative deprivation but some will be due to (largely unconscious) bias at all stages of the criminal justice system.[13]

(June 2021) <www.educationcounts.govt.nz>.

7 Uplifting of Māori newborn babies by the State from their families came to the fore in May 2019 after an uplifting in a regional hospital in May 2019: see "Children's Commission Andrew Becroft announces review into Oranga Tamariki's child uplift policies" *New Zealand Herald* (online ed, 16 June 2019); and Melanie Reid "New Zealand's own 'stolen generation': The babies taken by Oranga Tamariki" Stuff (online ed, 12 June 2019). ("Stolen Generation" refers to the removal of Aboriginal and Torres Strait Islander children from their parents by the Australian government in the 1900s-1960s: see the Australian Institution of Aboriginal and Torres Strait Islander Studies' website <https://aiatsis.govt.au>). The May 2019 incident led to an urgent inquiry by the Waitangi Tribunal into Oranga Tamariki (Wai 2915). The Tribunal's Report was released in 2021 and found multiple breaches of the Treaty of Waitangi. It concluded that disparities between the number of tamariki Māori and non-Māori being taken into care were as a result of the "Crown's intrusion into the rangatira or Māori over their kāinga". The Tribunal recommended that a Māori Transition Authority be established to consider how to remove the need for state care for tamariki Māori: Waitangi Tribunal *He Pāharakeke, he Rito Whakakīkanga Whāruarua – Oranga Tamariki Urgent Inquiry* (Wai 2915, 2021).

8 See Judge Carolyn Henwood, Chair *Final Report of The Confidential Listening and Assistance Service* (Confidential Listening and Assistance Service, June 2015), which led to the current Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions (see <www.abuseincare.org.nz>).

9 Māori people are overrepresented in lower paid jobs. As at June 2020, the average woman earns $30.30 per hour, whereas the average Māori woman earns $27.73. Additionally, the average man earns $33.77 per hour, whereas the average Māori man only earns $28.28: "Pay gaps by ethnicity and gender" (14 September 2020) Coalition for Equal Value, Equal Pay <www.cevepnz.org.nz>.

10 In 2017, Māori made up 28.1 per cent of the unemployed population. The Māori unemployment rate was 10.8 per cent as compared to the national unemployment rate of 4.9 per cent: Ministry of Business, Innovation and Employment Hikina Whakatutuki *Māori in the Labour Market* (September 2017) at iv.

11 As at 30 September 2021, 52.5 per cent of the New Zealand prison population are Māori and 12 per cent are Pasifika: see Department of Corrections "Prison Facts and Statistics – September 2021" <www.corrections.govt.nz> (as compared to Māori comprising 16.5 per cent and Pasifika peoples comprising 8.1 per cent of the national population: Statistics New Zealand "Ethnic group summaries reveal New Zealand's multicultural make-up" (3 September 2020) <www.stats.govt.nz>).

12 Department of Corrections *Wāhine - E rere ana ki te pae hou: Women's Strategy 2017 – 2021* (28 October 2021) at 7. Department of Corrections *Women's Experiences of Re-offending and Rehabilitation* (2016) at "Female Offenders in New Zealand – Ethnicity" <www.corrections.govt.nz>. See also Te Aniwa Hurihanganui "Study: Why do so many Māori end up behind bars?" *Radio New Zealand* (online ed, New Zealand, 4 October 2018).

13 In 2015, the Police Commissioner admitted to this "unconscious bias" that results in Māori people being more severely punished than non-Māori people for similar transgressions: Action Station *They're our Whānau* (2018) at 10–17. See also Elizabeth Stanley and Riki Mihaere "The Problems and Promise

Like other colonised nations, Māori had their own customary systems that regulated their society. These were based on collective values and relationships of kinship with people and with the land. Central to the relationship of people and that land was the notion of guardianship and conservation of the land and the other resources they used to live.[14]

As in in most colonised nations, the law in New Zealand became that of the colonisers and this played its part in the injustices suffered by Māori.[15] This was the case despite Māori customary law (tikanga) being in theory part of the common law in New Zealand, as it should have been in all common law jurisdictions.[16]

Further, until recently, the international human rights framework favoured individual rights over collective rights.[17] The 1948 Universal Declaration on Human Rights, the foundation of modern human rights, does not contain any collective rights and does not even refer to self-determination.[18] The fullest

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of International Rights in the Challenge to Māori Imprisonment" (2019) 8 International Journal for Crime, Justice and Social Democracy 1. Bias against racial and ethnic minorities at all stages of the criminal justice system exists in other jurisdictions as well, including the United States: The Sentencing Project *Report of the Sentencing Project to the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance* (March 2018).

14 Māori customary law, also often referred to as "tikanga Māori", is underpinned by values such as whanaungatanga and kaitiakitanga. Whanaungatanga places great importance on the relationship between all things, including that between land and people, and encompasses identifying not as an individual but as part of a collective whole: Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [130]–[136]. The value of kaitiakitanga can be understood as the obligation of stewardship, connected to the values of tapu, which acknowledges the sacred character of all things, and mana, which provides the authority for the exercise of kaitiakitanga: Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [163]–[166]. For further information see Richard Benton, Alex Frame, Paul Meredith *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013).

15 In New Zealand, for example, the Native Land Court, created in 1862, imposed colonial ideas of individual land ownership onto Māori, a concept that did not accord with the Māori view of their relationship with the land. David Williams *Te Kooti Tango Whenua* (Huia Publishers, Wellington, 1999) at 51–56; and also Richard Boast *The Native Land Court* (Brookers, Wellington, 2013).

16 In New Zealand, see the leading case of *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733. In Australia, see Australian Law Reform Commission *Recognition of Aboriginal Customary Laws* (Report 31, 12 June 1986) at [61]–[62]. See also A N Allot "The Judicial Ascertainment of Customary Law in British Africa" (1957) 20 MLR 244.

17 *Universal Declaration of Human Rights* GA Res 217A (1948). See for example Johanna Gibson "The UDHR and the Group: Individual and Community Rights to Culture" (2008) Hamline J Pub L & Pol'y 285 at 294.

18 The later International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 19 December 1966, entered into force 23 March 1976) [ICCPR] and International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 19 December 1966, entered into force 3 January 1976) [ICESCR] both contain the right to self-determination: ICCPR, art 1(1) and ICESCR, art 1(1) which both provide that "by virtue of that right [all peoples] determine their political

expression of collective rights eventually came in 2007 with the United Nations Declaration on the Rights of Indigenous Peoples. However, reconciliation of apparent conflicts between collective and individual rights remains largely unresolved.[19]

Māori are not alone. Colonisation has had similar effects in other jurisdictions where there are indigenous populations. There are also other groups in society who suffer from similar disadvantages for different reasons, such as the disabled,[20] those from the Lesbian, Gay, Bisexual, Transgender, Queer and Intersex (LGBTQI) communities,[21] migrant workers and refugees.[22]

I mention here too the particular effects colonisation has had on indigenous women. In many indigenous societies, women had traditional roles and customary authority. Colonial powers brought with them their own perceptions of the proper place of women and this meant that the effects of colonisation have been particularly acute for indigenous women.[23]

Women more generally have not been well served by the justice system in the past. For example, married women were seen as akin to mere chattels in inheritance laws.[24] Indeed, discriminatory laws persist today in many parts of

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status and freely pursue their economic, social and cultural development".

19 For commentary see Claire Charters "Finding the Rights Balance: A Methodology to Balance Indigenous Peoples' Rights and Human Rights in Decision-making" [2017] NZ L Rev 553.

20 Only 45 per cent of disabled adults are employed, as compared to 72 per cent of non-disabled adults. Additionally, disabled people are more likely to have lower incomes than non-disabled people: "Key facts about disability in New Zealand" (1 December 2016) Office for Disability Issues <www.odi.govt.nz>.

21 For example, before the Homosexual Law Reform Act 1986, sexual relations between men was a crime in New Zealand. Still, in 2019, the New Zealand LGBTQI community experiences disproportionate levels of violence: Sarah Murphy "NZ told to improve human rights of LGBTQI people" Radio New Zealand (New Zealand, 22 January 2019) <www.rnz.co.nz>.

22 See generally Ban Ki-moon, United Nations Secretary-General *In safety and dignity: addressing large movements of refugees and migrants* UN Doc A/70/59 (21 April 2016).

23 See Annie Mikaere "Māori Women: Caught in the Contradictions of a Colonised Reality" (1994) 2 Waikato L Rev 125; Jennifer Corrin Care "Negotiating the Constitutional Conundrum: Balancing Cultural Identity with Principles of Gender Equality in Post-Colonial South Pacific Societies" (2006) 5 Indigenous Law Journal 51; Mema Motusaga "Women in Decision Making in Samoa" (PhD, Victoria University, Victoria, Australia, 2016); and Silia Pa'Usisi Finau "Women's Leadership in Traditional Villages in Samoa: The Cultural, Social, and Religious Challenges" (PhD, Victoria University of Wellington, 2017).

24 For example, before the Married Women's Property Act 1884, a woman's legal personhood was subsumed into her husband's upon marriage. Under customary law in many parts of Africa, women cannot inherit property: see for example commentary in Anthony Diala "A critique of the judicial attitude towards matrimonial property rights under customary law in Nigeria's southern states" (2018) 18 African Human Rights Law Journal 100. While customary law traditionally included safeguards for widowed women, these protections disappeared under colonial rule as land became privatized and increasingly competitive to own: Mary Kimani "Women struggle to secure land rights" (2008)

the world.[25] But even outwardly neutral laws can be interpreted in a way that favours the status quo[26] in a world where privileged men disproportionately hold positions of power, including in the judiciary.[27] And it is also a world where those women who do form a minority in positions of power usually come from similar privileged backgrounds as their male colleagues.

More diverse judiciaries which reflect the societies they serve are an important step towards achieving a truly just system of justice. But diversity must apply to all levels of the judiciary and also to the rest of the justice system, including lawyers,[28] court staff, police, social workers and all others involved in the administration of justice.[29] There is compelling evidence that gender and other balance in governance and leadership roles correlates with better decision-making, organisational resilience and performance.[30] Having diverse perspectives improves the quality of debate, means that minority views that otherwise may not have been obvious to the majority are considered and plays a role in countering unconscious bias.[31]

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22 Africa Renewal 10; Uche Ewelukwa "Post-Colonialism, Gender, Customary Injustice: Widows in African Societies" (2002) 24 HRQ 424; and A Sanders "How customary is African customary law?" (1987) 20(3) Comparative and International Law Journal of Southern Africa 405.

25 Women also have more barriers to accessing justice: see IDLO *Justice for Women: High-level Group Report* (March 2019) at 14–34.

26 See also IDLO *Justice for Women,* above n 25, at 20.

27 As at November 2015, women make up less than 50 per cent of judges in many judiciaries: 29.9 per cent in New Zealand, 25.2 per cent in England and Wales, 35.4 per cent in Canada, 33.4 per cent in Australia, and 33 per cent in the United States: "New Zealand's Judiciary and Gender" (11 November 2015) New Zealand Law Society <www.lawsociety.org>. Women also face opposition, gender role stereotypes, harassment, and discrimination that prevents them from fully and equally participating in the judiciary. International Commission of Jurists *Women and the Judiciary* (International Commission of Jurists, Geneva Forum Series no 1, September 2014) at 5–6.

28 In the United Kingdom it is predicted that women will never reach half of practising barristers and that it will take over 30 years to for the percentage of female barristers to rise from 37 per cent to 44 per cent: The General Council of the Bar *Momentum Measures: Creating a Diverse Profession (Summary of Findings)* (2015) at 9.

29 See generally IDLO *Women Delivering Justice: Contributions, Barriers, Pathways* (November 2018).

30 See for example Economic and Social Commission for Western Asia (ESCWA) *Policy Brief Women in the Judiciary: A Stepping Stone towards Gender Justice* (United Nations, September 2018) at 5.

31 This is reflected in other spheres beyond the judiciary, such as corporate governance and politics. Companies with women outperform those without women – they are more profitable and innovative: see Vivian Hunt, Sara Price, Sundiatu Dixon-Fyle and Lareina Yee *Delivering Through Diversity* (McKinsey, 2018); and David Rock and Heidi Grant "Why Diverse Teams are Smarter" (4 November 2016) Harvard Business Review <www.hbr.org>. Diverse perspectives improve decision-making and create role models for minority groups looking to enter the workforce: see Ministry for Women *Increasing the Representation of Women on Private Sector Boards* (August 2016) at 11–13; and Helene Landemore "Why the Many are Smarter than the Few and Why it Matters" (2012) Journal of Public Deliberation 7.

More diverse courts are also essential to the perception of an equitable justice system and therefore to the rule of law.[32] Individuals from minority groups may be less willing to turn to the courts if courts are perceived as only representing and reflecting the majority.[33] Having a judiciary that reflects the society it serves shows a commitment to equality.[34] As Lady Hale, the President of the UK Supreme Court, said, “our courts, and the lawyers who serve their clients in and out of court, must be as reflective as possible of the society they serve”.[35] All members of the public need to feel that the justice system is available to them.

The belief, vision and reality that women and minorities can occupy positions of power is particularly important in post-conflict societies, given women and minorities are often disproportionately affected by the long-term effects of conflict.[36]

I venture to suggest, however, that mere numbers of women or other marginalised groups in the delivery of justice are not enough. To gain the full benefits of diversity, we need diverse thinking and understanding throughout the justice system. This requires commitment from all in the justice sector (including men), assisted by educational programmes tailored to the needs of the particular jurisdiction.[37] The organisation I represent here today, the International Association of Women Judges, has from its inception been

32 Beverly McLachlin, Chief Justice of Canada, has said that people, especially women, will be more sceptical of a legal system composed predominantly of “middle-aged men in pinstriped trousers” without much representation from women and minorities. Sian Elias, former Chief Justice of New Zealand, has said that having women in the judiciary “enhances public confidence” in the legal system: International Association of Women Judges *The IAWJ: Twenty Five Years of Judging for Equality* (2016) at 5–8. Lady Hale, President of the United Kingdom Supreme Court, has also said that a diverse judiciary gives the courts “democratic legitimacy” because people see that the courts serve the whole community, not just the “privileged elite”: Brenda Hale “Judges, Power and Accountability: Constitutional Implications of Judicial Selection” (speech to the Constitutional Law Summer School, Belfast, 11 August 2017).

33 See ESCWA *Policy Brief Women in the Judiciary*, above n 30, at 5; and Rosemary Hunter “More than Just a Different Face? Judicial Diversity and Decision-Making” (2015) 68 CLP 119 at 123.

34 Hunter, above n 33, at 123–124.

35 Brenda Hale “100 Years of Women in the Law” (Girton’s Visitor’s Anniversary Lecture 2019, Girton College, Cambridge, 2 May 2019).

36 As recognised by the United Nations Security Council in for example Resolutions 1325 and 1820. See more generally “Empowerment: Women & Gender Issues: Women, Gender & Peacebuilding Processes” (2008) Peacebuilding Initiative <www.peacebuildinginitiative.org>.

37 International Commission of Jurists, above n 27, at 7. The International Association of Women Judges, through its Jurisprudence of Equality Program, values judge-led education by encouraging groups of politically, religiously, and philosophically diverse judges to collaborate and combine their strengths and expertise: International Association of Women Judges, above n 32, at 84–96.

committed to delivering such educational programmes, concentrating in particular on issues that affect women and girls, such as domestic violence, trafficking, and sextortion.[38]

I also mention projects around the world to show that diversity of thought can affect decision making or, even where it cannot because of constraints of the law, at least mean that judgments are written taking into account different perspectives. I refer to the feminist judgments projects in various (mostly common law) jurisdictions where judgments have been rewritten, imagining that a feminist judge sits on the bench alongside the original judges.[39] Importantly, the judgments are written within the constraints, in terms of precedent, legislation, and relevant legal and social science research, which existed at the time.[40]

A key feature of many of the feminist judgments is recognising women's stories and experiences.[41] One particular feature of the New Zealand project was that it combined a feminist perspective with that of mana wāhine, a Māori women's perspective.[42] Those operating from the perspective of mana wāhine claim visible space for Māori women, identify rights and obligations that would uphold the mana (authority, prestige, spiritual power) of Māori women, place Māori concerns at the centre of the factual and legal analysis, apply legal tests to include Māori everyday reality and pay respect to Māori customary values and principles.[43]

So to recap, a diverse judiciary not only gives the courts greater legitimacy,

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38 International Association of Women Judges, above n 32, at 108–111. See also "Sextortion" (standing topic since May 2018) *BBC* <www.bbc.com>. Sextortion is defined as "the base of power to obtain a sexual benefit or advantage" or "a form of corruption in which sex, rather than money, is the currency of the bribe": International Association of Women Judges *Stopping the Abuse of Power through Sexual Exploitation – Toolkit Naming, Shaming, and Ending Sextortion* (2012) at 5.

39 For example Rosemary Hunter and others (eds) "Introducing the Feminist and Mana Wāhine Judgments" in McDonald and others (eds) *Feminist Judgments of Aotearoa New Zealand Te Rino: A Two-Stranded Rope* (Hart Publishing, Portland, 2017) [*Feminist Judgments of Aotearoa*]at 25; Rosemary Hunter, Clare McGlynn, and Erika Rackley (eds) *Feminist Judgments From Theory to Practice* (Hart Publishing, Portland, 2010); and Heather Douglas and others (eds) *Australian Feminist Judgments: Righting and Rewriting Law* (Hart Publishing, Portland, 2014).

40 Hunter, above n 33, at 130–131.

41 For example Janet McLean "*Brooker v Police* [2007] NZSC 307: Judgment" in *Feminist Judgments of Aotearoa*, above n 39, at 79; John Adams "*V v V* [2002] NZFLR 1105: Judgment" in *Feminist Judgments of Aotearoa*, above n 39, at 234; and Brenda Midson "*R v Wang* [1990] 2 NZLR 529: Judgment" in *Feminist Judgments of Aotearoa*, above n 39, at 504.

42 For example, Valmaine Toki "*R v Shashana Lee Te Tomo* [2012] NZHC 71: Judgment" in *Feminist Judgments of Aotearoa*, above n 39, at 522.

43 *Feminist Judgments of Aotearoa*, above n 39, at 45–47.

it also promotes the administration of justice and produces higher quality decisions and debate. We also, however, need to ensure diversity of thinking throughout the judiciary and the justice system as a whole.

SHOULD DEFENDANTS BE ALLOWED TO RELY ON THE "ROUGH SEX DEFENCE" IN NEW ZEALAND TRIALS?

Ciara Connolly[*]

The 2019 trial for the murder of Grace Millane made national and international headlines. The defendant's reliance upon the "rough sex defence" attracted particular attention. Jesse Kempson claimed that during "consensual rough sex" between Mr Kempson and Ms Millane, Ms Millane accidentally died, and thus, he did not intend to kill her, and the jury should find him not guilty of her murder. Although Mr Kempson's argument was unsuccessful, defendants around the world use this defence to absolve themselves of blame for the victim's death, often benefitting from a reduced sentence, charge or an acquittal. This article analyses the "rough sex defence" in the context of both New Zealand's and the United Kingdom's law. It draws upon international instances of the "rough sex defence" highlighted by the organisation We Can't Consent to This. This article examines arguments for and against the abolishment of the "rough sex defence" in New Zealand, particularly the perpetuation of a victim blaming rhetoric and defendants' right to a fair trial. This article proposes two solutions to the harm that the defence causes the victim and their family. First, abolish the "rough sex defence" in an approach similar to that of England and Wales and second, extend s 44 of the Evidence Act 2006 to apply to homicide cases.

I INTRODUCTION

The disappearance and murder of Grace Millane appalled and captivated the people of New Zealand. The case was avidly followed both nationally and internationally, from the first reports of her missing until her killer Jesse Kempson was sentenced. The author attended the trial for a couple of days – that is, when a seat was available in the overflowing public gallery. On the days where the court was full, the author followed the case through the media.

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The defence advanced the "rough sex defence" strategy, in which defendants argue that during consensual "rough sex" or BDSM, the victim accidentally died.[1] The defence claimed this happened to Ms Millane during consensual erotic asphyxiation, which Ms Millane had a history of participating in.[2] Erotic asphyxiation is the act of strangling another for sexual pleasure.[3] It is a form of bondage and discipline, dominance and submission, sadism, and masochism (BDSM), which encompasses a variety of sexual behaviours performed for sexual pleasure.[4] The "rough sex defence" is an argument increasingly run by defendants across the world.[5] The defendants claim that either the defence of consent applies and the prosecution has failed to prove the relevant charge, or they did not have the necessary intent to kill the victim and thus should not be found guilty of murder.[6]

In Ms Millane's case (herein referred to as the Millane case), Mr Kempson claimed that Ms Millane "accidentally" died during a consensual sexual interaction.[7] He claimed he did not intend to kill Ms Millane, nor did he foresee the risk of her death, and as a result, he should be found not guilty of her murder.[8] Because it was a murder trial, the jury only heard Mr Kempson's view of events, where he framed Ms Millane's death as a tragic accident.

Ms Millane is recorded as the fifty-ninth British woman where the defendant relied on the "rough sex defence" in trial.[9] This statistic is from the United Kingdom feminist organisation "We Can't Consent To This" (WCCTT), established in 2018, which has published a documented list of

1 Susan SM Edwards "Consent and the 'Rough Sex' Defence in Rape, Murder, Manslaughter and Gross Negligence" (2020) 84(4) JCL 293 at 302; Caroline Lowbridge "Rough sex murder defence: Why campaigners want it banned" (22 January 2020) BBC News <www.bbc.com>; and Fiona Mackenzie Consent Defences and the Criminal Justice System (We Can't Consent to This, Research Briefing – England and Wales, June 2020) at 6.

2 *Kempson v R* [2020] NZCA 656 at [37] and [41]; Anneke Smith "Grace Millane trial: Defence says death result of consensual choking" (19 November 2019) RNZ <www.rnz.co.nz>.

3 Karen Busby "Every Breath You Take: Erotic Asphyxiation, Vengeful Wives, and Other Enduring Myths in Spousal Sexual Assault Prosecutions" (2012) 24(2) CJWL 328 at 339.

4 Ashley Brown, Edward D Barker and Qazi Rahman "A Systematic Scoping Review of the Prevalence, Etiological, Psychological and Interpersonal Factors Associated with BDSM" (2020) 57(6) J Sex Res 781 at 781.

5 Hannah Bows and Jonathan Herring "Getting Away With Murder? A Review of the 'Rough Sex Defence'" (2020) 84(6) JCL 525 at 526.

6 At 529.

7 *Kempson v R*, above n 2, at [37]; Smith, above n 2.

8 *Kempson v R*, above n 2, at [37].

9 Louise Perry "The defence approach in the Grace Millane trial is no one-off. It is increasingly, shockingly common" (26 November 2019) The Spinoff <www.thespinoff.co.nz>.

cases in which the "rough sex defence" has been utilised. The list reveals a vast number of women killed by their sexual partners, all by a purported "accident".[10]

This article focuses on the use of the "rough sex defence" in circumstances where the victim has died and weighs competing arguments about whether the defence should be abolished.[11] Although this article focuses on the Millane case, where it was argued that the defendant died as a result of erotic asphyxiation, the "rough sex" defence strategy has also been used in other cases where the victim died due to other injuries caused during sex, including multiple injuries that were inflicted on the victim's body and damage caused to the victim's vaginal wall. [12]

This article begins with a brief overview of the "rough sex defence" and how it can be relied on in trial by a defendant under New Zealand law. To illustrate the "rough sex defence" in action, this article details the way it played out in the Millane case – the highest profile murder case in New Zealand history where the "rough sex defence" has been used. This article then reviews the defence of consent and the use of the "rough sex defence" in the United Kingdom.

Finally, this article sets out competing arguments as to whether defendants should be able to rely on the "rough sex defence". The success of the "rough sex defence" and the perpetuation of victim blaming rhetoric in such trials are arguments supporting the abolishment of the defence. However, although sexual history evidence can perpetuate rape myths and stereotypes, it also plays an important role in ensuring a defendant's right to a fair trial is protected.[13] While the tension between the victim's rights and the defendant's rights is never fully resolved, this article ultimately makes two key proposals for reform. First, that the victim's rights should prevail in these circumstances and that Parliament should abolish the "rough sex defence". Defendants should not be able to use the "rough sex defence" to disguise violent conduct and manipulate

10 "The Women & Girls" We Can't Consent To This (WCCTT) <www.wecantconsenttothis.uk>.

11 There are documented instances where the "rough sex defence" has been relied on by defendants in circumstances where the complainant has survived. However, those cases are beyond the scope of this article.

12 Claudia Aoraha "'It's not justice' twin of woman, 26, killed by millionaire in what he said was 'rough sex' feels 'physically sick' he'll be freed in days" *The Sun* (online ed, London, 3 October 2020); WCCTT, above n 10; and Christie Blatchford "Christie Blatchford: Her name was not 'native woman' – a look at the Supreme Court's Cindy Gladue ruling" *National Post* (online ed, Toronto, 24 May 2019).

13 Christina Laing "Sexual Experience and Reputation Evidence in Civil Proceedings: A Case for Reform" (2018) 24 Auckland U L Rev 175 at 175; and New Zealand Bill of Rights Act 1990 [NZBORA], s 25.

the outcomes of trials.[14] New Zealand should introduce a provision into statute, similar to the Domestic Abuse Act (UK) 2021, that prohibits the defence of consent for "the infliction of … serious harm[15] for the purposes of obtaining sexual gratification".[16] Second, that the evidential protection provided in s 44 of the Evidence Act 2006, known as the "rape shield", should be extended to homicide cases.[17]

II THE "ROUGH SEX DEFENCE"

A The defence: an overview

The "rough sex defence" is also known as the "fifty shades defence", a term referring to the rise in BDSM violence since the release of the "50 Shades of Grey" movie franchise.[18] Specifically, men are claiming their sexual partners accidentally died in the occurrence of consensual sexual practices, and have in some instances been successful.[19]

The "rough sex defence" is distinct from substantive defences, such as self-defence, which renders a criminal act permissible.[20] Rather, it is a defence strategy.[21] By relying on the defence in cases where a victim died, defendants can argue either that a lack of consent is not proven or that, due to the victim's consent, they did not have the necessary state of mind to be found guilty of

14 Susan SM Edwards "Assault, strangulation and murder – Challenging the sexual libido consent defence narrative" in Alan Reed and others (eds) *Consent: Domestic and Comparative Perspectives* (Routledge, London, 2016) 88 at 89.

15 Defined in s 71(3) Domestic Abuse Act (UK) 2021 as grievous bodily harm, wounding or actual bodily harm.

16 Section 71 (footnote added).

17 Section 44 of the Evidence Act 2006 is an evidential rule that controls the admissibility of evidence about a complainant's previous sexual experiences and reputation. It currently only applies to cases where the charge is sexual in nature (not murder or manslaughter cases).

18 Amy Woodyatt "Grace Millane and the rise of the '50 Shades' defense in murder trials" (21 February 2020) CNN <www.edition.cnn.com>.

19 Mackenzie, above n 1, at 6. This article uses male pronouns to describe defendants and female pronouns to describe victims, because historically females have predominantly been the victims of sexual violence in trials and men the perpetrators. The literature also suggests that females are predominantly the victims of offences where the "rough sex defence" has been used and male defendants. However, the author acknowledges that any person of any sex or gender can be the victim of sexual violence. Due to the dearth of case law and literature on the use of the "rough sex defence" through a queer lens, the article necessarily proceeds on the basis the victim and defendant are a heteronormative couple.

20 A P Simester and W J Brookbanks Principles of Criminal Law (5th ed, Thomson Reuters, Wellington, 2019) at 657–658.

21 To recognise this distinction between substantive defences and defence strategies, the author has used quotation marks throughout this article when referring to the "rough sex defence".

the charge.[22] Instead the defendant intended to engage in consensual BDSM, which tragically resulted in the victim's death. In other words, the victim's death was an unforeseen consequence of "consensual rough sex".

There is no specific legislation preventing defendants in New Zealand from relying upon the "rough sex defence", in contrast to England and Wales' Domestic Abuse Act.[23] Instead, defendants in New Zealand may defend their charges by raising the common law defence of consent, as preserved by s 20 of the Crimes Act 1961. In practice, the defendant has the evidential burden of raising the issue of the victim's consent in court. The Crown has the burden of proving, beyond reasonable doubt, that the victim did not consent.[24]

WCCTT has collected data from across the world, with a particular focus on British cases, where defendants have used the "rough sex defence" to avoid charges or reduce the seriousness of their charge.[25] WCCTT was created in response to the death of a British woman in 2016, Natalie Connolly, whose killer was convicted only of manslaughter and sentenced to three years and eight months' imprisonment after arguing the "rough sex defence" in court.[26] WCCTT has traced the defence back to the 1970s, yet have noted a 90 per cent rise in its use since 2010.[27] The organisation found that over half of the women were killed by current or former partners, and the cause of death for two thirds of the women was strangulation.[28] In 60 out of 67 cases the victim was female, and the organisation is yet to find a case where the perpetrator has not been male.[29] WCCTT claim the defence was effective in 45 per cent of the cases that took place in the past five years, meaning the defendant received a lesser sentence for murder, had their charge reduced to manslaughter, or

22 Bows and Herring, above n 5, at 529.

23 Domestic Abuse Act (UK), s 71.

24 *R v Lee* [2006] 3 NZLR 42 (CA) at [161].

25 Mackenzie, above n 1, at 4. The author notes that as there is minimal scholarship in New Zealand on the "rough sex defence" and its increasing popularity over the past few decades, this article relies heavily on WCCTT's data. However, the author recognises the limitations of the data: WCTT's statements are based on their own research of predominantly British cases and the supposed success of the "rough sex defence" may be due to other factors. For example, just because a defendant's charge is reduced from murder to manslaughter does not mean that the "rough sex defence" was successful. The charge may have been reduced for other reasons, such as a lack of evidence. Having said that WCCTT's data is valuable because it shows how frequently women are killed and harmed at the hands of their partner, and how often a defence is mounted on the premise of "sex games gone wrong".

26 Anna Moore and Coco Khan "The fatal, hateful rise of choking during sex" The Guardian (online ed, London, 25 July 2019).

27 Bows and Herring, above n 5, at 526.

28 Mackenzie, above n 1, at 6.

29 At 7; and Bows and Herring, above n 5, at 527.

the death was not prosecuted at all.[30] WCCTT infer that the "rough sex defence" can influence the offence the defendant is charged with. For example, raising questions of consent may make it difficult for the Crown to prove the defendant's mens rea (state of mind), and reducing the defendant's charge may be a pragmatic resolution.

Professor Elizabeth Yardley, a criminal justice expert at the University of Birmingham, has also undertaken research on women killed between 2000 and 2018 where defendants advanced the "rough sex defence", or as she refers to it the "sex game gone wrong" defence.[31] Of the 43 women identified as killed by men in this context where the defence was engaged, just over 75 per cent of defendants were convicted of murder and just over 20 per cent of manslaughter or culpable homicide.[32] Notably, 100 per cent of males who had a relationship with the victim as ex-partner, friend or client were convicted of murder.[33] In contrast, 75 per cent of the males who had a current partner relationship with the victim were convicted of murder.[34] Yardley also found that men who relied on this defence were more likely than not to have convictions for domestic abuse, violence and property crimes.[35]

The "rough sex defence" has been criticised as the current day "crime of passion" or the updated "she asked for it" defence.[36] Previously, men used such defences to argue they were provoked to kill women by the women themselves. Nowadays, Yardley asserts the "sex game gone wrong" defence has replaced the defence of provocation, as that defence lost legal standing.[37] The growing use of the "rough sex defence" in England and Wales triggered the British public, politicians and feminist advocates to call on the government for law reform.[38] The advocacy was successful, with Parliament enacting s 71 of the

30 Mackenzie, above n 1, at 6.
31 Elizabeth Yardley "The Killing of Women in "Sex Games Gone Wrong": An Analysis of Femicides in Great Britain 2000-2018" (2021) 27(11) VAW 1840 at 1840.
32 At 1854. Note that Yardley's research relates to Great Britain, which has different offences compared to New Zealand.
33 At 1854.
34 At 1854.
35 At 1857.
36 Diane Taylor "Rough sex excuse in women's deaths is variation of 'crime of passion' - study" *The Guardian* (online ed, London, 10 November 2020); and George E Buzash "The 'Rough Sex' defense" (1989) 80 J Crim Law Criminology 557 at 557.
37 Yardley, above n 31, at 1844.
38 Bows and Herring, above n 5, at 534.

Domestic Abuse Act (UK).[39] Ms Millane's family, and the detective inspector who oversaw the Millane case, call on New Zealand to do the same.[40]

B The "rough sex defence" strategies under New Zealand law

WCCTT's and Yardley's research indicate the use of the "rough sex defence" is a rising phenomenon in society, illustrating the need for it to be analysed in the context of New Zealand law. In deploying the "rough sex defence" there are generally two similar, but narrowly distinct, defence strategies that are commonly used in "rough sex" trials.

1 Defence strategy one: the defence of consent

New Zealand law prohibits a person from consenting to their own death.[41] However, this does not necessarily eliminate the "rough sex defence" from being put to the jury in murder cases. The common law position is that consent is a defence to injury short of death, except if: the defendant was acting with reckless disregard for another's safety; intended to inflict grievous bodily harm; or persuasive policy grounds exclude the defence.[42] If the defence is available, the defendant's honest but mistaken belief in consent will also provide a defence to harm, even if the belief is unreasonable.[43]

The New Zealand courts have consistently erred on the side of protecting autonomy.[44] In furtherance of this position, New Zealand has adopted the United Kingdom position as set out in *R v Lee*.[45] This Court of Appeal decision set out three tiers of harm and explains, within these tiers, whether or not the defence applies.[46] First, if the defendant intends to cause or is reckless as to actual bodily harm, the defendant is generally entitled to the defence of consent.[47] Secondly, if grievous bodily harm is intended or risked by the defendant, the judge may withdraw the defence of consent from the jury.[48]

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39 Caroline Williams "Grace Millane: UK to ban 'rough sex' defence under new domestic abuse law" (18 June 2020) Stuff <www.stuff.co.nz>; and Domestic Abuse Act (UK), s 71. Note under s 89 of the Domestic Abuse Act (UK), s 71 only applies to England and Wales.

40 "Grace Millane's family calls for NZ to end rough sex defence as UK law passes" *The New Zealand Herald* (online ed, Auckland, 8 July 2020).

41 Crimes Act, s 63.

42 *R v Lee*, above n 24, at [301].

43 *Ah-Chong v R* [2015] NZSC 83, [2016] 1 NZLR 445 at [50(b)].

44 *R v Lee*, above n 24, at [300]; and Simester and Brookbanks, above n 20, at 796–797.

45 *R v Lee*, above n 24, at [300]–[318].

46 At [300]–[316].

47 At [314]–[315]. Crimes Act, s 2 defines to injure as "to cause actual bodily harm".

48 *R v Lee,* above n 24, at [316].

The Court of Appeal in *R v Waters* held "really serious hurt" or "really serious harm" constitutes grievous bodily harm.[49] The Court also provided guidance when making the decision to include or exclude the defence in the jury trial, noting the trial judge should consider policy factors including:[50]

> the right to personal autonomy, the social utility (or otherwise) of the activity, the level of seriousness of the injury intended or risked, the level of risk of such injury, the rationality of any consent or belief in consent, and any other relevant factors in the particular case.

Notably, the Supreme Court in *Ah-Chong v R* held if grievous bodily harm was intended, "it will be rare for a court to accept that consent is available as a defence".[51] However, the Court also said where the activity "involves the risk of serious injury" a court is "more likely to accept that consent is available".[52]

The last tier concludes that if the defendant intends to cause death, or was reckless as to whether death occurred, consent is no defence in any circumstance.[53] This is also codified in s 63 of the Crimes Act, which prohibits a person from consenting to their own death:[54]

> if any person is killed, the fact that he or she gave … consent shall not affect the criminal responsibility of any person who is a party to the killing.

This section has been held to apply to the offence of murder under ss 167(a)–(b), usually the most relevant provisions in fatal "rough sex" trials.[55] For the Crown to prove a murder charge on these bases, it must prove either the defendant meant to cause the death of the victim, or the defendant meant to cause bodily injury that he knew would cause death and was reckless as to whether death occurred.[56] However, if the defendant is convicted of manslaughter, it is likely s 63 would not bar such a defence.[57] As one academic put it, s 63 does not apply

49 *R v Waters* [1979] 1 NZLR 375 (CA) at 379.
50 *R v Lee*, above n 24, at [316].
51 *Ah-Chong v R*, above n 43, at [50(e)].
52 *Ah-Chong v R*, above n 43, at [50].
53 *R v Lee*, above n 24, at [289].
54 Section 63.
55 Simester and Brookbanks, above n 20, at 795; *Kempson v R* (CA), above n 2, at [63]; and *Kempson v R* [2021] NZSC 74 at [18].
56 Crimes Act, s 167.
57 *R v Lee*, above n 24, at [289].

to "homicide by misadventure in cases where the common law regards consent as rendering lawful an act which otherwise would not be lawful".[58]

The defence of consent is complicated when it comes to "rough sex". A good illustration of that is the Millane case and, in particular, Moore J's directions to the jury on the availability of the defence of consent to Mr Kempson.

In the Millane case, Moore J directed the jury that if they were satisfied Mr Kempson had the murderous intent required to prove the charge of murder under ss 167(a) or (b) of the Crimes Act, the jury could not consider the defence of consent.[59] Alternatively, if the jury was not satisfied Mr Kempson was guilty of murder, the defence of consent was available to the lesser included charge of manslaughter[60] – a charge placed in *R v Lee's* second tier of harm. His Honour held there was an evidential basis, albeit slim, for the claim that Ms Millane consented to the strangulation that had led to her death. His Honour did note Ms Millane was obviously unable to consent to strangulation while unconscious,[61] but considered:[62]

> it [was] plausible that in the throes of passion and heavily intoxicated, [the defendant] did not realise that Ms Millane had lost consciousness until after she had died or was fatally injured before he removed his hands from her neck.

His Honour undertook the careful policy analysis required by *R v Lee* and concluded that public policy required the defence be available after considering, among other things, the high value placed on individual autonomy, the social utility arising from erotic asphyxiation, the lack of a power imbalance in Mr Kempson and Ms Millane's relationship, the pair's experience in erotic asphyxiation and the low level of harm.[63] This case illustrates the complexity of the defence of consent. Moore J noted that Ms Millane may have consented to Mr Kempson's initial application of pressure onto her neck.[64] However, it

58 At [165], citing Francis Boyd Adams *Criminal Law and Practice in New Zealand* (2nd ed, annotated to 1 March 1982) at 601.

59 *R v K* [2019] NZHC 3219, 6 December 2019, (Ruling of Moore J on whether consent should be put to jury) at [46].

60 At [1].

61 At [24].

62 At [27].

63 At [46].

64 At [21].

was for the jury to consider whether Ms Millane's consent continued once she lost consciousness or if it ceased at some point, and whether Mr Kempson had a honest belief in Ms Millane's consent.[65] In this case, although consent was withdrawn for the charge of murder, the jury was required to consider it for manslaughter.[66]

2 Defence strategy two: lack of requisite intention

Another argument under the "rough sex defence", that is linked inextricably to the defence of consent, is that a defendant did not have the required state of mind for the offence, because he did not intend to cause the victim death or grievous bodily harm.[67] Consent is highly relevant as it provides background to the circumstances of the death or injury and the state of mind of the defendant. However, in contrast to the above option, this line of defence is available to the defendant to defend both murder and manslaughter charges. For example, in the Millane case, the Court of Appeal held:[68]

> While consent was not available as a defence to murder, it was nevertheless open to the defence to contend (as they did) that the evidence did not establish beyond reasonable doubt that the appellant had the requisite intent for murder pursuant to either s 167(a) or (b).

As Bows and Herring assert, if the defendant's conduct "was committed for the purposes of sexual pleasure", the defendant may claim that instead of murder they should be guilty of manslaughter or even acquitted.[69] The defendant can argue they lacked the intent to cause death or serious harm, instead the defendant intended to engage in consensual sex.[70]

C The "rough sex defence" in New Zealand: The Millane case

Grace Millane, a British backpacker, was killed by Jesse Kempson sometime between the late hours of 1 December 2018 and the early hours of 2 December 2018.[71] Ms Millane was 21 years old and arrived in New Zealand on 20

65 At [22]—[26].
66 At [53].
67 Bows and Herring, above n 5, at 529.
68 *Kempson v R (CA)*, above n 2, at [37].
69 Bows and Herring, above n 5, at 529, citing *R v Slingsby* [1995] Crim LR 571.
70 Buzash, above n 36, at 569.
71 Jamie Ensor "Grace Millane murder trial: Timeline of British backpacker's final hours" (22 November 2019) Newshub <www.newshub.co.nz>.

November 2018 after travelling in South America.[72] On 30 November 2018, Ms Millane and Mr Kempson matched on the dating application Tinder.[73] The pair met up on 1 December 2018 and visited several bars that Saturday evening, before going to Mr Kempson's apartment in the CityLife hotel.[74] Ms Millane's family did not hear from her the following day, which was her 22nd birthday.[75] Alarmed at this out-of-character lack of communication, they alerted the New Zealand Police.[76] A week later, police found Ms Millane's body, buried in a suitcase in the Waitākere Ranges.[77]

After a three-week trial, a jury found Mr Kempson had murdered Ms Millane.[78] A defining feature of the case was Mr Kempson's conduct after he killed Ms Millane; Mr Kempson conducted internet searches for pornography and the Waitākere Ranges, and took intimate photos of Ms Millane while deceased.[79] The jury also heard Mr Kempson organised a date with a woman on 2 December 2018, the night after he murdered Ms Millane.[80] The woman relayed to the court the conversations she had with Mr Kempson, including discussions about a man who has killed a woman after "rough sex" and missing bodies in the Waitākere Ranges.[81]

The trial of Ms Millane's murderer attracted global attention, predominantly from the New Zealand and British media. Of particular concern to the media was the defence's strategy at trial. Like others across the world, defence lawyers Mr Ian Brookie and Mr Ron Mansfield relied on the "rough sex defence" to defend Mr Kempson.[82] The evidence showed that Ms Millane was killed by pressure to the neck through manual strangulation, which the defence claimed was the accidental consequence of consensual erotic asphyxiation.[83] The defence made an effort to denounce victim-blaming and instead framed the sexual interactions between Ms Millane and Mr Kempson

72 Ensor, above n 71.
73 Ensor, above n 71.
74 Ensor, above n 71.
75 Edward Gay "The complete evidence in the Grace Millane murder trial: Inside the case that gripped a nation" (21 February 2020) Stuff <www.stuff.co.nz>.
76 Gay, above n 75.
77 Ensor, above n 71.
78 Gay, above n 75.
79 Gay, above n 75.
80 Gay, above n 75.
81 Gay, above n 75.
82 Nicola Gavey "Men's violence against women: the blind spots in the Grace Millane trial" (26 November 2019) The Spinoff <www.thespinoff.co.nz>; and Bows and Herring, above n 5, at 526.
83 Smith, above n 2.

as progressive, and an example of female empowerment in the bedroom.[84] They relied on expert evidence that BDSM was common practice in the bedrooms of the younger generation, with young females and males alike engaging in these sexual practices.[85] Professor Clarissa Smith, an expert on sexual cultures from the University of Sunderland, was quoted as stating BDSM is "common practice, and [that it] was not an interest driven only by men".[86] Professor Smith claimed it was liberating for women to engage in such an activity because women were communicating their desires in the bedroom and "we're no longer living in the era of, you know, 'lay back and think of England'".[87] Defence counsel framed the rise of BDSM as empowering for women, while noting that unfortunately with these activities comes a risk of accidental death, as indeed occurred in this case.

It may be that Ms Millane consented to erotic asphyxiation, as Mr Kempson claimed. However, the practical reality of this being a murder case is that only Mr Kempson's version of that night can be told to the jury. In addition, Ms Millane's past sexual history was investigated in minute detail.[88] The defence called evidence from past sexual partners of Ms Millane, examining the witnesses on Ms Millane's sexual history and her experience with, and interest in, BDSM.[89] One witness claimed Ms Millane liked her partners to put their hands around her neck and another claimed Ms Millane often requested "choking" during sex, which stopped on the utterance of a safe word.[90] Ms Millane's membership of Whiplr and FetLife, dating websites for those interested in BDSM, were made public, as well as her past interactions with men she met on Tinder.[91] Ms Millane's sexual history was reported over numerous platforms. Much of this reporting negatively painted her past and interests. Unfortunately, Ms Millane was not present to share her side of

84 Gavey, above n 82.

85 Gavey, above n 82.

86 Gavey, above n 82; Anneke Smith "Millane trial: Expert on sexual culture testifies" (20 November 2019) RNZ <www.rnz.co.nz>.

87 Gavey, above n 82.

88 Woodyatt, above n 18.

89 Lisa Owen "Grace Millane case: Defence's first day" (19 November 2019) RNZ <www.rnz.co.nz>.

90 Interview with Sarah Robson, Journalist (Lisa Owen, Checkpoint, Grace Millane case: Defence finishes evidence, RNZ, 20 November 2019). A safe word is used as a codeword for the participants' emotional and physical state. It is usually used to interrupt the practice of BDSM. Urban Dictionary "Safeword" <www.urbandictionary.com>.

91 Robson, above n 90.

events. Mr Kempson's past sexual history was also relayed in court.[92] However, by nature of his name suppression information about his sexual history did not attract the same attention in the media as Ms Millane's.[93]

The Crown responded to the defence's position that the strangulation was consensual by arguing Ms Millane's death was in fact murder through reckless disregard for her life.[94] Mr Brian Dickey and Mr Robin McCoubrey for the Crown told the jury that the defendant strangled Ms Millane for five to 10 minutes. No doubt during that time she had succumbed to unconsciousness, yet Mr Kempson continued to apply pressure to her neck.[95] Three weeks after the trial began, after deliberating for just over five hours, the jury found Mr Kempson guilty of murder.[96] The jury found Mr Kempson, at the very least, had caused Ms Millane bodily injury which he knew was likely to cause death, and was reckless as to whether or not she died.[97] In February of 2020, Mr Kempson was sentenced to life imprisonment with a non-parole period of at least 17 years.[98]

However, the public ordeal was not yet over for Ms Millane's family and friends. After being convicted of the murder of Ms Millane, Mr Kempson unsuccessfully appealed his conviction and sentence to the Court of Appeal. His appeal was dismissed on 18 December 2020.[99] Mr Kempson's name suppression lapsed when the Court of Appeal issued its December judgment, despite his application for its continuation.[100]

D The "Rough Sex Defence" in the United Kingdom

The Millane case is one of the few cases where the "rough sex defence" has been used in New Zealand. However, as noted earlier it is increasingly being used in the United Kingdom, typically by males attempting to defend murder and assault charges.[101]

92 Gay, above n 82.

93 Mr Kempson's name was suppressed in the case because he was facing two other criminal trials at the time of the Millane trial, see Kempson v R (SC), above n 55, at [1].

94 Lisa Owen "Grace Millane case: Prosecution, defence make final statements" (21 November 2019) Youtube <www.youtube.com>; and Crimes Act, s 167.

95 Owen, above n 94.

96 Anna Leask "Grace Millane trial: Jury retires to consider verdict" *The New Zealand Herald* (online ed, Auckland, 22 November 2019).

97 *R v K* [2020] NZHC 233 at [49].

98 At [83].

99 *Kempson v R* (SC), above n 55, at [2].

100 At [2].

101 Bows and Herring, above n 5, at 526.

1 The United Kingdom's law on consent

Notably, the New Zealand common law on consent is distinct from that of the United Kingdom. The United Kingdom will disregard the defence of consent unless there are good reasons to include it, whilst New Zealand will put the defence to the jury unless there are good reasons to exclude it.[102] The House of Lords in *R v Brown* held that where actual bodily harm is intended, a defendant cannot rely on the consent of the victim unless the activity in question falls into an exception to the rule.[103] Exceptions include games with well set out rules, sports, surgery, bodily decoration, chastisement of children and religious mortification.[104] Interestingly, the House of Lords held it was against public policy to allow the defence of consent for violent acts in sadomasochistic conduct; in other words sadomasochistic conduct did not fall within one of the above exceptions.[105]

However, the case of *R v Wilson* has since raised ambiguity about the scope of *Brown.*[106] In *Wilson* the defendant was charged with assault after branding his initials into his wife's buttocks.[107] The trial judge held the defence of consent was not available and directed the jury to convict the defendant.[108] However, the defendant successfully appealed to the Court of Appeal, which held the consensual branding between a man and wife in their own home was similar to tattooing and was not criminal behaviour.[109] Thus, it would seem that *Wilson* allowed the defence of consent for an act of sadomasochism. However, regardless of the impact *Wilson* has had on the authority set out in *Brown,* the Domestic Abuse Act has made it clear that defendants in England and Wales are barred from claiming the "rough sex defence" in the context of BDSM practices. The Act rules out consent "for the purposes of obtaining sexual gratification" as a defence to harm.[110]

102 Simester and Brookbanks, above n 20, at 797.
103 *R v Brown* [1993] 2 All ER 75, [1994] 1 AC 212 (HL) at 231.
104 At 231, 233 and 267.
105 At 213.
106 *R v Wilson* [1997] QB 47.
107 At 49.
108 At 49.
109 At 50.
110 Domestic Abuse Act, s 71.

2 The "rough sex defence" in the United Kingdom

As previously mentioned, WCCTT has recorded at least 60 cases where the "rough sex defence" has been used.[111] All of the cases concerned either victims from the United Kingdom or took place in the United Kingdom.[112] WCCTT was founded in response to the specific tragic death of Natalie Connolly and her killer's conviction.[113] In that case, Ms Connolly suffered over 40 injuries to her head, buttocks and breasts, as well as internal injuries, at the hand of her partner, millionaire Mr John Broadhurst.[114] Mr Broadhurst left Ms Connolly to die at the bottom of his steps while he went to sleep.[115] At trial, Mr Broadhurst's argued that Ms Connolly consented to such harm and died as a result of a "sex game gone wrong".[116] Mr Broadhurst was not charged with her murder, rather he pleaded guilty to manslaughter by gross negligence for failing to get Ms Connolly the required medical assistance.[117] He was sentenced to just three years and eight months' imprisonment.[118]

Ms Connolly's case is just one of at least 15 trials recorded by WCCTT where the defendant was convicted of manslaughter or culpable homicide, when the "rough sex defence" was used.[119] WCCTT has also recorded two cases where the defendant was found not guilty when the "rough sex defence" was used, two cases where no charges were brought against the defendant and a case where the charges against the defendant were dropped.[120] Of course, it cannot be said with certainty that the use of the "rough sex defence" is directly correlated with the outcome of these cases, as such outcomes could be the result of other factors.

Since the 1970s, WCCTT have identified a rising trend of reliance on the "rough sex defence" by defendants in the United Kingdom, influencing England and Wales to take action and abolish the defence.[121] This article now turns to discuss whether New Zealand should follow suit.

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111 WCCTT, above n 10.
112 WCCTT, above n 10.
113 Moore and Khan, above n 26.
114 WCCTT, above n 10.
115 Aoraha , above n 12.
116 Aoraha, above n 12.
117 *R v Broadhurst* (sentencing remarks of Knowles J Birmingham Crown Court, 17 December 2018).
118 At [44].
119 WCCTT, above n 10.
120 WCCTT, above n 10.
121 Bows and Herring, above n 5, at 526 and 534; and Domestic Abuse Act, s 71.

III PROBLEMS WITH THE "ROUGH SEX DEFENCE"

1 Excuse for violence

One argument in favour of abolishing the "rough sex defence" is that it is used by perpetrators as an excuse for violent behaviour.[122] Many BDSM practitioners argue BDSM has measures in place to minimise the risk of danger; 'true' BDSM is based on negotiation and boundary making.[123] However, as BDSM has become normalised in mainstream society,[124] uneducated and violent men are using BDSM as an excuse to "get away with murder".[125] Of the 60 cases WCCTT has recorded where defendants used the "rough sex defence" to explain the death of their partner, five of those were acquitted or had their charges dropped.[126] By claiming women consented to BDSM, the defence relies on rape myths and gender stereotypes, as discussed below.[127] Such stereotypes increase the possibility the jury will reduce the defendant's charge or even acquit the defendant.[128] To put this concern into concrete terms, WCCTT has recorded circumstances where the defendant has inflicted intentional acts of violence against their partner, resulting in her death, such as the case of Natalie Connolly.[129] Nevertheless, the jury agrees with the defence's argument that the death was caused by an accident, finding the defendant not guilty.

The success of the "rough sex defence" can have serious consequences for women and society. To put this in perspective for New Zealanders, if not for Mr Kempson's conduct after Ms Millane's death (such as taking photos of Ms Millane's deceased body and searching for pornography), it is conceivable that the jury would have reasonable doubt about Mr Kempson's intention to cause Ms Millane's death or bodily injury, and his recklessness as to whether she died as a result. Given only two people were in the room when Ms Millane died, it would have been difficult to prove her death was not an accident and that Mr Kempson had intended to kill or harm Ms Millane. The defence's theory of the case might have been quite persuasive; Ms Millane had consented to BDSM

122 Yardley, above n 31, at 1859; Lowbridge, above n 1; Taylor, above n 36; and Busby, above n 3, at 352.
123 Lowbridge, above n 1.
124 Lowbridge, above n 1.
125 Bows and Herring, above n 5, at 533–534. The author notes that feminist scholarship has highlighted other concerns arising from BDSM, however that discussion is not within the scope of the article.
126 WCCTT, above n 10.
127 Bows and Herring, above n 5, at 532.
128 At 532.
129 Moore and Khan, above n 26.

before, had expressed an interest in BDSM with multiple partners (both short and long-term) and entered Mr Kempson's apartment purportedly of her own volition, although she was highly intoxicated.[130] The circumstances all point to Ms Millane engaging in consensual BDSM, allowing the defence to frame the death as a tragic instance of a "sex act gone wrong".

2 *Victim blaming*

The occurrence of victim blaming and its perpetuation of patriarchal narratives supports the contention the "rough sex defence" should be abolished. Many of the cases where the "rough sex defence" has been used involve a victim blaming rhetoric in trial which is extensively repeated in the media.[131] For example, Ms Chloe Miazek's father stated his daughter's reputation was "trashed" in the media because of an "agreed narrative" employed by both the prosecution and defence counsel in her killer's trial.[132] In this case, Mark Bruce strangled 20 year old Chloe Miazek during sex after meeting him on a night out.[133] Defence counsel advanced the "rough sex defence", arguing that Ms Miazek and Mr Bruce had consensually engaged in erotic asphyxiation, in which Ms Miazek accidentally died.[134] Defence counsel focused on the fact that both Ms Miazek and Mr Bruce had expressed an interest in erotic asphyxiation.[135] Mr Bruce's defence advocate stated during the trial, "I don't wish to sound like I'm suggesting she was the author of her own misfortun[e] but it is a significant factor".[136] Mr Bruce pleaded guilty to culpable homicide (the Scottish version of manslaughter).[137] He was sentenced to six years in prison, despite the fact that after his conviction and before his sentencing, Mr Bruce admitted he did not have consent from Ms Miazek before engaging in the erotic asphyxiation that led to her death.[138]

There are three aspects of victim blaming present within the "rough sex

130 Alison Mau "The New "She Asked for it" Rough Sex, Victim Blaming and the Grace Millane Trial" (November 2019) Stuff <www.stuff.co.nz>.
131 WCCTT, above n 10.
132 Myles Bonnars "Father rejects killer's rough sex defence" (24 March 2020) BBC News <www.bbc.com>.
133 WCCTT, above n 10.
134 Bonnar, above n 132.
135 Phoebe Southworth "'I've done something terrible': Killer strangled woman, 20, to death during sex game just hours after meeting her and then handed himself in at police station" Daily Mail (online ed, London, 13 March 2018).
136 Southworth, above n 135.
137 WCCTT, above n 10.
138 WCCTT, above n 10.

defence". First, the "rough sex defence" is a form of the "she asked for it" defence, which in itself presents issues with fairness towards the victim and their families.[139] Secondly, when using the "rough sex defence" to defend murder or manslaughter charges, the defendant benefits from being the only first-hand perspective presented to the jury.[140] Men can use this advantage to reduce their charge, sentence or even receive an acquittal.[141] Finally, the use of sexual history and reputation evidence that goes hand-in-hand with the "rough sex defence" unfairly prejudices the jury against the victim in a situation in which, by the very nature of the offence, she is not present to defend herself.[142]

(a) The "she asked for it" defence

Inherent in the "rough sex defence" is the idea that the victim "asked for it". The defence usually run a case arguing the victim asked for the conduct that led to her death or harm, blaming the victim for her loss of life or suffering.[143] For example, in the Millane case, the defence's strategy focused on proving consensual sex occurred and that Ms Millane asked Mr Kempson to apply pressure to her neck.[144] By allowing someone else to put their hands around your neck and engage in erotic asphyxiation, the defence argued it was foreseeable to Ms Millane that fatal or serious medical consequences could result. Implicitly, the defence suggested to the jury that Ms Millane was at least partially responsible for her death.[145] In another previously discussed case, Ms Miazek was also implicitly blamed for her alleged engagement and interest in erotic asphyxiation, by defence counsel during her killer's trial.[146] In reality, both Ms Millane and Ms Miazek, whether consenting to breath play or not, did not consent to their own death – nor could they consent to their death in law.[147] The "blame the victim" strategy that has been employed by defence teams has attracted widespread criticism from victims' advocates and groups who believe the criminal justice system is tougher on the victim and their families than it is for the defendant.[148]

139 Buzash, above n 36, at 558.
140 Bows and Herring, above n 5, at 531.
141 Mackenzie, above n 1, at 4.
142 Laing, above n 13, at 176.
143 Buzash, above n 36, at 558.
144 Mau, above n 130.
145 Mau, above n 130.
146 Southworth, above n 135.
147 Crimes Act, s 63.
148 Buzash, above n 36, at 558.

However, some commentators argue that the “rough sex defence” does not always blame the victim. As New Zealand criminal barrister Simon Shamy contends, just raising the “rough sex defence” does not necessarily imply that the victim’s death or injury was her fault.[149] The “rough sex defence” is merely an avenue for the defendant to recount their account of events and argue that during consensual sexual relations, the victim tragically died.

(b) A one-sided story

When the defendant has killed the victim, only one perspective can be told in court: his.[150] As a result, the jury may be biased in favour of the defendant’s case, as he is able to explain his actions and account of the incident in person.[151] This is especially dangerous if the jury is sympathetic to the defendant. The defendant’s perspective is near impossible to verify in these types of intimate offences, as it often lacks witnesses and scientific evidence.[152] For example, if some acts during sexual intercourse between the victim and defendant were consensual and other acts were not, it is difficult (if not impossible) to extract scientific evidence demonstrating that the part resulting in her death was non-consensual.[153] Spermatozoa may be present, however that is not necessarily relevant to the question of whether the victim consented to acts of BDSM, such as erotic asphyxiation.[154] As a result, the defendant is free to frame the incident however he pleases, usually framing it as an incident involving sexual desire instead of violence.[155]

Feminist scholars have referred to such conduct as “euphemising”, a technique which enables male violence to be presented in a way that obscures the defendant’s responsibility.[156] The technique positions the victim as responsible for her death, as defendants are able to manipulate sadomasochist narratives to “disguise what is essentially cruel and misogynist[ic] conduct”.[157] Thus, it could be argued the “rough sex defence” should be abolished because it unfairly weights the evidence in favour of the defendant.

149 Ruth Hill "‘Grace Millane murder: ‘Rough sex’ defence should not be outlawed, legal experts say” T*he New Zealand Herald (online ed, Auckland, 22 February 2020).*

150 Bows and Herring, above n 5, at 531.

151 At 531.

152 Buzash, above n 36, at 561.

153 At 561.

154 At 561.

155 Bows and Herring, above n 5, at 531.

156 At 531.

157 Edwards, above n 14, at 89.

On the other hand, the right to a fair trial is a foundational principle of New Zealand's criminal justice system.[158] Defendants have a presumption of innocence and a right to defend themselves.[159] It is the Crown's duty to prove the defendant's charges beyond reasonable doubt, in order to prevent innocent people from going to prison. Abolishment of the "rough sex defence" is supported by some because it allows the defendant to tell his perspective of the event in question, without an opposing account from the victim.[160] It is acknowledged that the victim's inability to share her side of the story does not warrant the erosion of the defendant's fundamental right to defend themselves. It must be recalled that the purpose of criminal trials is to protect society and determine the guilt of the defendant, not to shelter and protect victims.[161] Thus, the "rough sex defence" plays a crucial role in ensuring that defendants benefit from their right to a fair trial.

However, it is noted that the "rough sex defence" is only one strategy available for the defendant. The defendant still has other defences and strategies available, for example self-defence or arguing that there is an absence of evidence to prove the charge beyond reasonable doubt.

(c) Use of sexual experience evidence and perpetuation or "rape myths"

Another aspect of victim blaming in "rough sex" trials occurs through the use of the victim's sexual history and reputation evidence.[162] Defendants use this evidence in order to show the victim's propensity to engage in such sexual behaviour, strengthening their argument that the victim and defendant did engage in BDSM. The evidence makes the contention that the victim's death occurred by accident more credible because she had engaged in such conduct before.

In non-fatal sexual cases, s 44 of the Evidence Act, or the "rape shield", protects sexual assault victims from having their sexual reputation and their sexual experience presented in trial.[163] While the former evidence is absolutely barred from entering court, the latter can be allowed into court with the judge's permission.[164] The judge must be satisfied the evidence has direct relevance

158 NZBORA, s 25.
159 Section 25.
160 Bows and Herring, above n 5, at 531.
161 Stephen Todd and others *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) at 4.
162 Bows and Herring, above n 5, at 532.
163 Evidence Act, s 44.
164 Section 44.

to the issues in the proceeding, and that excluding the evidence "would be contrary to the interests of justice".[165] The "rape shield" prevents counsel from using the victim's sexual reputation and experience history to perpetuate myths and biases in trial.[166] Such evidence can prejudice fact finders against the victim, influencing the outcome of the case.[167]

However, the "rape shield" only applies to "sexual cases".[168] Homicide offences do not fall within such a bracket.[169] Thus in "rough sex" trials that do not involve rape or sexual assault charges, such as the Millane case, evidence relating to the victim's sexual history and/or reputation may be deemed relevant and admitted into court. In the Millane case, Ms Millane's past experiences with former partners and matches on dating websites were deemed relevant and were scrutinised by the defence.[170] The defence team called past sexual partners, friends and acquaintances met through dating apps to be witnesses.[171] The evidence was relied on to illustrate Ms Millane's propensity to engage in BDSM and made Mr Kempson's claim that Ms Millane died during consensual "rough sex" more credible.[172] The focus on such evidence implies that Ms Millane knew what she was risking and, in some way, "asked for it".[173]

Evidence of the victim's sexual history and reputation can have significant consequences on the outcome of cases. Studies have found sexual history evidence biases the jury and judge against the victim, resulting in more not guilty verdicts.[174] The use of evidence regarding the victim's past relationships makes the reputation and actions of the woman the central focus of the trial and media coverage, instead of the culpability of the defendant.[175] The decision makers, subconsciously or consciously, internalise this evidence and make judgments about what characterises an "ideal" and "not ideal" witness.[176] If

165 Section 44(3).
166 Laing, above n 13, at 176.
167 At 176.
168 Evidence Act, s 44.
169 The definition in s 4 of "sexual case" does not include homicide.
170 Khylee Quince "Defending the Indefensible? On the Grace Millane trial and victim blaming (25 November 2019) The Spinoff <www.thespinoff.co.nz>; and Owen, above n 89.
171 Owen, above n 89.
172 Quince, above n 170.
173 Mau, above n 130.
174 Bows and Herring, above n 5, at 532, citing Louise Ellison and Vanessa E Munro "Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility" (2009) 49 Br J Crim 202 at 204.
175 Bows and Herring, above n 5, at 532.
176 Yardley, above n 31, at 1843.

the witness is "not ideal", they are more likely to be accorded blame.[177] Yardley claims a "not ideal" witness usually includes women who were killed by a person who had legitimate access to them.[178] For example, a "not ideal" witness is a woman who "allowed" their future killer into their apartment or a woman who "allowed" themselves to be in a vulnerable position. Women identified as "not ideal" victims are accorded low value in the victim hierarchy and given less sympathy by the jury and public.[179] This discourse blames women for violence, diverting blame from the defendant, and can often result in the defendant being found not guilty.[180]

The Millane case and that of Ms Cindy Gladue, a Canadian woman, illustrate such biases at work. Ms Millane was young, white and educated, all factors which point towards her classification as an "ideal victim", although she did enter into Mr Kempson's apartment of her own volition (though intoxicated).[181] In comparison, Ms Cindy Gladue, an Indigenous Canadian woman and a sex worker, was clearly classified as a "not ideal" victim in her murder trial.[182] In 2011, Ms Gladue died from an 11 centimetre wound in her vaginal wall inflicted by Mr Bradley Barton.[183] During the 2015 trial, the judge and lawyers referred to Ms Gladue as a sex worker and prostitute over 50 times,[184] and repeatedly referred to her as a "native".[185] The jury acquitted Mr Barton of first degree murder and manslaughter, although her case was appealed to the Supreme Court of Canada.[186] The Supreme Court of Canada deemed the myths and biases perpetuated in Ms Gladue's trial warranted a retrial on the charge of manslaughter, of which Mr Barton was eventually found guilty.[187] The comparison of the Millane case and that of Ms Gladue highlights the impact that the classification of the victim can have on the outcome of a case. Not to mention, the impact such discourses can have on the victim's family

177 Bows and Herring, above n 5, at 532.

178 Yardley, above n 31, at 1843.

179 At 1843.

180 Bows and Herring, above n 5, at 532.

181 Russell Hope "Grace Millane: A 'gregarious, talented' student who dreamed of travelling the world" (21 February 2020) Sky News <news.sky.com>

182 Blatchford, above n 12.

183 Blatchford, above n 12.

184 Brandi Morin "Cindy Gladue deserved to be valued as a human in life – and in death" *The Toronto Star* (online ed, Toronto, 3 February 2021).

185 Blatchford, above n 12.

186 Fakiha Baig "Alberta judge sentences trucker to 12 1/2 years in the death of Cindy Gladue" (27 July 2021) Global News <www.globalnews.ca>

187 Blatchford, above n 12; and Baig, above n 186.

is unmerited. Not only does the victim's family have to deal with grief, but as Mrs Gillian Millane, mother to Grace Millane is alleged to have stated, her daughter was on trial instead of the defendant.[188]

Despite the harmful consequences of sexual history evidence, in murder trials such evidence may be necessary to ensure the trial complies with the defendant's right to a fair trial.[189] In fatal BDSM cases, like Ms Millane's, sexual history evidence can be relevant to the victim's propensity to engage in BDSM, giving credibility to the defendant's claim that the victim died in consensual "rough sex". Ms Quince believes the use of sexual history evidence in the Millane case was necessary to ensure that Mr Kempson received a fair trial.[190] Ms Quince concedes the rising use of the "rough sex defence" is concerning, however claims the use of the sexual history evidence in the Millane trial was justified because it was directly relevant as to whether Ms Millane did indeed engage in BDSM with Mr Kempson.[191] As illustrated in the Millane case, sexual history evidence can form a critical component of the defendant's right to defend themselves.[192] Thus, although a person's life has been lost during sexual interactions, another person cannot be unjustly deprived of a fundamental right because hearing such evidence would cause the victim and their family undeserved pain and suffering.[193] As Ms Quince argues, "we should not sanitise trials merely to quell public distaste".[194]

Evidently, the use of victims' sexual history evidence in court can bias and prejudice decision makers against the victim. However, such evidence plays an important role in ensuring the trial complies with the right to a fair trial. That is why s 44 provides for a heightened direct relevance test in sexual cases; to ensure the victim's and defendant's rights are appropriately balanced and the jury has the most relevant and probative information before it.

IV PROPOSED SOLUTIONS

This article proposes two solutions to the difficulties identified above: abolish the "rough sex defence" in New Zealand and extend the "rape shield" to apply to homicide cases.

188 Mau, above n 130.
189 NZBORA, s 25.
190 Quince, above n 170.
191 Quince, above n 170.
192 Owen, above n 89.
193 Hill, above n 149.
194 Quince, above n 170.

A Abolish the "Rough Sex Defence"

As the law in New Zealand currently stands, although a person cannot consent to their own death, in murder cases it is still likely the jury will hear the "rough sex defence".[195] Even when the defendant kills the victim and is charged with murder under s 167 of the Crimes Act, the "rough sex defence" can still be heard by the jury because it may be relevant to the lesser included charge of manslaughter. Further, regardless of the offence the defendant is charged with, the defendant can claim he did not have the required state of mind for the charge and thus be found not guilty.

This article proposes that Parliament abolish the "rough sex defence", following the approach of England and Wales.[196] As previously discussed, the Domestic Abuse Act abolishes the defence of consent for serious harm inflicted "for the purposes of obtaining sexual gratification".[197] This article proposes a similar provision should be introduced into the New Zealand Crimes Act. The solution codifies the *R v Brown* decision would abolish the "rough sex defence" for fatal-BDSM cases. However, the United Kingdom provision defines "rough sex" as "serious harm for the purposes of obtaining sexual gratification".[198] "Serious harm" is defined as grievous bodily harm, wounding and actual bodily harm in the Act.[199] In New Zealand, "really serious harm" constitutes grievous bodily harm and injuring means actual bodily harm.[200] Thus, some amendments are necessary for the New Zealand context. This article proposes that New Zealand legislators should amend the wording of the Domestic Abuse Act to include both actual and grievous bodily harm. Further, New Zealand Parliament could introduce a section into the Crimes Act stating, "it is not a defence to murder or manslaughter that the victim consented to the infliction of actual or grievous bodily harm for the purposes of obtaining sexual gratification".

A weakness of this solution is that it prohibits those in the BDSM community from engaging in BDSM. Not all BDSM practitioners are violent and abusive men using BDSM as an excuse to "get away with murder".[201]

195 Crimes Act, s 63.
196 Domestic Abuse Act, s 71.
197 Section 71.
198 Section 71.
199 Section 71(3).
200 *R v Waters*, above n 49, at 379; and Crimes Act, s 2.
201 Bows and Herring, above n 5, at 534.

Instead, some have chosen to join the BDSM community which is founded upon boundaries and negotiation.[202] Those in the community argue their engagement in BDSM is safe and only proceeds with the informed consent of both parties.[203] Thus, prohibiting people from being able to consent to "the infliction of actual or grievous bodily harm for the purposes of obtaining sexual gratification" hinders BDSM practitioners' agency. However, this does not mean that BDSM practitioners cannot engage in the activity, it just means that they cannot rely upon the defence of consent if BDSM activities turn fatal. However, the abolishment of the defence of consent has practical implications. For example, it is possible that there will be legitimate cases of accidental death as a result of BDSM activities and so a person would not be able to rely on the defence, and it also may discourage people from calling enforcement agencies in the case of an emergency, for fear of being prosecuted.

Although potentially infringing upon the BDSM community's agency, the purpose of the proposed provision is to prohibit violent men from relying upon the "rough sex defence" and "getting away with murder". Defendants are increasingly excusing violent actions by claiming women accidentally died in "sex acts gone wrong", warranting such an infringement on the BDSM community.

B Preventing Victim Blaming

The abolishment of the "rough sex defence" through statute will aid in reducing victim blaming in trial. However, for completeness and to mitigate the circumstances where victim blaming strategies are utilised in murder cases, the "rape shield" should also be amended to extend to homicide cases. This amendment would reduce the risk that decision makers are unfairly prejudiced by sexual history evidence and would assist in protecting victims' families from re-traumatisation. Nonetheless, the "rape shield" is not absolute. With permission of the judge, the victim's sexual experience evidence may be admitted into court.[204] Thus, to ensure murder victims are not the subject of a blaming rhetoric, this solution is proposed in conjunction with the abolishment of the "rough sex defence".

202 Rebecca Reid "I spent years in the fetish and BDSM scene – I know exactly why people die during kinky sex" *The Independent* (online ed, London, 13 April 2019).

203 Reid, above n 202; and Cara R Dunkley and Lori A Brotto "The Role of Consent in the Context of BDSM" (2020) 32 Sexual Abuse 657 at 660.

204 Evidence Act, s 44.

V CONCLUSION

Although not yet prevalent in New Zealand, WCCTT has highlighted over 60 cases where men have used the "rough sex defence" in an attempt to receive a lesser sentence or acquittal.[205] The Millane case provides a good case study for how the courts will deal with BDSM in New Zealand and highlights how controversial the "rough sex defence" can be. The rising popularity of the defence across the world emphasises the need for New Zealand legislators to consider the defence and its appropriateness in law.

This article argues that the "rough sex defence" should be abolished through statute, similar to the English and Welsh approach. The "rough sex defence" is being used by violent and uneducated men to 'get away with murder' and perpetuates a victim blaming rhetoric. By following the English and Welsh approach, defendants would not be able to rely on the defence of consent in murder and manslaughter trials. By association, if the "rough sex defence" was abolished, the victim blaming rhetoric that forms part of the "rough sex defence", would not unfairly prejudice a trial. However, for completeness, the "rape shield" should also be extended to apply to homicide victims to ensure only directly relevant evidence is before a decisionmaker.

205 Mackenzie, above n 1, at 4.

WHAT ARE REASONABLE ALTERNATIVES?
Reflections on Ruddelle, Witehira and the application of the self-defence defence

Charlotte Agnew-Harington* **and Benjamin Morgan****

I INTRODUCTION

Aotearoa's approach to self-defence rests on the pillars of imminence and proportionality, both of which are well understood prerequisites to accessing the defence. The question is whether a defendant was justified in using the level of defensive force that they did, given the imminence and seriousness of the threat posed. The recent cases *R v Witehira* and *R v Ruddelle* suggest that women who kill abusive family members are unlikely to succeed with self-defence because, despite the imminence of the threat, the level of force they respond with may be perceived as unreasonable or excessive.[1] But what lens did the jury use to assess reasonableness, and did it factor in the lived experiences of these women, the background to these violent encounters, and the escape mechanisms that were realistically available?

This article assesses *Witehira* and *Ruddelle* and what those cases tell us about how self-defence is operating in Aotearoa. Ultimately, we conclude that for the defence of "self-defence" to serve justice and the rule of law, it needs to be employed in a manner that has regard to the broader experiences of defendants, particularly women who have been long-term victims of violence. We also consider it is imperative that everyone who plays a role in the criminal

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1 *R v Witehira* [2021] NZHC 678 at [18] and [20]; and *R v Ruddelle* [2020] NZHC 1983 at [28(c)].

justice system, including jurors, actively and conscientiously asks whether the use of force against an imminent threat was reasonable based on a realistic, holistic view of the circumstances the defendant perceived themselves to be facing. The assessment of whether force was reasonable also needs to be done without recourse to alternatives that were theoretically, rather than actually available to the defendant.[2] That will require a shift in attitudes, and a reframing of our assumptions and the education of stakeholders, including jurors. Our hope is to draw attention to the need for juries and all those in the justice system to look deeper than the assumption that a person could have simply run away from a fight and ask instead what alternative options were *really* available.

In Part II of this article, we set out the legal framework for self-defence in Aotearoa, before providing an overview of the two cases in Parts III and IV. In Part V we ask why the defence may have failed in each case. In Part VI we consider the case of X, where the defence succeeded, and in Part VII we suggest that stakeholders might need to start thinking differently about self-defence.

II THE SELF-DEFENCE DEFENCE

Self-defence is a justification-based defence. A finding that a defendant acted in self-defence provides a legal basis for justifying their behaviour and avoiding conviction. Part 3 of the Crimes Act 1961 (Crimes Act) deals with defences of justification. Where such defences apply, they are a defence for any applicable offence.[3] Self-defence is codified in s 48 of the Crimes Act as follows:

> Every one is justified in using, in the defence of himself or herself or another, such force as, in the circumstances as he or she believes them to be, it is reasonable to use.

Section 48 has remained unchanged since 1981.[4] The provision sets out a two-limb test. Part one requires a subjective analysis of whether an act in self-defence was justified in "the circumstances as [the defendant] believes them to be". The second part mandates an objective assessment of whether the

2 Noting that the criminal justice system is just one part of a broader system that interacts with vulnerable victims.

3 Crimes Act 1961, s 20(2).

4 For a more fulsome analysis of the genesis of s 48, see Fran Wright "The Circumstances as She Believed Them to Be: A Reappraisal of Section 48 of the Crimes Act 1961" (1998) 6 Waikato L Rev 109 at 115.

defensive force was "reasonable to use". The Court of Appeal has split the subjective and objective requirements into three questions:[5]

> i) What were the circumstances as the accused honestly believed them to be?;
>
> ii) In those circumstances, was the accused acting in the defence of himself or another?; and
>
> iii) Was the force used reasonable against the circumstances as the accused believed them to be?

Once a defendant has raised a credible self-defence argument, it is for the Crown to disprove that the defendant acted in self-defence.[6] Self-defence then becomes an issue for determination by the jury. Fran Wright says that s 48 requires a jury to assess a defendant's use of force by considering the defendant's belief about the circumstances they were in, including any "mistake" under which they were labouring, such as assuming that the assailant was armed when they were not.[7] Wright says that any assessment of whether the use of force was reasonable should therefore proceed as though the defendant's mistaken belief was correct (even if the defendant had omitted to consider some alternatives).[8] Like Wright, we think that this "broad" application of the defence is mandated by the mixed subjective-objective test created by s 48.[9]

III R v RUDDELLE

On 14 November 2018, Karen Ruddelle stabbed her partner, Joseph Ngapera, in the course of an argument.[10] Ms Ruddelle had suffered years of abuse at the hands of Mr Ngapera, combined with a life marred by family violence. She was acquitted of murder, but a jury found her guilty of manslaughter by a vote of 11:1.

On the night in question Ms Ruddelle and Mr Ngapera had been drinking together. They returned home in the early morning and sat at the table. An argument developed. Ms Ruddelle said that Mr Ngapera got up

5 *R v Bridger* [2003] NZLR 636 (CA) at [18]. See *Afamasaga v R* [2015] NZCA 615, (2015) 27 CRNZ 640; and *McNaughton v R* [2013] NZCA 657, [2014] 2 NZLR 467 for application of these three questions.

6 *R v Tavete* [1988] 1 NZLR 428 (CA).

7 Wright, above n 4, at 119–120.

8 At 123.

9 At 119.

10 *R v Ruddelle*, above n 1, at [20].

from his chair at the dining table and came towards her; she expected she was about to "get a hiding".[11] After she yelled for the help of her adult son, her 14-year-old son entered the room and pushed Mr Ngapera in the chest. At trial, Ms Ruddelle said no one could push Mr Ngapera like that and get away with it.[12] Ms Ruddelle grabbed a knife from the dining table and stabbed Mr Ngapera, twice, in the chest. In handing Ms Ruddelle an end-sentence of home detention, Palmer J surmised that the jury:[13]

> … found Ms Ruddelle not guilty of murder but they did not acquit Ms Ruddelle on the basis that she acted in self-defence or defence of her son. … But the jury did find Ms Ruddelle guilty of manslaughter. So they were sure she intended to stab Mr Ngapera and they were sure the stabbing was likely to cause more than trivial harm to him.

IV R v WITEHIRA

Ms Witehira stabbed her sister's partner, Mr Anderson.[14] The offending followed a day of drinking and Mr Anderson's aggression towards Ms Witehira's sister, Kuini. Ms Witehira and Mr Anderson got into an argument, which also involved Ms Witehira's mother, Mini. Kuini unsuccessfully tried to stop the fight. Later, Mr Anderson started to strangle Mini. As Peters J recorded at sentencing:[15]

> Your evidence was that, on seeing this, you picked up Mr Anderson's crutch, which was in the living area, and hit him with it to the back of his leg to make him stop attacking your mother. That did make him stop. However, your evidence was that he then grabbed the crutch from you, got to his feet and started coming towards you. Your evidence was you were scared he was going to attack you. By this stage, you were close to the dining table and you reached down, picked up the first thing that came to hand, and stabbed Mr Anderson with it, he being right in front of you. Your evidence was that you thought you had picked up a pencil, but in fact you had picked up one of several knives on the table.

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11 At [20].
12 At [28].
13 At [21].
14 *R v Witehira*, above n 1, at [14]—[15].
15 At [14].

Mr Anderson died of his injuries. Ms Witehira "always acknowledged" that she had caused Mr Anderson's death, but said she was acting to defend herself and her mother when she did so.[16]

V SELF DEFENCE AND THE VICTIM-DEFENDANT

Recent data suggests that it is difficult for female victims of violence to succeed with the self-defence defence. The Family Violence Death Review Committee's (FVDRC) *Fifth Report Data* records that over the period from 2009 – 2015 there were 16 cases where the primary victim of intimate partner violence (IPV) killed their aggressor – i.e., there were 16 cases where the victim of violence became the defendant to homicide.[17] All were women and 50 per cent were convicted of manslaughter; only 19 per cent were acquitted.[18] *Ruddelle* and *Witehira* add to these statistics. So why does the self-defence defence continue to fail female defendants?

A Imminency and victim-defendants

Women who have been subjected to violence and subsequently kill their aggressors in circumstances where there has been no imminent threat have infamously been denied the self-defence defence in Aotearoa.[19] In 1990, the defendant in *R v Wang* failed to convince the jury that she had acted in self-defence after she killed her drunk, sleeping husband who had physically, sexually and psychologically abused her and blackmailed her to the point where she claimed she had no escape but a pre-emptive strike.[20] That case illustrated how the requirement for imminence could frustrate the application of the defence to women who pre-emptively killed abusers.

Similarly, in 1995 the defendant in *R v Oakes* was convicted of murdering her former partner while he slept.[21] The defendant failed to establish that there was an imminent threat, so the defence was unsuccessful. *Oakes* confirmed that a pattern of violence and the fear of further violence is not an "imminent" threat that might justify the killing of a violent partner.

16 At [16].
17 Family Violence Death Review Committee (FVDRC) *Fifth Report Data: January 2009 to December 2015* (June 2017) at 27.
18 At 57–58.
19 See for example *R v Wang* [1990] 2 NZLR 529 (CA); and *R v Oakes* [1995] 2 NZLR 673 (CA).
20 *R v Wang*, above n 19.
21 *R v Oakes*, above n 19.

In 2001, the New Zealand Law Commission Te Aka Matua o te Ture said that in *Oakes*:[22]

> … the Crown suggested, incorrectly, that battered women typically do not leave their partners or take active steps to protect themselves and that, therefore, since the accused did take these actions she could not have been in a battering relationship.

After *Oakes*, "battered women syndrome" (now more commonly conceived of as an impact of IPV) was relevant to — but not determinative of — a woman's claim to have acted in self-defence.[23]

Subsequently, there was an expectation that although self-defence failed in *Wang* and *Oakes*, it could succeed in circumstances where a woman killed her aggressor while under attack, and that her lived experience as a victim of IPV would be factored into the analysis of her defence.[24] Indeed, the FVDRC's data indicates that most female defendants (ten of 16) commit violence in response to imminent threats.[25] Given the outcomes in *Ruddelle* and *Witehira*, however, we have to question whether that holds true.

B Reasonableness of force and experiences of defendants

In its 2001 report titled *Some Criminal Defences with Particular Reference to Battered Defendants* the Law Commission examined how Aotearoa's rules on self-defence applied to aggressors who were themselves victims of family violence.[26] It considered the imminence requirement as well as the requirement for proportional use of force. In relation to the second, it said that "the determination of what is reasonable in self-defence calls for the application of community values".[27] The Law Commission identified two areas of reform for the defence (neither would be implemented) and noted that "[e]xpert evidence

22 Law Commission *Some Criminal Defences with Particular Reference to Battered Defendants* (NZLC R73, 2001) at [9].

23 Law Commission *Understanding Family Violence: Reforming the Criminal Law relating to Homicide* (NZLC R139, 2016) at [6.61]. In this report, the Law Commission considered how the defence was being applied to victims of family violence. It took the preliminary view that the requirements of imminence, proportionality and lack of alternatives had the potential to unfairly exclude victim-defendants from successfully relying on self-defence, at [5.22]. See also *R v Oakes*, above n 19, at 675—676.

24 Law Commission NZLC R139, above n 23, at [6.31].

25 FVDRC *Fifth Report Data*, above n 17, at 55.

26 Law Commission NZLC R73, above n 22.

27 At [39].

on the social context, nature and dynamics of family violence is vital to ensure that the law on self-defence is applied flexibly and fairly".[28]

But *Ruddelle* and *Witehira* suggest that social contexts and the realities of IPV are, instead, being overlooked in favour of abstract and "best case" assumptions about what a defendant ought to have done to escape from an aggressor (both pre and mid-fight). Those assumptions appear to be based on misunderstandings of IPV, the psychological impacts of abuse over time and for wāhine Māori (like Ms Ruddelle and Ms Witehira), te ao Māori imperatives and contexts. The latter is particularly problematic given that, statistically, wāhine Māori are "twice as likely to experience violence as other New Zealand women".[29] In both *Ruddelle* and *Witehira* the Crown submitted that the defendants ought to have protected themselves by other means and in *Witehira* the sentencing judge expressly recorded that the Crown said the defendant ought to have run away or called the police.[30] The consistent theme is that the force used was excessive because other options were available. But we wonder, how does the jury determine that defensive force was excessive, and how does it approach the task of considering what the reasonable alternatives were?

VI WHY DID THE DEFENCE FAIL?

The offending in both *Witehira* and *Ruddelle* was violent and it resulted in the loss of two lives. Neither our justice system nor our moral code permits the taking of a life in circumstances other than where absolutely necessary for self-preservation. Both Ms Ruddelle and Ms Witehira argued that they had acted in defence of themselves and others, but neither jury accepted that their actions were reasonable. Given the opacity of the jury system in Aotearoa, we will never know precisely what influenced the respective juries in their decisions.[31] However, the sentencing decisions of Palmer J in *Ruddelle*

28 At [43].

29 Ministry for Women *Wāhine Māori, Wāhine Ora, Wāhine Kaha: preventing violence against Māori women* (February 2015) at 4. See also FVDRC *Fifth Report: January 2014 to December 2015* (February 2016) at 48. We acknowledge that the label "Māori" attempts to homogenise diverse groups of people and that greater emphasis ought to be put on iwi, hapū and whānau relationships. See Denise Wilson and others "*Aroha and Manaakitanga* — That's What It Is About: Indigenous Women, 'Love,' and Interpersonal Violence" (2021) 36 Journal of Interpersonal Violence 9808 at 9811-9812.

30 *R v Ruddelle*, above n 1, at [24]; *Witehira*, above n 1, at [18].

31 For discussion about requiring reasons from juries in cases of sexual offending, see Jessica Sutton "Salvaging the Jury in Sexual Violence Trials: A Requirement for Reasoned Verdicts" (2020) 4 NZWLJ 66.

and Peters J in *Witehira* discuss the way each of these cases played out and indicate that the defence *may* have failed, in part, because the jury considered the defensive force excessive *because* of the supposed availability of alternative options.[32] Peters J said, in relation to Ms Witehira, that the Crown submitted Ms Witehira had other options – she could have run away or called the police.[33] Similarly, Palmer J summarised the Crown's argument that Ms Ruddelle may "in theory" have had other options.[34] On that basis, we say "supposed" options because it is not clear how or to what extent the parties at trial or the jury considered the practicality of the alternatives suggested.

As will be evident, we were not present at Ms Ruddelle or Ms Witehira's respective trials, and as such have relied on the sentencing decisions of Palmer and Peters JJ, as well as media reports, as the basis for this article. Both judgments are, we think, unusually reflective in their approach, with Palmer J in particular going into significant detail about the submissions and evidence from the trial.

From those decisions, it is clear that both Ms Ruddelle and Ms Witehira had encountered violence at the hands of various aggressors over many years. In *Ruddelle* the Crown submitted that Ms Ruddelle had not established either of the two limbs of the self-defence defence; she was neither in a situation that justified a defensive attack, nor was the force she used reasonable.[35] The jury clearly accepted that one of those submissions was true. But how does that conclusion reflect Ms Ruddelle's lived experience? To what extent, if at all, did the jury factor in Ms Ruddelle's past, trauma, and actual options? We explore this below.

A Lived experiences, entrapment and the realistic options available

1 R v Ruddelle

In his sentencing decision, Palmer J set out Ms Ruddelle's history as a victim of violence, her obligations in childhood and adulthood to protect others from

32 We note that in the sentencing notes in *Ruddelle*, Palmer J said that "[o]bviously, the jury regarded inflicting the two stab wounds as too excessive to sustain the defence of self-defence or defence of another", see *R v Ruddelle*, above n 1, at [28(c)].

33 *R v Witehira*, above n 1, at [18].

34 *R v Ruddelle*, above n 1, at [28(b)].

35 At [25].

violence,[36] Mr Ngapera's acts of violence against her daughter,[37] a history of more than 80 recorded incidents of family violence,[38] and her attempt to access community support.[39] His Honour recorded how her interactions with the state had led not to a cessation of violence, but rather to her children being taken from her.[40]

His Honour also outlined how, at trial, evidence was tendered in support of Ms Ruddelle's traumatic history and how this might have conditioned her to respond to Mr Ngapera's attack with defensive force. Palmer J's decision refers to the trial evidence of experts Rachel Smith and Dr Alison Towns, including evidence of:[41]

> i) patterns of social entrapment and inadequate safety options, as well as coercive control,[42] and the fact that the effects of abuse on women accumulate over time;
>
> ii) the fact that victims of abuse are particularly sensitive to when situations are becoming violent;
>
> iii) the fact that Ms Ruddelle's lifetime of trauma had conditioned her to react irrationally;
>
> iv) how social entrapment drives women to stay in violent relationships that others might leave; and
>
> v) insights into the pressure on wāhine Māori in particular to look after people with whom they have been in relationships.

It appears to us that extensive evidence was put to the jury to suggest that Ms Ruddelle was suffering from entrapment and had a dearth of safety options available to her. Further, the facts of Ms Ruddelle's past – including her extensive history as a victim of violence and the fact that state apparatus had

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36 At [6].
37 At [10].
38 At [11].
39 At [13].
40 At [18]. See also FVDRC *Fifth Report*, above n 29, at 58. The FVDRC notes that while victims of IPV are often proactive help-seekers, it is not often that they receive the help required. Further, they note that Māori mothers in particular are keenly aware that they risk losing their children if they cannot keep them safe.
41 *R v Ruddelle*, above n 1, at [16]–[17].
42 See Sami Nevala "Coercive Control and Its Impact on Intimate Partner Violence Through the Lens of an EU-Wide Survey on Violence Against Women" (2017) 32 JIV 1792.

failed to adequately protect her – in combination with the evidence indicate that it was unlikely that she would have perceived herself to have alternative pathways to ensure the safety of herself and her son on the night she killed Mr Ngapera.

Therefore, it is evident that the defence had a clear focus on using Ms Ruddelle's lived experience to contextualise the threat she perceived to herself and her son. However, questions arise regarding whether the jury was equipped to grapple with Ms Ruddelle's lived experiences, in light of how the case was argued by both the prosecution and defence. Palmer J surmised that the jury determined that Ms Ruddelle was responding to an imminent threat but used excessive force in doing so. His Honour said, "I consider the jury did see this as a case of excessive selfdefence [sic]".[43] Assuming that is the case, on what basis did the jury determine that Ms Ruddelle's actions were excessive? Did it accept that Ms Ruddelle had other options available to her, as the Crown suggested?[44] If that is the case, we have to ask what lens the jury used to assess the availability of other options. Did it appreciate, from Ms Ruddelle's perspective, the hopelessness of her situation in light of her experiences? We query whether the jury was in a position to grapple with Ms Ruddelle's lived experiences and, therefore, the options that were subjectively available to her.

Palmer J also recorded that in cross-examination Ms Ruddelle "accepted that it was her choice to stay in the relationship and she was not reliant on Mr Ngapera for money, so she was not trapped".[45] This appears to have been an attempt by the Crown to discredit the evidence that Ms Ruddelle was suffering from social entrapment. We are concerned about how such a line of questioning might have fed into the jury's evaluation of Ms Ruddelle and her defence. The cross-examination, with respect, proceeds on an incorrect understanding of social entrapment, which is not about mere dependency (financial or otherwise). The phenomenon of social entrapment does not mean that women stop assessing their options from all angles; it means that they take all the circumstances of their relationship into account and also have to factor in previous violence or control, and threats of more of the same.[46] Entrapment

43 *R v Ruddelle*, above n 1, at [27].
44 At [28].
45 At [17].
46 FVDRC *Fifth Report*, above n 29, at 39. The FVDRC notes that entrapment encompasses notions of fear, isolation, and coercion, alongside the indifference of institutions to the suffering of victims. It can be exacerbated by structural inequities that arise on account of gender, class and racism.

is not disproved or displaced by the theoretical presence of alternative options; the phenomenon of entrapment is one that keeps victims in place without any real access to so-called "alternatives".[47] We query whether the Crown approach was appropriate, given how entrapment operates in reality, and we suggest that the Crown could not reasonably suggest at trial that a lack of financial dependence disproved Ms Ruddelle's entrapment and, therefore, lack of viable safety options.

The cross-examination also overlooked how entrapment might affect wāhine Māori, and therefore further derailed the jury's ability to assess Ms Ruddelle's defence by considering the circumstances as she believed them to be. Wilson and others' research suggests that wāhine Māori may stay in violent relationships because cultural imperatives linked to aroha and manaakitanga keep them rooted in place,[48] such that wāhine Māori may stay in relationships others would leave.[49] As a consequence:[50]

> *Māori* women's connection to their partner is a commitment to and an investment in someone else, which they did not easily give up on. It involved "fighting" for their partner's attention, love, and respect within contexts of some partners' addiction, and the unpredictability of their abusive and violent behaviors. … For many, they became entrapped not only by their violent partners but also by agencies whose purpose was to help them …

It is unclear what efforts were made at trial to consider Ms Ruddelle's experience as a wāhine Māori. Palmer J acknowledged that Ms Ruddelle, like other Māori, had suffered "social and cultural disadvantage … systematically mandated by the social dynamics of New Zealand society".[51] It may be that relevant considerations include the marginalisation of women through colonisation, the destruction of whānau and hapū structures, and the fact that colonisation continues into the present day.[52] Indeed, the FVDRC says "[g]ender inequity, racism, poverty, social exclusion, disability, heterosexism

47 See Julia Tolmie and others "Social Entrapment: A Realistic Understanding of the Criminal Offending of Primary Victims of Intimate Partner Violence" (2018) NZ L Rev 181 at 201–202.

48 Wilson and others, above n 29, at 9826. These authors note that simply applying Western notions is inappropriate to explain or conceptualise the experiences of wāhine Māori.

49 At 9823–9824.

50 At 9824–9825.

51 *R v Ruddelle*, above n 1, at [41].

52 Annie Mikaere "Māori Women: Caught in the Contradictions of a Colonised Reality" (1994) 2 Waikato L Rev 125 at 134.

and the legacy of colonisation shape people's experiences of abuse".[53] Palmer J appeared to recognise that when he recorded that Ms Ruddelle was disassociated from Māori culture and "dispossessed of critical values and protective factors associated with close connection with [her] whānau and community".[54] He also referred to the trial evidence of "cultural pressure on Māori women, in particular, to nurture and look after people with whom they are or have been in relationships".[55]

Finally, we note that the Crown's case against Ms Ruddelle was that she not only used excessive force, but that she was not facing an imminent threat; rather, there was at most an implied threat to her but not to her son.[56] Given Ms Ruddelle's extensive history of violence and victimisation, like the Judge, we do not accept that the threat was or could have been "implied" or theoretical – Mr Ngapera had a history of being physically abusive to Ms Ruddelle and her children. He had previously inflicted potentially lethal violence on Ms Ruddelle (strangulation).[57] It was reasonable that she would have apprehended that he posed a serious and immediate threat to her and her son. What mother would have left the room?[58] Failing to contextualise Ms Ruddelle's experience set an unrealistic standard for measuring her response in the circumstances as she believed them to be. As M J Willoughby has said:[59]

> … society gains nothing, except perhaps the additional risk that the battered woman will herself be killed, because she must wait until her abusive husband instigates another battering episode before she can justifiably act.

2 *R v Witehira*

Just as in *Ruddelle*, the Crown's approach in *Witehira* undermined the lived reality of the victim-defendant by supposing that she had safety options

53 FVDRC *Fifth Report*, above n 29, at 42.
54 *R v Ruddelle*, above n 1, at [40].
55 At [17].
56 At [25].
57 At [12].
58 At [28]. Palmer J said that it was understandable that Ms Ruddelle, reasonably anticipating violence against her son, stayed in the room.
59 M J Willoughby "Rendering Each Woman Her Due: Can a Battered Woman Claim Self-Defense When She Kills Her Sleeping Batterer?" (1989) 38 U Kan L Rev 169 at 184.

that ought not have been assumed or inferred given the facts of the case and circumstances of the defendant. In *Witehira* Peters J said:[60]

> … the jury must have accepted you were trying to defend yourself and Mini at the time you stabbed Mr Anderson, but considered that the force you used was excessive. The Crown submitted to the jury you had other options. One was to run away and another was to call the Police. I think the jury must have accepted that those were realistic alternatives in the circumstances.

We do not accept that those alternatives were realistic. The Crown's options were just that; Crown options that fit a Crown case theory. Together with gendered expectations that suggest violent women are inherently unreasonable, the Crown's reliance on theoretical rather than practical (or proven) alternatives made the barrier to the self-defence defence insurmountable.[61] It is by no means clear that the Crown had established that the options asserted were reasonable or perceptible to Ms Witehira in the circumstances as she perceived them. Mr Anderson had strangled Ms Witehira's mother, which brings to the fore an imminent risk of death: it can take as little as four to five minutes to cause brain death via strangulation.[62] In the context of Ms Witehira's experiences of IPV, her consequent conditioning, and the harm already done to her mother, we do not consider it was reasonable to propose that Ms Witehira could or should have distinguished a threat of imminent death due to strangulation from the incoming threat of Mr Anderson wielding a crutch. Was it unreasonable for Ms Witehira to also take up a weapon?[63]

Did Ms Witehira have an *actual* opportunity of running away or making an emergency call? Would the law really require her to act so fast, to produce an outcome so slow (the police's target response time for priority one incidents is 10 minutes),[64] in the face of her own mother being strangled and the aggressor then turning on her? We do not accept that stabbing Mr Anderson was necessarily justified, but we do question how available other interventions were. As the FVDRC says, "[r]eal help for victims of IPV within our current

60 *R v Witehira*, above n 1, at [18].
61 Elizabeth M Schneider *Battered Women and Feminist Lawmaking* (Yale University Press, New Haven, 2000) at 114.
62 Law Commission *Strangulation: The Case for a New Offence* (NZLC R138, 2016) at [2.2].
63 Wright, above n 4, at 112, where she notes that a person facing a knife is not expected to wait until they are attacked before fighting back.
64 Scott Palmer "Police failing to meet emergency time targets" (26 October 2018) Newshub <www.newshub.co.nz>.

system is sporadic, unpredictable and frequently not available".[65] Against that background, the Crown's assertion that Ms Witehira had alternative options in the form of escape or police intervention was incorrect.

B A note on the approach at sentence

The focus of this article is on the self-defence defence and asking whether our juries are appropriately applying the test by considering the circumstances that *victim-defendants believed themselves to be in* given their own particular circumstances.

We note that the sentencing submissions in each case give some cause for concern and perpetuate some of the myths around IPV that we say may have frustrated the juries' attempts to correctly apply the test set out in s 48. For instance, Palmer J said that despite accepting that Mr Ngapera had been violent towards Ms Ruddelle, the Crown submitted at sentencing that:[66]

> i) the last occasion of physical violence was in March 2017;
>
> ii) [Ms Ruddelle] applied to discharge a previous protection order [against Mr Ngapera];
>
> iii) there was only one Police callout in 2018;
>
> iv) Mr Ngapera had never been intentionally violent towards [Ms Ruddelle's] son;
>
> v) Mr Ngapera was unarmed, limping and not physically violent towards [Ms Ruddelle] on [the night in question];
>
> vi) [Ms Ruddelle] was intoxicated and angry with him; and
>
> vii) [Ms Ruddelle] had other options available to [her].

Most, if not all of these submissions are problematic in that they minimise the effects of IPV and reflect the substitution of assumed "alternatives" that were not realistic for a defendant with a long history of victimisation. The submissions might have been appropriate post-conviction, but they represent a step in the wrong direction if our goal is to ensure our justice system is receptive to our society – particularly in cases like this where victims have become defendants. For instance, the submission that the last occasion of violence was

65 FVDRC *Fifth Report*, above n 29, at 14.
66 *R v Ruddelle*, above n 1, at [24].

historic is incongruous given the events on the night in question, the evidence of a long history of violence between Ms Ruddelle and Mr Ngapera, and the fact that family violence is not a series of isolated incidents but rather a pattern of behaviour leading to entrapment and conditioning.[67] The submission that Ms Ruddelle had applied to discharge a protection order implies that she was somehow complicit in her own mistreatment – either she tolerated it or she was exaggerating it at trial.

Palmer J appears to have understood this. In his sentencing decision, he rejected the submissions on the last occasion of violence and the application to discharge the protection order, neither of which mitigated the threat that Ms Ruddelle "reasonably would have perceived" in the circumstances.[68] He accepted that Ms Ruddelle acted instinctively, having noted the trial evidence of social entrapment and accepting that Ms Ruddelle had "heightened sensitivity to whether and when the situation was becoming dangerous, conditioned by [her] past experiences of Mr Ngapera's actions".[69] He also made the point that although "in theory, there were other options available to you, as … the Crown submitted, I consider it is understandable you stayed in the room, in the circumstances."[70] We think that Palmer J's sentencing notes reflect his Honour's focus on and appreciation for Ms Ruddelle's lived experiences and the circumstances as she believed them to be.

Peters J's sentencing decision presents a similarly balanced and contextualised view of the victim-defendant and her circumstances. In particular, her Honour Peters J used the pre-sentence reports to explain Ms Witehira's background and the reasons why she may have reacted with force against Mr Anderson. Peters J referred particularly to the report of a psychiatrist, Dr Gardiner:[71]

> Dr Gardiner's professional view is that you meet the diagnostic criteria for post-traumatic stress disorder, as a result of the combined effect of the events in your life, and that domestic violence particularly triggers an "adrenaline rush" in you, and that is what happened when you saw your mother being strangled. The sight of Mr Anderson attacking your mother would have

67 Further, victims are unlikely to see "incidents" of violence as one-offs, which the justice system is want to do. See FVDRC *Fifth Report*, above n 29, at 34–36.
68 *R v Ruddelle*, above n 1, at [28].
69 At [28].
70 At [28].
71 *R v Witehira*, above n 1, at [42].

> been intolerable to you. Dr Gardiner also says your background meant that when you perceived Mr Anderson was going to attack you, you opted for the "fight" rather than "flight" response.

Other pre-sentence reports showed that Ms Witehira's life had been "marked by violence", neglect, sexual and physical abuse from multiple parties, personal tragedy, and material deprivation.[72] One of Ms Witehira's previous partners had been convicted of the manslaughter of another man, and of abducting one of Ms Witehira's children and assaulting Ms Witehira.[73] Another partner had slashed her throat with a broken bottle.[74] The reports also said Ms Witehira had been alienated from Te Ao Māori.[75]

In assessing the matters for which Ms Witehira should receive a reduction in sentence, Peters J accepted that Ms Witehira's experiences and observation of her mother being strangled had led her to fight, rather than run away.[76] Her Honour said "[e]xperience has taught you that domestic violence is normal, is to be expected, and it should be met with a like response."[77] Questions arise as to whether or to what extent this same information was presented at trial and factored into the jury's assessment of self-defence, or whether the jury preferred standardised options as a proxy for determining reasonable force.

Given Ms Witehira's personal history with IPV,[78] it is troubling that the Crown would seek to rely on the lack of violent history between Ms Witehira and Mr Anderson to sidestep the fact that Ms Witehira had a history as a victim of violence that, as Peters J suggested, taught her to meet violence with a "like response".[79] These kind of assumptions are harmful and, although this particular submission was made at sentencing, would undermine a jury's ability to properly undertake the assessment required where a victim-defendant has raised a defence under s 48. There is, we suggest, a need for the prosecution to avoid submissions that distort the realities and victimisation of defendants if

72 At [36]–[40].
73 At [37].
74 At [38].
75 At [41].
76 At [64].
77 At [64].
78 At [36]–[37].
79 At [64]. In any event, a lack of previous violence between an offender and a victim ought not be termed an aggravating factor when the offending itself was a response to an immediate threat in a case of self-defence.

we are to ensure our justice system is responsive to victimisation in its many forms.

VII IS THERE ANOTHER WAY?

The approach in both *Ruddelle* and *Witehira* might appear to be a relatively orthodox approach to self-defence; there is a strict focus on the actual threat posed, the presumptive options that the defendant could have employed, and a reluctance to tolerate defensive force. But that is not the only approach to the self-defence defence.

In 2015 the Law Commission delivered its report on "Victims of Family Violence who commit Homicide".[80] The Government of the time asked the Law Commission to conduct the review by reference to the *Fourth Annual Report* by the FVDRC,[81] who considered Aotearoa had adopted a restrictive interpretation of self-defence even though s 48 is capable of being more broadly applied.[82] One of the reasons that the Law Commission's 2001 recommendations on changes to the law of self-defence were not implemented was because the then-Government had expected that the law would develop on a case-by-case basis.[83]

However, in 2021 it is clear that our approach to self-defence has continued to fail women. This is at least in part because the law and government have failed to adopt a nuanced and evidence-based approach to determining the defendant's subjective circumstances and to articulating the "alternative" responses that the law says should have been adopted. In doing so, we have overlooked the fact that most jurors have minimal knowledge of how entrapment, IPV and systemic victimisation contribute to potentially criminal offending. As a consequence, those of us within the justice system must stop proposing that victims of IPV – mainly women – can escape violence because effective support services are available.[84] And we need to stop arguing that victims should merely have run away, without considering what they would be leaving behind, and whether they had anywhere to run.

We see *Ruddelle* and *Witehira* as clear examples of how the self-defence defence can fail women in two ways. First, by eliding their lived experiences

80 Law Commission *Victims of Family Violence who Commit Homicide* (NZLC IP39, 2015).

81 See FVDRC *Fourth Annual Report: January 2013 to December 2013* (June 2014).

82 At 102.

83 Law Commission NZLC IP39, above n 80, at [5.27].

84 They do not. See FVDRC *Fifth Report*, above n 29, at 37–39 and 42.

and overlooking the resultant conditioning and mental health implications. We include in this a tendency to discount the particular perspectives of wāhine Māori (whom may instead be judged by reference to western assumptions). Second, by imposing superficial and unsubstantiated assumptions as to what they could or should have done to achieve safety or avoid violence. These assumptions put an onus on victims that the research indicates is not appropriate, given the cumulative and systemic impacts of IPV and the systematic inadequacy of state support.[85]

A The case of Mr X

However, the law of self-defence does not fail the victim-defendant in all cases. For example, in June 2018, news broke that a young Auckland man, X, had been cleared of murder and manslaughter by a jury, who found that he had been acting in self-defence when he tracked down and stabbed his abusive father.[86] The facts of the case told the story of practiced family violence; on the night in question, the deceased had beaten up the defendant's mother. The mother then escaped and arrived – with her baby – bloodied and bruised at the defendant's home. The father soon arrived at the home, but the family had locked the doors. The deceased was shouting abuse and the family called the police. Sometime later it may have seemed that the father left the property. The defendant went outside with a 14-inch blade and found his father still there. There was an altercation, with the defendant saying that the deceased punched him. The defendant stabbed the deceased multiple times, causing his death. According to media reports, this was the first time the defendant had ever fought back against his father's abuse.

The Crown reportedly referred to the deceased as "[a] bad man", "a wife beater and a drug user".[87] Media reports indicated that the evidence at trial was that the defendant was not injured in the fight, and that the prosecutor made it clear that the deceased "had been nasty and hostile to the defendant and his family", before framing the relevant legal question as whether the defendant's

85 See FVDRC *Fifth Report*, above n 29.

86 Catrin Owen "Son found not guilty of murdering his abusive father" (8 June 2018) Stuff <www.stuff.co.nz>; and Sam Hurley "Son on trial for murdering abusive `Jake the Muss' father, argues self-defence" *The New Zealand Herald* (online ed, Auckland, 14 May 2018).

87 Hurley, above n 86.

use of force was "proportionate and reasonable to the threat".[88] The Crown apparently went on to characterise the defendant's use of force as excessive.[89]

What is striking about the case is that it seems at least arguable that the threat posed to defendant X by the deceased was less immediate, less serious, and more easily avoided than the threats faced by Ms Ruddelle and Ms Witehira. Of course, the threat posed by the deceased and X's response must be assessed immediately prior to the stabbing of the deceased (that is, after the deceased had punched the defendant) but the fact remains that defendant X did not find himself in a fight, he sought one out. He did not indiscriminately grab something he could use to defend himself, he approached his father with a plainly dangerous weapon. We do not know what persuaded the juries in any of these cases to make the findings they did, but it is necessary to point out that defendant X, unlike Ms Ruddelle and Ms Witehira, had *actual* alternative options available, in that he had the capacity to seek police help (evidenced by the fact that the police had already been called) and had a clear alternative pathway that could have avoided violence (staying inside). X's father threw a punch at X, but X was not harmed and so we have to query whether repeatedly stabbing his father was a reasonable use of force in response – particularly if the force used by Ms Ruddelle and Ms Witehira was not.

One could argue that defendant X would have needed a degree of space and time to escape the deceased's violence and so in context his actions were appropriate and proportionate. But if that is the case, why does the same not apply to Ms Ruddelle and Ms Witehira? If we are prepared to tell Ms Ruddelle and Ms Witehira that they ought to have run away or called the police, we are in effect asking them to escape – to find space, time, or respite – that was not available to them, just like (the jury must have accepted) it was not available to Mr X. Why were those alternative avenues expected of Ms Ruddelle and Ms Witehira, but not Mr X?

It is perhaps because society and the law tolerate men who fight back, but not women who do the same.[90] It may be because we presume that women ought to run away, rather than take up arms to defend themselves. But that is incongruous given that women are the primary victims of IPV and family

88 Hurley, above n 86.

89 Tommy Livingston "'I am so sorry Dad': man accused of murdering his father held him while he died" (15 May 2018) Stuff <www.stuff.co.nz>.

90 Lizzie Seal *Women, Murder and Femininity: Gender Representations of Women who Kill* (Palgrave Macmillan, London, 2010) at 1.

violence homicide.[91] However, gendered notions of masculinity may underlie jury conceptions of the legitimate use of violence: as Lizzie Seal said, "[w]hereas '[v]iolence is an accepted attribute of most recognised masculinities'[,] … killing by women violates norms of femininity, such as nurturance, gentleness and social conformity".[92]

The idea of female violence is an affront to gender norms and we may, therefore, more readily accept that violence perpetrated by men is more reasonable than that perpetrated by women. The law demands reasonableness, but what is reasonable may be (improperly) contextualised by gender.[93] If a jury (that is, society) more readily accepts male violence, the reasonableness of a male response is judged from a starting point that accepts that men may be justifiably violent. Conversely, if a jury's conception of gender norms is upset by female violence, then the reasonableness of the female response is judged from a starting point that deems the use of violence by women to be inherently unreasonable.[94]

The effects of these gendered distortions may compound for wāhine Māori and for other women at the intersection of gender, race, and/or deprivation. Western constructs of femininity and gender rules have been applied in Aotearoa across the board, including to wāhine Māori who, prior to colonisation, held mana and equal status with men.[95] As Wilson and others explain, post-colonisation, Māori women were subordinated to men, in accordance with the western worldview and suffered from the loss of their own culture and context.[96] Wilson and others further note that "[s]tandard views held about *Māori* women often disregard the ongoing and harmful effects of colonialism, historical trauma, marginalization, loss of cultural values and practices, and social and political disenfranchisement".[97] Society and juries therefore need to be aware not only of the roles that gender myths may play in conceptualising acts of violence by women, but also how those gender myths

91 FVDRC *Fifth Report*, above n 29, at 20.

92 Seal, above n 90, at 1 (citation omitted).

93 And we do not overlook the fact that what the law now terms "reasonableness" was traditionally measured by reference to "the reasonable man".

94 FVDRC *Fifth Report*, above n 29, at 51. As put by the FVDRC, "[w]omen's use of violence is understood in the wider context of men's violence against women. Women's use of violence is different in intent, meaning and impact, and is often aimed at resisting their partner's violence in order to keep themselves and their children safe".

95 Wilson and others, above n 29, at 9812.

96 At 9828–9830 .

97 At 9813.

may be born from western stereotypes that have the potential to undermine te ao Māori imperatives and marginalise wāhine Māori.[98]

B Applying the test

This brings us back to the need to focus on the circumstances *as the defendant believed them to be.* An objective consideration of the defendant's use of force can only proceed once the jury appreciates the defendant's lived experiences and broader context, while keeping one eye on systematic bias and structural inequities. In the cases of *Ruddelle* and *Witehira*, we do not think the defendants were operating under "mistakes" of the kind Wright discussed,[99] but we do agree with Wright's analysis that courts and juries have not been consistent when faced with decisions around the defendant's subjective view of the circumstances and the force they employed in response.[100] That is to say, we do not necessarily think that Ms Ruddelle or Ms Witehira were "mistaken" if they thought they could not have run away or called the police. Taking into account the immediacy of the threats they faced, their experiences of violence, and the fact that state/NGO apparatus had thus far failed to protect them from violence, we do not think that those alternative options were necessarily available to them – subjectively or objectively. To that extent, we disagree with their respective juries.

The notion that either Ms Ruddelle or Ms Witehira could have run away and left their loved ones to face a threat is not necessarily any more conscionable than their use of force was. How many people would run away from an attacker and leave their son or mother behind? The law does not expect people to abandon their loved ones in the face of an imminent threat; s 48 justifies the use of defensive force in the defence of oneself and in "defence of others". To ask them to do otherwise is an affront to both western and te

98 At 9829–9830, Wilson and others say that "[t]he majority of literature overlooks the ongoing intergenerational effects of colonization, historical and contemporary trauma, and social deprivation that continue affecting colonized Indigenous communities". Mikaere, above n 52, at 125 notes "[t]he roles of men and women in traditional Māori society can be understood only in the context of the Māori world view", and notes that instances of violence or abuse were matters for whānau, not individuals alone.

99 Wright, above n 4, at 112. Wright notes that where submission, flight, or calling for help may have been more appropriate in the circumstances, a use of force will not be reasonable. She says that issues arise where the defendant might be mistaken as to whether those alternatives are possible or effective. While this issue may arise, we do not see mistake as having been the key issue in *Ruddelle* or *Witehira*. We do note, however, that Ms Witehira argued a mistaken belief that she had picked up a pencil rather than a knife.

100 At 112.

ao Māori notions of aroha (love) and whakapapa (kinship), and for Māori defendants it is also an affront to mana.

Whakapapa connects Ms Ruddelle to her son and Ms Witehira to her mother. That whakapapa is a source of strength and interconnectedness, and for Māori women it also creates obligations to ensure safety.[101] We cannot apply western presumptions if those might be inappropriate. We reiterate that both Peters and Palmer JJ acknowledged that each defendant – in staying in the room with their aggressor and their loved one – did what most people would have done.[102]

If, therefore, one accepts that running away and calling the police were not likely to be realistic options for these defendants, the focus shifts to the objective limb of the test in s 48 and asks whether the force used was proportional to the threat, rather than whether the force was proportional because the defendant also had the option of running away or calling the police. These options cannot be presumed, nor are they intended to be the subject of an objective assessment.[103] The FVDRC's *Fifth Report* cautioned all of us who confront IPV against applying standardised, one-size-fits-all safety plans that fail to consider the victim's experiences and vulnerabilities, do not consider what the victim has already tried, what her worst fears are for herself or her children, and that are insufficient.[104]

Applying the framework set out above, a jury may well accept that in each of the cases we have discussed the force was excessive, but the question must be whether the particular use of force was reasonable and *not* whether there were theoretical alternatives available (nor, taking it a step further, whether the force used was reasonable in the face of those theoretical, assumed alternatives). If alternatives are to be weighed, they must be looked at from the point of view of what the defendant saw as available to defend herself and/or her whānau. Wright's methodology then suggests that even if a defendant was mistaken in her belief that she had no alternative to using the force she did, the objective assessment would need to account for a perceived threat to herself or others.

101 Ministry for Women, above n 29, at 19.
102 *R v Witehira*, above n 1, at [24]; and *R v Ruddelle*, above n 1, at [28].
103 Wright, above n 4.
104 FVDRC *Fifth Report*, above n 29, at 27.

VIII MOVING FORWARD

We cannot say for certain whether the self-defence defence is currently operating on a gendered basis – that is, whether it is being inappropriately applied because gender-based assumptions and values distort jury decisions. But what we observe is a failure – gender based or otherwise – on the part of juries and others to accurately and appropriately consider the subjective perceptions of female defendants seeking to rely on self-defence. That encompasses a failure to appreciate their lived experiences, contexts, and their options for responding to threats.[105] It seems likely that the issue is more acute for wāhine Māori.

The time for change has come. We need a more realistic approach to self-defence that actively and appropriately asks what level of risk the victim-defendant considered herself to be facing, and therefore what level of response was appropriate, taking into account lived experience, gender, culture, history, worldview and any other factors that may be relevant to the perception of threat and response.[106] That is particularly so in cases of family harm where the defendant has been a victim of IPV or other violence. That will include a distinct focus on the options available to women, victims, and wāhine Māori subject to different (external and internal) expectations and obligations that may or may not be familiar to the jury.

Our point in this article is to reinforce what the Law Commission said 20 years ago: expert evidence of the victim-defendant's experiences of family violence needs to be factored, and factored appropriately, by juries or judges considering self-defence.[107] That kind of analysis may be assisted by a defendant's own evidence and by ensuring that the jury understands the subjective-objective test mandated by s 48 and what that means for them.[108]

105 Wilson and others, above n 29, at 9813, also argue that care needs to be taken to appreciate the experience of wāhine Māori in their proper context. In the course of discussing their experiences of family violence, they say that "[c]omprehending family violence for *Māori* requires responses that are cognizant of the violence that exists beyond intimate partners and wider family members and is inclusive of their distinct historical, social, and cultural complexities".

106 As Wright, above n 4, puts it, a broader approach to s 48 "could be particularly valuable in cases involving abused women, where their previous experiences of violence and of the assistance available to them might lead to a view of the circumstances which differs from that which a person without those experiences would form", at 125.

107 See Law Commission NZLC R73, above n 22. This solution is a mere stepping stone for the purposes of applying s 48. A broader, integrated approach to meaningfully tacking family violence is imperative and overdue.

108 See *McNaughton v R*, above n 5, at [7] where the Court of Appeal noted "[w]hile it will not be in every case that a credible narrative for self-defence requires the accused to give evidence, it is hard to see how

This approach should also be informed by whether or to what extent the Crown has proved that the defendant had other options available *to her* and that *she* knew those other options were available.[109] The question is not whether the victim-defendant had alternatives or whether *in the mind of the jury* those alternatives were reasonably available. In the mind of a victim-defendant conditioned to expect and proactively react to violent encounters from a place of "fight" rather than "flight" calling the police or running away should not be seen as realistic options and neither the law nor the jury should require such actions simply because they appear to be available. Further, they should not require it of women but not men.

It needs to become standard practice, on the part of lawyers, judges, and juries, to start from a position that acknowledges that choosing flight (that is, running away) is not necessarily an option that is available to a defendant. Nor, necessarily, is calling the police. The presence of and risk to a vulnerable third-party, an imminent attack, a foreseeable continuation of violence, and the defendant's conditioning (whether by lived experience, heritage, or gender) must be weighed before supposed alternative options are asserted. If such alternatives are asserted, they ought to be interrogated by all involved.

IX CONCLUSION

We said at the outset that the offending in *Ruddelle* and *Witehira* was violent. But this type of offending does not occur in a vacuum. It is imperative that we actively and conscientiously ask whether the use of force in the face of an imminent threat was reasonable based on a realistic, holistic view of the circumstances the defendants perceived themselves to be facing. The offending in *Ruddelle* and *Witehira* was a product of circumstances – lives conditioned by violence, a justice and social system that had failed to offer protection, and the lived experiences of two defendant-victims that included trauma, abuse, and a lack of effective state or community protection.

Section 48 offers equal protection to men and to women, Māori and Pākehā, victims of ongoing violence and those who simply find themselves compelled to act against a one-off attack. But if it is to serve justice and the rule of law, it needs to be applied in a broad way that acknowledges the experiences of and the options available to each defendant. The experiences of Ms Ruddelle

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the defence could be properly put forward in this case without that occurring".

109 An argument of self-defence will usually necessitate that the defendant gives evidence. See *McNaughton v R*, above n 5, at [52]–[54].

and Ms Witehira, especially when contrasted with the jury's treatment of Mr X, show that we must work the parameters of the self-defence defence harder, and require juries and stakeholders to consider the offending and the defence by asking what the circumstances were in the mind of the defendant and therefore whether the use of force was reasonable, without presupposing that those perceived circumstances would have allowed the defendant to have chosen a different path.

CONSCIENTIOUS OBJECTION TO ABORTION IN AOTEAROA NEW ZEALAND

A justifiable protection of conscience or a violation of the right to healthcare?

Prerna Handa*

I INTRODUCTION

Access to abortion services is a human right.[1] Nevertheless, abortion has been the subject of live social, moral, political and legal debates for decades. The recent decriminalisation of abortion in New Zealand represents an important, if long overdue, recognition and advancement of the human rights of women and pregnant people. However, stricter regulation of the exercise of conscientious objection to abortion is necessary to ensure that New Zealand's accommodation of the right to freedom of conscience does not undermine the right to healthcare.

In March 2020, Parliament passed the Abortion Legislation Act 2020 (the ALA) which decriminalised abortion in New Zealand.[2] Section 8 of the ALA amended the Contraception, Sterilisation, and Abortion Act 1977 (the CSA Act) to allow the provision of abortion services to women not more than 20 weeks pregnant.[3] Section 17 of the ALA amended the Health and Disability Commissioner Act 1994 to recognise that abortion services form a part of "health services" in New Zealand.[4]

Section 14 of the CSA Act allows health practitioners to conscientiously object to providing or assisting with providing contraception, sterilisation, abortion or information on the termination of a pregnancy. This means

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1 See Human Rights Committee *General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life* UN Doc CCPR/C/GC/36 (30 October 2018) at [8].

2 Section 12, which inserted the new s 182(2) into the Crimes Act 1961.

3 Contraception, Sterilisation, and Abortion Act 1977 [CSA Act], s 10.

4 Health and Disability Commissioner Act 1994, s 2(1).

practitioners can refuse to provide or be involved in these lawful health services on the grounds that doing so would conflict with their conscience.[5] The accommodation of conscientious objection in healthcare presents a conflict between the rights of practitioners to object to providing services which are incompatible with their beliefs and the rights of patients to access legal healthcare, when the two intersect.

The CSA Act requires objecting practitioners to, at the earliest opportunity, inform the requesting patient of their conscientious objection as well as how to access the contact details of another person who is the closest provider of the service requested.[6] The provision does not override the duties of practitioners to provide prompt and appropriate medical assistance in medical emergencies.[7] The CSA Act also requires employers to accommodate their employees' conscientious objections, unless it would unreasonably disrupt the employer's provision of health services.[8] Lastly, the Director-General of Health is required to maintain a list of abortion service providers in New Zealand, which must be accessible to any person on request.[9]

This article examines whether the recent reform of abortion law in New Zealand has struck the correct balance between the right to healthcare and the right to freedom of conscience. The right to healthcare is engaged because abortion services have now been recognised as legal healthcare in New Zealand,[10] rather than a criminal act. This article considers that conscientious objection serves to protect the rights of health practitioners who voluntarily choose to work in healthcare, and that this therefore must also be balanced against their professional duty to provide health services. The importance of legalised abortion is paralleled by other rights long protected by the common law, such as bodily autonomy and privacy. These rights also form significant considerations within the context of conscientious objection. The importance of such other rights was considered by Parliament when deciding whether abortion should be decriminalised,[11] and is beyond the scope of this article.

5 Mark R Wicclair *Conscientious Objection in Health Care: An Ethical Analysis* (Cambridge University Press, Cambridge, 2011) at 1.
6 Section 14(2).
7 Section 14(4).
8 Section 15.
9 Section 18.
10 See (b)(ii)(D) of the definition of "health services" in s 2(1) of the Health and Disability Commissioner Act.
11 Comments regarding a woman's right to both bodily autonomy and privacy arose while the Abortion Legislation Bill was debated in Parliament. See, for example, (8 August 2019) 740 NZPD 13071; (3

Protecting conscientious objection upholds the right to freedom of conscience, a right protected by the New Zealand Bill of Rights Act 1990 (NZBORA).[12] Section 15 of the NZBORA gives everyone the right to manifest their beliefs in practice. Unlike healthcare, this right is expressly protected in domestic legislation. New Zealand has, however, committed to protecting the right to healthcare through ratification of the International Covenant of Economic, Social and Cultural Rights,[13] and by incorporating elements of the right to healthcare into domestic legislation.

This article contends that the current balance between the right to healthcare and the right to freedom of conscience is skewed in favour of the practitioner. New Zealand's provision for conscientious objection has the effect of obstructing access to healthcare, stripping pregnant individuals of the dignity and independence they are entitled to as health consumers, and systemically discriminating against women because their rights are impeded disproportionately to men's. The current law is inadequate because it deprives pregnant individuals of their right to healthcare, and therefore, reform requiring stricter regulation of conscientious objection is necessary.

To that end, it is not argued here that the provision for conscientious objection in the CSA Act should be abolished. The right to freedom of conscience should not be unjustifiably limited. However, it is imperative that conscientious objection is sufficiently regulated to ensure that healthcare is accessible. Conscientious objection should be accommodated insofar as one's right to healthcare is not obstructed, and the burden of accommodating it should not fall on the patient who is exercising their right to legal healthcare. This article argues that New Zealand's current law on conscientious objection has not struck a fair and justified balance between the two rights, and as a result, it does not adequately protect the right to healthcare. New Zealand ought to follow in the footsteps of other jurisdictions which have more stringent requirements for objecting practitioners.

March 2020) 744 NZPD 16582; and (18 March 2020) 745 NZPD 17169 and 17193.

12 Section 13. The author recognises that medical practitioners tend in practice to refer to religious grounds for the exercise of conscientious objection to abortion but has focused on freedom of conscience. Along with freedom of conscience, s 13 provides for the right to freedom of religion (and s 15 to manifestation of religion and belief). The rights to freedom of religion and manifestation of that right were important to the context in which Parliament considered the Abortion Legislation Bill: see, for example, (8 August 2019) 740 NZPD 13071 and 13101; and (3 March 2020) 744 NZPD 16561 and 16570.

13 International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 19 December 1966, entered into force 3 January 1976), art 12.

This article starts by examining the right to healthcare with reference to both international law and domestic legislation. It then discusses the right to freedom of conscience in New Zealand and the circumstances in which it can be limited, before identifying the problems with the current law and establishing why reform is necessary. This article then attempts to find the balance between the two rights, by first analysing recommendations for the regulation of conscientious objection by the World Health Organization (WHO), the International Federation of Gynecology and Obstetrics (FIGO) and the New Zealand Law Commission, and then examining how overseas jurisdictions such as Italy, the United Kingdom, Canada, Australia, Portugal and Sweden have balanced accommodation of conscientious objection with the right to healthcare. Finally, this article offers recommendations and proposed improvements to the regulation of conscientious objection in New Zealand.

This article recognises that abortion is best understood as a pregnant person's right to healthcare: not all who identify as women can or want to become pregnant, and not all who are or can become pregnant identify as women. As such, inclusive terms such as "patient" and "pregnant persons" are used in this article as far as possible. Nevertheless, it is important to note that this issue largely affects women and is therefore also a significant women's rights issue.

II THE RIGHT TO HEALTHCARE

A Recognition of the right to healthcare

1 International Law

The right to health is a fundamental human right that includes the right to access healthcare.[14] The narrower term "right to healthcare" is used in this article where appropriate because abortion is a "health service" in New Zealand.

New Zealand's legislation does not expressly provide for a right to healthcare but this right has been affirmed through the ratification of international human rights treaties. Of the international treaties New Zealand is eligible to ratify, it has ratified all five of the treaties recognising this right.[15] Other jurisdictions such as Australia, Canada and the United Kingdom have

14 Alison J Blaiklock "The Right to Health: An Introduction" The University of Auckland <www.auckland.ac.nz> 1.

15 Gunilla Backman and others "Health systems and the right to health: an assessment of 194 countries" (2008) 372 Lancet 2047 at 2066.

also recognised the right to healthcare through international treaties and have not specifically incorporated the right in domestic legislation.[16]

The right to health is included in the Universal Declaration of Human Rights (the UDHR),[17] and most explicitly stated in the International Covenant on Economic, Social and Cultural Rights (ICESCR).[18] The right to health under the ICESCR includes access to timely and appropriate healthcare.[19] New Zealand's ratification of the ICESCR in 1978 demonstrates that the Government has recognised the right to health and has committed to undertaking the obligations required under the treaty. This is a social right, and States have committed to its progressive realisation.[20] Article 12(1) of the ICESCR states:

> The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

The work of the United Nations Committee on Economic, Social and Cultural Rights has developed a right-to-health analytical framework to guide the application of the right to health to relevant policies.[21] The framework highlights the autonomy of individuals and holds that individuals must be able to participate in decision-making relative to their own health. The right to health also provides that healthcare must be "physically and economically accessible to everyone without discrimination".[22]

2 *Domestic Law*

Although the right to healthcare is notably absent from the NZBORA, some statutes in New Zealand help promote the right to health, albeit in a limited manner.[23] The Government has indicated initiatives to continue to achieve

16 At 2062 and 2070.
17 *Universal Declaration of Human Rights* GA Res 217A (1948), art 25.
18 International Covenant on Economic, Social and Cultural Rights, art 12.
19 Committee on Economic, Social and Cultural Rights *CESCR General Comment No 14: The Rights to the Highest Attainable Standard of Health* UN Doc E/C.12/2000/4 (11 August 2000) [*General Comment No 14*] at [11].
20 International Covenant on Economic, Social and Cultural Rights, art 2(1).
21 Health Promotion Forum of New Zealand "The Right to Health" (February 2012) <www.hauora.co.nz> at 12–14.
22 At 13.
23 New Zealand Public Health and Disability Act 2000; Health and Disability Commissioner Act; and Health Act 1956.

greater realisation of the right to health in the future, such as by addressing outcome disparities for Māori,[24] and recently by creating a centralized national health system to make healthcare more accessible for all New Zealanders.[25] It has also been argued that Te Tiriti o Waitangi guarantees hauora (health and wellbeing) to all New Zealanders.[26] Although Te Tiriti o Waitangi is not legally enforceable itself, it is widely accepted as the "founding document of New Zealand" and a central tenet of New Zealand's constitution.[27]

For the purposes of this article, the definition and standard for the broad right to healthcare expected in New Zealand will be that contained within art 12(1) of the ICESCR as it applies to access to health services. Further elements of this right can be derived from the domestic law's recognition of art 12(1) by way of incorporation of elements of the right into statute.

First, the New Zealand Public Health and Disability Act 2000 purports to facilitate access to and deliver effective and timely health services.[28] Secondly, the Health and Disability Commissioner Act authorises the Governor-General to regulate a Code of Health and Disability Services Consumers' Rights (the Code).[29] Section 20(1)(g) of the Act states that the Code must contain provisions relating to the duties of health care providers to provide services in a manner that respects the dignity and independence of the individual. The term "independence" signifies that individuals must be free to make their own decisions without the influence or control of others. The Medical Council of New Zealand has also recognised that patients have the right to make their own decisions about their treatment.[30] This upholds their dignity.

24 *Implementation of the International Covenant on Economic, Social and Cultural Rights: Third periodic report submitted by States parties under articles 16 and 17 of the Covenant* Un Doc E/C.12/NZL/3AUV (17 January 2011) at [429].

25 "The new health system" (23 September 2021) Department of the Prime Minister and Cabinet <www.dpmc.govt.nz>.

26 Blaiklock, above n 14, at 2.

27 Cabinet Office *Cabinet Manual* 2017 at 1.

28 Section 3(1)(d).

29 Section 74(1).

30 "Your rights as a patient" (5 November 2019) Medical Council of New Zealand <https://www.mcnz.org.nz>.

The Code recognises that health consumers have the following relevant rights:[31]

i) Right 1: Right to be treated with respect.

ii) Right 2: Right to freedom from discrimination, coercion, harassment and exploitation.

iii) Right 3: Right to dignity and independence.

iv) Right 7: Right to make an informed choice and give informed consent.

These elements provide a fuller picture of what the right to healthcare in New Zealand is comprised of. The right to healthcare in domestic legislation therefore includes healthcare that is timely and effective, respectful, free from discrimination, harassment and coercion, and that respects the independence and dignity of patients by allowing them to make their own decisions.

3 *Summary of Elements of the Right to Healthcare*

The table below sets out a summary of the essential characteristics of the right to healthcare that can be derived from both the United Nations Committee on Economic, Social and Cultural Rights (in relation to the ICESCR) and domestic legislation.

1. The United Nations' Right–to–Health Analytical Framework	2. New Zealand Legislation
1.1 Physically and economically accessible to everyone	2.1 Timely and effective
1.2 Individuals must be able to participate in decision–making relative to their own health	2.2 Includes abortion services
	2.3 Respects the dignity and independence of the individual
	2.4 Free from discrimination, harassment and coercion
	2.5 Freedom to make an informed choice

B Reproductive rights

Reproductive rights, including legal and accessible abortion services, are

31 Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996, sch 1, cl 2 [The Code].

a fundamental component of the human right to healthcare.[32] Access to reproductive healthcare has a clear impact on women's health, but it also has wider social and cultural effects, such as improving and facilitating access to education and work.[33] In decriminalising abortion, Parliament has legislated for women and pregnant persons to make their own reproductive choices with dignity and freedom.[34]

New Zealand has also ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),[35] which affirms reproductive rights. First, art 12(1) requires States to take all appropriate measures to ensure equal access to healthcare services, including those related to family planning. Secondly, art 16(1)(e) states that women should be given the same rights "to decide freely and responsibly on the number and spacing of their children".

There is growing recognition of the fact that these rights are a routine component of the right to healthcare.[36] The United Nations Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of Discrimination against Women have both expressed that women's health rights include reproductive rights.[37] Importantly, the recognition of abortion services as health services in New Zealand legislation signifies Parliament's acceptance of abortion as healthcare.[38] Abortion services must therefore be provided in accordance with the essential characteristics of the right to healthcare to reflect this recognition.

III THE RIGHT TO FREEDOM OF CONSCIENCE

The right to freedom of conscience is a fundamental human right in any democratic society. New Zealand is a pluralist country in which the right to hold and manifest our various individual beliefs is one that is highly valued and

32 "Abortion" World Health Organization <https://www.who.int>; *General Comment No 14*, above n 19, at [8]; and Committee on Economic, Social and Cultural Rights *General Comment No 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)* Un Doc E/C.12/GC/22 (2 May 2016) [*General Comment No 22*] at [1].

33 Sheelagh McGuinness and Jonathan Montgomery "Legal Determinants of Health: Regulating Abortion Care" (2020) 13 Public Health Ethics 34 at 37.

34 See, for example, (8 August 2019) 740 NZPD 13082 and 13092.

35 Convention on the Elimination of All Forms of Discrimination against Women 1249 UNTS 13 (opened for signature 1 March 1980, entered into force 3 September 1981) [CEDAW].

36 Blaiklock, above n 14, at 6.

37 "Sexual and reproductive health and rights" United Nations Human Rights Office of the High Commissioner <https://www.ohchr.org>.

38 Health and Disability Commissioner Act, s 2(1).

protected. Unlike the right to healthcare, the NZBORA expressly protects the right to freedom of conscience and religion[39] and its manifestation.[40] Section 13 gives everyone the right to freedom of conscience and religion and s 15 gives everyone the right to manifest their religion or belief in practice.

The right to freedom of conscience has also been recognised in the UDHR[41] and through New Zealand's ratification of the International Covenant on Civil and Political Rights (ICCPR).[42] The ICCPR provides that the right to manifest one's beliefs is subject to limitations prescribed by law which are necessary to protect the fundamental human rights of others.[43] The NZBORA also provides that rights can be limited, if doing so is prescribed by law and demonstrably justified in a free and democratic society.[44]

While the NZBORA, the UDHR and the ICCPR all jointly protect both the right to freedom of conscience and religion, this article focuses primarily on the former. This is to reflect that the provision for conscientious objection in the CSA Act allows providers to object on the grounds of their conscience.[45] It is worth noting, however, that both are complex rights which are closely related and often interdependent.[46] The fundamental difference is that conscience protects a person's moral beliefs and obligations instead of their religious views.[47] In reality the distinction is not always so clear; it may well be the case that a person's conscience is informed by their religious beliefs, and vice versa.

A Objecting on the grounds of conscience

In the recent case of *Hospice v Attorney-General*, the High Court considered the interpretation of the conscientious objection provisions in the End of Life Choice Act 2019 in relation to assisted-dying.[48] It held that the right to conscientiously object encompasses when a practitioner holds a deeply-felt belief that it is wrong for them to provide the assistance for personal, moral

39 Section 13.
40 Section 15.
41 *Universal Declaration of Human Rights*, art 18.
42 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 18(1).
43 Article 18(3).
44 Section 5.
45 See the definition of "conscientious objection" in s 2 of the CSA Act.
46 Rafael Domingo "Restoring freedom of conscience" (2015) 30 J L & Relig 176 at 181.
47 At 176–177.
48 *Hospice New Zealand v Attorney-General* [2020] NZHC 1356.

reasons, internal to them.[49] The Court acknowledged a distinction between conscientious objection and clinical judgement, recognising that conscience reflects personal values, whereas a practitioner's ethical, clinical or professional judgement is informed by their training, experience, and clinical standards.[50] Ultimately, however, the Court left open the possibility that the scope for conscientious objection could be broadened or justifiably limited in light of future circumstances.[51]

One academic has put forward that a health practitioner's refusal to provide abortions should only be characterised as *conscientious* objection if:[52]

i) the practitioner has a core set of moral beliefs;

ii) providing the abortion would be incompatible with these beliefs; and

iii) the practitioner's refusal is on the grounds of their beliefs.

B The need for protection

Failing to protect the right to freedom of conscience in the abortion services context can be harmful for medical practitioners, particularly when their conscientious (or religious) views against participating in abortion are sincerely and deeply held.[53] Performing an act that contradicts a practitioner's fundamental life views may have grave personal consequences for the practitioner, and can result in guilt, shame[54] and self–betrayal.[55] Matters of individual conscience are "intensely personal",[56] and will differ significantly between practitioners. In *Hallagan v Medical Council of NZ*, the High Court accepted that the act of arranging a referral may also violate the conscience of some objecting practitioners, which if required would nonetheless contravene their right to freedom of conscience under the NZBORA.[57]

Additionally, s 15 of the CSA Act requires employers to accommodate conscientious objection unless it would unreasonably disrupt their provision of

49 At [214(e)].
50 At [197].
51 At [215].
52 Wicclair, above n 5, at 5.
53 See, for example, Edmund D Pellegrino "The Physician's Conscience, Conscience Clauses, and Religious Belief: A Catholic Perspective" (2002) 30 Fordham Urb L J 221.
54 At 227.
55 Wicclair, above n 5, at 10–11.
56 *Hallagan v Medical Council of NZ* HC Wellington CIV–2010–485–222, 2 December 2010 at [17].
57 *Hallagan v Medical Council of NZ*, above n 56.

health services. Such a provision could arguably lead to unlawful discrimination against practitioners on the grounds of their conscientious and religious beliefs.[58] In *New Zealand Health Professionals Alliance Inc v Attorney-General,* a judgment delivered as this article was being published, the High Court held that s 15 of the CSA Act did not limit an objecting practitioner's right to be free from discrimination, but even if it did, those limits would be demonstrably justified in a free and democratic society under s 5 of the NZBORA.[59] This issue is too substantial to discuss here in depth. Other jurisdictions in which there are more stringent conscientious objection provisions have also considered the issue. For example, the European Court of Human Rights has held in Swedish cases that the refusal to employ objecting practitioners does not constitute unlawful discrimination when balanced against the importance of the right to access to abortion services.[60]

C Reasonable and justified limits

In *New Zealand Health Professionals Alliance Inc*, Ellis J held that the s 13 right to freedom of conscience is an absolute, internal right, whereas the s 15 right of every person to manifest their beliefs is subject to reasonable and justifiable limits under s 5 of the NZBORA.[61] To determine what constitutes a reasonable and justified limit on a right under s 5, the Supreme Court in *R v Hansen* adopted the Canadian *Oakes* test.[62] The stages of the *Oakes* test are:

i) Does the proposed limit serve a purpose sufficiently important to justify limiting a right?

ii) If so,

  a) Is the limiting provision rationally connected to its purpose?

  b) Does the proposed limit impair the right no more than is reasonably necessary for sufficient achievement of the purpose?

  c) Is the limit proportionate to the importance of the objective?

58 See New Zealand Bill of Rights Act 1990, s 19; and Human Rights Act 1993, s 21(c) and (d).
59 *New Zealand Health Professionals Alliance Inc v Attorney-General* [2021] NZHC 2510 at [152]–[167] and [187]–[190].
60 See *Grimmark v Sweden* ECHR 43726/17, 12 March 2020; and *Steen v Sweden* ECHR 62309/17, 12 March 2020. These cases are also discussed later in this article.
61 *New Zealand Health Professionals Alliance Inc v Attorney-General*, above n 59, at [65]–[70].
62 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [103]–[104] per Tipping J, citing *R v Oakes* [1986] 1 SCR 103.

This article now moves to consider how the current regulation of conscientious objection does not sufficiently protect and prioritise the right to healthcare. If the above test can be satisfied, further reasonable limits should be placed on the right to freedom of conscience in order to minimise its intrusion on the right to healthcare.

IV THE NEED FOR REFORM

The United Nations treaty monitoring bodies have stated that if conscientious objection is allowed, States must establish effective regulations so that it does not obstruct the right to access legal healthcare.[63] This section of the article lays out the issues with New Zealand's current law on conscientious objection under the CSA Act and argues that the right to healthcare is obstructed because of insufficient regulation of conscientious objection. This article argues that if conscientious objection is not properly regulated, it can result in the following three key problems:

i) obstruction of access to health care;

ii) a lack of dignity and independence for patients; and

iii) a health system that is discriminatory on the grounds of sex.

A Obstruction of access to healthcare

Research on the impact of conscientious objection on access to abortion in New Zealand is limited. However, a 2019 survey conducted in New Zealand among the New Zealand Fellows and trainees of the Royal Australian and New Zealand College of Obstetricians and Gynaecologists found that 14.6 per cent of practitioners were totally opposed to abortions on religious or conscientious grounds.[64] Similarly, an Australian study found that 15 per cent of health care professionals were reported as objecting to abortion in Australia.[65] The New

63 "Law and Policy Guide: Conscientious Objection" Center for Reproductive Rights <https://maps.reproductiverights.org >, citing, amongst other sources, *General Comment No 22*, above n 32, at [43].

64 Emma MacFarlane and Helen Paterson "A survey of the views and practices of abortion of the New Zealand Fellows and trainees of the Royal Australian and New Zealand College of Obstetricians and Gynaecologists" (2020) 60 Aust N Z J Obstet Gynaecol 296 at 298.

65 Louise Anne Keogh and others "Conscientious objection to abortion, the law and its implementation in Victoria, Australia: perspectives of abortion service providers" (2019) 20(11) BMC Medical Ethics 1 at 2.

Zealand Law Commission's 2018 report on abortion law reform also noted that:[66]

> While there are no official records of the number of general practitioners (GPs) who are conscientious objectors, anecdotally the Commission heard from health practitioners that *it is quite common*. The Commission was told that in some parts of the country *it can be difficult to find a GP who will make a referral*.

Additionally, a recent report by Family Planning on the use of contraception found that one in four women reported not using their preferred method of contraception for reasons including barriers in accessing healthcare, such as the costs and time involved.[67] The survey found that 290 respondents (five per cent of the group) had experienced conscientious objection from healthcare practitioners when trying to access contraception.[68] While comprehensive statistical data on the prevalence of conscientious objection to abortion in New Zealand is scarce, it is likely that rates of objection will be higher for abortion than contraception, since it is generally seen as a more contentious issue and has only recently been decriminalised. For example, a study from the United States of America conducted among pharmacists found that 17.2 per cent of respondents were unwilling to provide medical abortifacients and 7.5 per cent unwilling to provide emergency contraceptives, compared with only 0.5 per cent unwilling to provide oral contraceptives.[69]

In Victoria, Australia, legislation regulating abortion services has a similar but more stringent provision to the CSA Act for conscientious objection.[70] A Victorian study conducted into the impact of conscientious objection on access to healthcare found that access was obstructed by:[71]

i) doctors commonly failing to refer the patient to another provider;

66 Law Commission *Alternative Approaches to Abortion Law: Ministerial briefing paper* (NZLC MB4, October 2018) at 111 n 66 (emphasis added).

67 New Zealand Family Planning "Contraception Use Survey 2020" (2020) <https://familyplanning.org.nz> at 8–9.

68 At 19.

69 Laura A Davidson and others "Religion and conscientious objection: A survey of pharmacists' willingness to dispense medications" (2010) 71 Social Science and Medicine 161 at 163.

70 Abortion Law Reform Act 2008 (Vic), s 8.

71 Keogh and others, above n 65, 5–6.

ii) doctors attempting to deter or delay the patient from obtaining access;

iii) doctors attempting to make the patient feel guilty; and

iv) doctors objecting on grounds other than conscience.

This highlights the problematic nature that conscientious objection can have on access to healthcare, insofar as allowing for the situation in which patients experience conscientious objection from their practitioner. The study also noted that some objecting practitioners felt they would still be conscientiously complicit in the provision of abortion if they complied with their statutory duty to refer.[72]

Another study into the impact of conscientious objection in Italy found that it obstructed access by increasing costs, waiting times and travel distances for those seeking abortion services. Those who were economically disadvantaged were found to face higher barriers to accessing healthcare.[73] Similarly, in Ireland, limited access to abortion services was found to place significant financial burdens on pregnant persons because they then had to travel abroad to access abortions.[74] The availability of legal abortion in Ireland was also found to be compromised because of unregulated conscientious objection.[75]

At the very least, conscientious objection inevitably causes delays in healthcare to the patient seeking it,[76] which contravenes the requirement for healthcare to be delivered in a timely and effective manner.[77] Abortion is a time-sensitive health service, and in some cases, delaying access can prevent access altogether.[78] In New Zealand, unlike Victoria, practitioners only have to inform patients on how to access the contact details of the closest provider of the requested service (an *indirect* referral); they do not have to ensure that

72 At 3.

73 Tommaso Autorino, Francesco Mattioli and Letizia Mencarini "The impact of gynecologists' conscientious objection on abortion access" (2020) 87(102403) Social Science Research 1 at 14.

74 Máiréad Enright and others "Abortion Law Reform in Ireland: A Model for Change" (2015) 5 feminists@law 1 at 7.

75 At 15.

76 See Wendy Chavkin and others "Conscientious objection and refusal to provide reproductive healthcare: A White Paper examining prevalence, health consequences, and policy responses" (2013) 123 International Journal of Gynecology & Obstetrics S41.

77 New Zealand Public Health and Disability Act, s 3(1)(d).

78 *Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario* 2019 ONCA 393, 147 OR (3d) 398 at [122].

the provider is also willing and available to provide it. Systemic delays in healthcare already exist in New Zealand: one study, conducted before the 2020 reforms, found that patients waited an average of 25 days between the date they first contacted the health system and their abortion procedure.[79] These delays are exacerbated for patients who encounter objecting practitioners, which means they must then arrange to see a different practitioner and experience compounded delays in the process. The duty of indirect referral does not sufficiently mitigate the further delay arising from objecting practitioners.

Although empirical research is scarce, New Zealand is already known to have comparatively long delays in access to abortion stemming from the referral process.[80] Barriers to abortion, such as these delays, disproportionally impact minorities and those living in rural areas.[81] The Law Commission also noted that conscientious objection can disproportionately obstruct access in smaller or remote communities because pregnant persons would have to travel to find a non–objecting practitioner,[82] and bear the financial cost of such travel.

A lack of oversight mechanisms with respect to practitioners conscientiously objecting can result in doctors abusing their right to object and not providing referrals as required.[83] Surveys in the United States of America found that 15 per cent of objecting doctors did not comply with their duty to refer, and sought to delay or deny access to abortion services.[84] Further research in the United States of America found that in 2017:[85]

i) only 18 per cent of objecting practitioners would facilitate a referral;

ii) 39 per cent would just offer the name of a clinic or a doctor;

iii) 29 per cent would provide nothing; and

iv) 15 per cent would give misleading information.

79 Martha Silva, Rob McNeill and Toni Ashton "Ladies in waiting: the timeliness of first trimester services in New Zealand" (2010) 7 Reproductive Health 19 at 5.
80 Angela Ballantyne, Colin Gavaghan and Jeanne Snelling "Doctors' rights to conscientiously object to refer patients to abortion service providers" (2019) 132 NZMJ 64 at 69.
81 At 69.
82 Law Commission, above n 66, at 158.
83 See Christian Fiala and Joyce H. Arthur "'Dishonourable disobedience' – Why refusal to treat in reproductive healthcare is not conscientious objection" [2014] 1 Woman - Psychosomatic Gynaecology and Obstetrics 12 at 13.
84 Keogh and others, above n 65, at 17.
85 At 12.

In Victoria, conscientious objection was also found to be invoked by doctors who did not hold religious or conscientious beliefs that opposed abortion, and in some cases, was viewed as an opportunity to simply opt out of providing such services.[86] The scope of conscientious objection must be adequately regulated and enforced in order to ensure compliance with the broadly recognised duties that a doctor has to their patient.[87]

Conscientious objection can therefore create significant barriers for pregnant persons exercising their right to access legal healthcare, particularly when the exercise of conscientious objection is not appropriately regulated. Its disproportionate impact on those from disadvantaged, rural or minority backgrounds indicates that reproductive healthcare is not physically and economically accessible to everyone in the first instance, as required by the United Nation's right to health framework,[88] let alone in circumstances where medical practitioners conscientiously object and cause further delays. Moreover, delays within the referral process indicate that conscientious objection can effectively restrict healthcare from being provided in a timely and effective manner, as required by New Zealand law. Such barriers significantly infringe upon the right to access healthcare.[89]

B Lack of dignity and independence for health consumers

Everyone has the right to make decisions about their healthcare with dignity and independence.[90] Laws allowing conscientious objection deepen and legitimise the stigma that a person's reproductive rights are something which can be objected to.[91] A study in the United States of America found that 63 per cent of physicians felt they were ethically permitted to describe their objection to their patients.[92] When people seek abortion services, they are

86 At 16.

87 See, for example, Council of Europe Parliamentary Assembly *Women's access to lawful medical care: the problem of unregulated use of conscientious objection (Draft report)* (Social, Health and Family Affairs Committee, 2010) at [2].

88 Health Promotion Forum of New Zealand, above n 21, at 13.

89 For further comments on barriers for pregnant people, and the disproportionate effect on vulnerable people, see Law Commission, above n 66, at 121; and *Interim report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health* UN Doc A/66/354 (3 August 2011) at [24].

90 The Code, above n 31, Right 3.

91 *Interim report of the Special Rapporteur*, above n 89, at [24].

92 Farr A Curlin and others "Religion, Conscience, and Controversial Clinical Practices" (2007) 356 N Engl J Med 593 at 593.

often already experiencing stress and trauma.[93] Experiencing conscientious objection from a provider may add to the stress and stigma that they encounter[94] and may result in psychological, emotional and even physical harm to the patient.[95]

A study in the United States of America, known as the Turnaway Study, examined the mental health and wellbeing of people who had been denied an abortion. The study found that both those who had been turned away but did not give birth (either due to getting an abortion elsewhere, or a miscarriage) and those who had been turned away and did give birth, had significantly more anxiety, less self–esteem and less life satisfaction than those who were not denied an abortion. Importantly, even those who were able to access an abortion after the initial refusal suffered negative effects on their mental health, when compared with the group who did not experience a denial at all.[96] This indicates that merely instating a duty to refer on those who conscientiously object is not sufficient to protect patients from the psychological harm that the initial objection can cause.

The currently high cost of conscientious objection should not be borne by the person who is simply exercising their right to healthcare. This practice compromises the patient's rights to bodily autonomy and the dignity and independence they are entitled to as health consumers.[97] Making legal provisions for health practitioners to refuse their professional obligations based on their personal views necessarily undermines the autonomy and independence of the patient, who is entitled to request that service.[98]

Medical practitioners are also in a position of power and authority compared to patients. Patients who are seeking clinical care are inherently more vulnerable than their health practitioners, who are well and carrying out their professional duties.[99] Disparities in health literacy and privilege between health practitioners and patients would also exacerbate this power imbalance.

93 Law Commission, above n 66, at 158.
94 At 158–159.
95 International Women's Health Coalition "Unconscionable: When Providers Deny Abortion Care" (2018) <iwhc.org> at 8.
96 Antonia M Biggs and others "Women's Mental Health and Well-Being 5 Years After Receiving or Being Denied an Abortion: A Prospective, Longitudinal Cohort Study" (2017) 74 JAMA Psychiatry 169.
97 The Code, Right 3.
98 International Women's Health Coalition, above n 95, at 11.
99 Ballantyne, Garaghan and Snelling, above n 80, at 67.

This dynamic opens the door to misuses of conscientious objection,[100] which patients are not adequately protected against or necessarily able to recognise.

C Systemic discrimination on the grounds of sex

As noted at the outset, this article recognises that abortion services affect all pregnant persons, including those who may not identify as women. While the focus of this section remains on discrimination on the grounds of sex, discrimination against women, as recognised below in CEDAW, is also discussed where appropriate.

Article 12(1) of CEDAW states:

> States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

By ratifying CEDAW, New Zealand has committed to ensuring that everyone, regardless of their sex or gender, has equal access to healthcare services, including those relating to family planning. This principle can also be found in domestic law. The NZBORA gives everyone the right to be free from discrimination.[101] This includes discrimination on the grounds of sex, ethical beliefs and political opinions.[102] The Code also gives all health consumers the right to be free from discrimination when it comes to the provision of health services.[103]

By its nature, only those who are pregnant require access to abortion services. The accommodation of conscientious objection therefore creates barriers of access to health for women and pregnant persons which do not exist for those who cannot be pregnant.[104]

100 International Women's Health Coalition, above n 95, at 5.
101 Section 19.
102 Section 21(1)(a), (d) and (j).
103 The Code, Right 2.
104 See Reva B Siegel "Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression" (2007) 56 Emory L J 815.

In its General Recommendation No 24, the Committee on the Elimination of Discrimination against Women noted that:[105]

> It is discriminatory for a State Party to refuse to provide legally for the performance of certain reproductive health services for women. For instance, if health service providers refuse to perform such services based on conscientious objection, measures should be introduced to ensure that women are referred to alternative health providers.

In New Zealand, in order for a practice to be discriminatory, there must be a distinction based on one of the prohibited grounds of discrimination, and the distinction must impose a material disadvantage on the group.[106]

Importantly, discrimination can arise indirectly.[107] Although the basis for conscientious objection may not be in itself based on the prohibited grounds of discrimination — for example, practitioners are not denying the service *because* of a patient's sex or ethical beliefs — the systemic impact of the law allowing such refusal to abortion services inevitably affects the rights of women and pregnant people in a way which it does not affect the rights of men,[108] thus providing a clear distinction on the grounds of sex.

Conscientious objection indirectly imposes a material disadvantage on the discriminated group by systemically obstructing their right to health. For example, abortion is one of the most common health procedures undertaken by women, with about 30 per cent of women in New Zealand having experienced it in their lifetime.[109] One of the few gender diverse pregnancy studies found that of the 12 per cent of respondents who had been pregnant, 20 per cent of those pregnancies ended in abortion.[110] Allowing conscientious objection to such a common service obstructs the ability of women and pregnant persons to access healthcare, whereas the rights of those who cannot be pregnant

105 Committee on the Elimination of Discrimination against Women *CEDAW General Recommendation No 24: Article 12 of the Convention (Women and Health)* UN Doc A/54/38/Rev.1, chap I (1999) at [11].

106 *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [109].

107 See *Northern Regional Health Authority v Human Rights Commission* [1998] 2 NZLR 218 (HC).

108 Siegel, above n 104.

109 Abortion Supervisory Committee S*tandards of Care for Women Requesting Abortion in Aotearoa New Zealand* (Report of a Standards Committee to the Abortion Supervisory Committee, January 2018) at 1.

110 Heidi Moseson and others "Pregnancy intentions and outcomes among transgender, nonbinary, and gender-expansive people assigned female or intersex at birth in the United States: Result from a national, quantitative survey" (2020) 20 International Journal of Transgender Health 30.

remain unaffected. It is therefore institutionally discriminatory for health care providers to refuse to provide health services that disproportionally restrict the right to access healthcare in this way.[111]

Notably, the right to freedom from discrimination in New Zealand is also subject to the *Hansen* test for reasonable limits.[112] While the protection of the practitioner's right to freedom of conscience is likely to justify limiting the patient's right to freedom from discrimination to some extent, further regulations should be introduced to reduce the disadvantages faced by the discriminated group in order to satisfy the *Hansen* requirement for "minimum impairment".

Additionally, as discussed earlier, conscientious objection also creates substantially greater barriers to healthcare for patients in rural areas and those from minority or economically disadvantaged backgrounds. The negative impact of conscientious objection on access to healthcare must be minimised to ensure that the current practice does not continue to have these discriminatory effects, as prohibited by the NZBORA.[113] As it stands, the current provision for conscientious objection[114] does not minimise its disproportionate impact on women's right to access healthcare as required by art 12(1) of CEDAW.

D Shortcomings of section 14 of the CSA Act

This analysis has highlighted how the accommodation of conscientious objection can obstruct access to healthcare, impede patients' right to dignity and independence as health consumers, and result in a discriminatory system which disproportionally restricts access to healthcare on the grounds of sex. These effects must be examined alongside s 14 of the CSA Act in order to analyse how this specific provision fails to prevent these negative impacts.

This article argues that there are three key shortcomings of the CSA Act's current regulation of conscientious objection:

i) conscientious objection occurs *after* request for abortion services;

111 Gustavo Ortiz-Millán "Abortion and conscientious objection: rethinking conflicting rights in the Mexican context" (2018) 29 Global Bioethics 1 at 7. The same institutional discrimination of course would be true if men were commonly denied access to a healthcare service that was sex/gender specific to them.

112 This was common ground in *Atkinson*, above n 106, at [143].

113 Section 19.

114 CSA Act, s 14.

ii) all health practitioners who are *assisting* with the provision of abortion can object; and

iii) there is no duty of *direct* referral.

1 The timing of conscientious objections

First, s 14(2)(a) of the CSA Act provides that the health practitioner must inform the person requesting abortion services about their conscientious objection at the earliest opportunity. This creates a system where patients must first request the service from a potential objector without knowing of the objection and bear the emotional, mental, financial and operational cost of being refused the service.[115] The patient should not have to experience a refusal of their personal choice and the detrimental effects that accompany it. As is the case in some other jurisdictions, such as Italy for example, the burden should instead be on the healthcare authorities to ensure that practitioners register their conscientious objections in advance.[116]

2 All health practitioners 'assisting' with abortion may object

Secondly, s 14(1) allows practitioners who are merely assisting with the provision of abortion services to conscientiously object. The scope of this provision is broad and risks allowing conscientious objection from practitioners who are not directly involved in contraception or abortion services. It is unclear, however, what the effect of such a provision may be in practice. *Medical Law in New Zealand* suggests that the term "assisting" includes "any preparation for the abortion".[117] However, in *Hallagan v Medical Council of NZ,* the High Court took the view that "assisting" did not extend to arranging for the case to be dealt with and considered by another practitioner.[118] Other jurisdictions, such as the United Kingdom, Australia (Victoria) and Portugal, have narrowed the scope for the exercise of conscientious objection in order to protect against ambiguity and broad application, and accordingly mitigate the risk of further obstruction of access to healthcare. These jurisdictions are discussed further on in this article.

115 See International Women's Health Coalition, above n 95, at 27.
116 Autorino, Mattioli and Mencarini, above n 73, at 2–4.
117 PDG Skegg and Ron Paterson (eds) *Medical Law in New Zealand* (Brookers, Wellington, 2006) as cited in *Hallagan v Medical Council of NZ,* above n 56, at [13].
118 *Hallagan v Medical Council of NZ,* above n 56, at [10]

3 *The duty of indirect referral*

Section 14(2)(b) of the CSA Act requires the health practitioner to inform the patient of how to access the contact details of the closest provider of the requested service at the earliest opportunity. They are under no obligation to actually provide those details, and they do not have to ensure that the closest provider is also willing and able to perform the service. Indirect referrals have been considered to present less of a conflict with the beliefs of objecting practitioners, because they are thought to be less or indirectly morally complicit in the provision of the service.[119] However, indirect referrals are not sufficient to protect access to healthcare because they can result in some patients being unable to navigate the health system on their own,[120] or being refused service more than once. These issues and the potential resulting delays are particularly problematic as abortion is a time-sensitive treatment, and barriers to access are more pronounced for vulnerable people, such as those who are economically disadvantaged or located in rural areas.[121]

The United Nations treaty monitoring bodies have stated that in order to guarantee access to abortion services where conscientious objection is allowed, States must at least require referrals to practitioners who are both willing and able to provide the requested service.[122]

These three shortcomings demonstrate that New Zealand's current regulation of conscientious objection is insufficient to protect the rights of patients to access healthcare, and the law should therefore be reformed to address these issues.

V THE BALANCING ACT

The balance between two fundamental human rights is always a delicate one. On the one hand, everyone has the right to access healthcare and medical practitioners have a duty to uphold their professional obligations to patients. On the other hand, all individuals have the right to freedom of conscience and its manifestation which should not be infringed upon unless the limitation can be demonstrably justified in a free and democratic society, under s 5 of the NZBORA. Likewise, at the international level, the ICCPR provides that the

119 Wicclair, above n 5, at 37.
120 Law Commission, above n 66, at 158.
121 Louise Newman "The Compromise of Conscience: Conscientious Objection in Healthcare" (LLM Research Paper, Victoria University of Wellington, 2013) at 42–43.
122 Center for Reproductive Rights, above n 63.

right to manifest one's beliefs is subject to limitations which are necessary to protect the fundamental human rights of others.[123] Therefore, if conscientious objection is allowed, it should be sufficiently regulated so that it does not interfere with or obstruct the right of others to access healthcare.[124]

In order to find the correct balance, this article considers the *Hansen* test regarding reasonable limits. Secondly, it analyses regulatory guidance from FIGO, the WHO and the Law Commission to determine how conscientious objection should be regulated in order to better protect the right to healthcare. Lastly, it outlines the relevant law in Italy, the United Kingdom, Canada, Australia, Portugal and Sweden to observe how conscientious objection has been regulated in different countries and to compare the strength of their regulations with New Zealand's CSA Act.

A The Hansen test for reasonable limits

In order to justify the imposition of further regulations on conscientious objection, the *Hansen* test for "reasonable limits" on freedom of conscience must first be satisfied.[125]

In *New Zealand Health Professionals Alliance Inc*, Ellis J held that s 14 of the CSA Act does not engage the right to freedom of conscience nor the right to manifest one's beliefs under ss 13 and 15 of the NZBORA.[126] Specifically, freedom of conscience was not engaged by the duty to provide indirect referrals because s 13 absolutely protects a person's *internal* thought processes, unlike s 15 which provides qualified protection to the manifestations of one's beliefs through their actions or inactions.[127] Ellis J held that the provision of information (an indirect referral), as required under s 14 of the CSA Act, did not engage the notions of practice and observance of one's beliefs under s 15 of the NZBORA.[128] Her Honour went on to say that, even if s 15 were engaged, being required to comply with s 14 of the CSA Act does not interfere materially or significantly with the ability of practitioners to manifest their beliefs because the duty to provide an indirect referral is minimal and, at best, only remotely

123 International Covenant on Civil and Political Rights, above n 42, art 18(3).
124 World Health Organization *Safe abortion: technical and policy guidance for health systems* (2nd ed, 2012) at 96.
125 *Hansen*, above n 62, at [104].
126 *New Zealand Health Professionals Alliance Inc v Attorney-General*, above n 59, at [88] and [115].
127 At [86].
128 At [111].

connected to any abortion that may or may not follow.[129] Given that neither ss 13 or 15 of the NZBORA were found to be engaged by s 14 of the CSA Act, the issue of whether any limits upon them were justified did not arise. Out of an abundance of caution, her Honour addressed justification briefly, with relevant obiter dicta set out as appropriate in the *Hansen* analysis below.

1 A sufficiently important purpose

First, the proposed limits must serve a purpose sufficiently important to justify limiting a right. In its 2018 report on abortion law reform, the Law Commission considered the application of *Hansen* in relation to conscientious objection. It held that ensuring access to abortion services without delay, inconvenience and stress is likely to satisfy the requirement for a "sufficiently important" purpose to restrict conscientious objection.[130] In *New Zealand Health Professionals Alliance Inc*, Ellis J stated, obiter, that the objective of facilitating access to abortions in a timely way supports a number of fundamental and internationally recognised human rights.[131] Similarly, in the case of *Christian Medical and Dental Society of Canada*, the Ontario Court of Appeal held that the facilitation of equitable access to healthcare was a sufficiently important purpose.[132]

2 Rational connection

Secondly, the limiting provisions must be rationally connected to their purpose. The Law Commission report noted that the obstruction of access to healthcare caused by conscientious objection can impede upon women's rights.[133] The rational connection between strengthening the regulation of conscientious objection and ensuring access to abortion services is therefore sufficiently clear. If the issue had arisen, Ellis J in *New Zealand Health Professionals Alliance Inc* would have held that the duty of indirect referral under s 14 is rationally connected to the protected rights because it reduces the delay that would otherwise be caused by an objecting healthcare provider.[134]

3 Minimum impairment

Thirdly, the proposed limits must only impair the right to the extent reasonably

129 At [121]–[124].
130 Law Commission, above n 66, at 160.
131 *New Zealand Health Professionals Alliance Inc v Attorney-General*, above n 59, at [179].
132 *Christian Medical and Dental Society of Canada*, above n 78, at [101] and [106]–[108].
133 Law Commission, above n 66, at 160.
134 *New Zealand Health Professionals Alliance Inc v Attorney-General*, above n 59, at [180].

necessary for their purpose to be sufficiently achieved. The Law Commission noted that the key issues here with the *Hansen* test were likely to be minimum impairment and proportionality.[135] These were also the two contested issues in *Christian Medical and Dental Society of Canada*.[136] On the minimum impairment issue, the Law Commission expressed the view that the wider legal context of abortion law should be considered. For instance, other reforms, such as allowing the patient to self–refer, could reduce the harm of conscientious objection on access to abortion.[137] Nevertheless, the Law Commission still proposed imposing a requirement on objecting practitioners to provide direct referrals, recognising that this would provide a balance between the rights of objecting practitioners to refrain from participating, and the rights of the patients requesting abortions.[138]

4 *Proportionality*

Lastly, the limit must be proportionate to the importance of the objective. If the issue had arisen, Ellis J in *New Zealand Health Professionals Alliance Inc* would have held that, if s 14 did limit the s 15 NZBORA right, the limit was proportionate to the objective of s 14 of the CSA Act, which is to "further and enhance the enjoyment of indisputable and fundamental rights".[139] The issue of proportionality is difficult to analyse in depth because of the lack of substantial data on the degree to which conscientious objection actually impacts access to healthcare in New Zealand. One study, discussed earlier in this article, found that around 14.6 per cent of practitioners were completely opposed to providing abortion services.[140] However, this presents an area where further research is required to understand the scale of impact and allow for a more comprehensive proportionality analysis. In *Christian Medical and Dental Society of Canada*, the Ontario Court of Appeal held that the requirement to refer patients directly to a non-objecting practitioner, rather than the default medical process of a *formal* referral (where practitioners provide a formal letter of referral to, and arrange an appointment for their patient with, another practitioner), provides a reasonable compromise between the rights of patients and practitioners.[141]

135 Law Commission, above n 66, at 160.
136 *Christian Medical and Dental Society of Canada*, above n 78, at [108].
137 Law Commission, above n 66, at 160.
138 At 162.
139 *New Zealand Health Professionals Alliance Inc v Attorney-General*, above n 59, at [186].
140 MacFarlane and Paterson, above n 64, at 298.
141 *Christian Medical and Dental Society of Canada*, above n 78, at [26] and [187].

Similarly, it is argued that other proposals discussed later in this article, such as a requirement to register as an objector, are unlikely to impose any disproportionate restrictions on the rights of objecting practitioners.

B Guidelines and recommendations

1 FIGO's ethical guidelines

FIGO's position is that a practitioner's primary duty is to treat their patient, and their conscientious objections are secondary to this duty.[142] This is an important consideration, not because a strict interpretation of it arguably means objecting practitioners should be required to perform abortions in non-emergencies, but because it supports the view that practitioners should, at the very least, assist their patients in more easily accessing to healthcare by providing direct referrals. FIGO's ethical guidelines include the following:[143]

i) Practitioners are required to provide timely access to services.

ii) Practitioners have professional duties to abide by scientific and professional definitions of reproductive health services and must not misrepresent them based on their personal views.

iii) Practitioners have a right to have their conscientious objections respected, and to not be discriminated against on the basis of their views.

iv) Patients have the right to be referred in good faith to practitioners who do not object to their requested services.

v) Practitioners must provide timely care where referral is not possible, and delay would be harmful to the health and wellbeing of the patient.

142 FIGO Committee for the Study of Ethical Aspects of Human Reproduction and Women's Health *Ethical Issues in Obstetrics and Gynecology* (FIGO, October 2012) at 26.

143 At 26–27.

2 *Recommendations by the WHO*

The WHO has also offered the following recommendations on conscientious objections:[144]

i) Nations should establish national standards and guidelines on conscientious objection.

ii) A provider's right to conscientiously object should not entitle them to delay or deny access to legal healthcare.

iii) Objecting healthcare practitioners must refer the patient to a provider who is both willing and able to provide the service, in the same or another facility which is easily accessible.

3 *Recommendations by the New Zealand Law Commission*

The Law Commission's 2018 report on abortion law reform provided guidance for the CSA Act. The report offered two proposals for the accommodation for conscientious objection. Option A entailed retaining the previous law on conscientious objection, which only required objecting practitioners to inform patients that the requested abortion services could be accessed elsewhere.[145] There was no requirement to provide a referral in Option A.

Option B, which was supported by the majority of health professional bodies that had made submissions, imposed a requirement on objecting practitioners to refer the woman to another health practitioner or abortion service provider who is able to provide the service.[146] This option would have created a duty of direct referral.

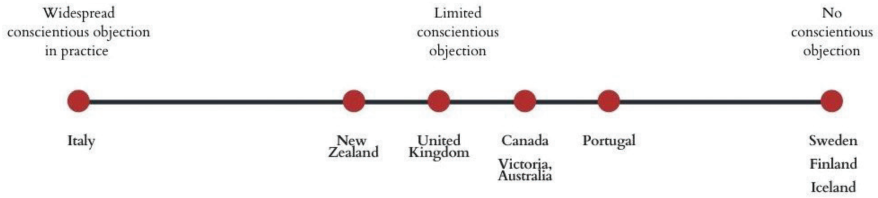
The CSA Act has enacted Option A and only imposes a duty of indirect referral.

C Overseas jurisdictions

Examining the regulation of conscientious objection in other countries provides guidance for how New Zealand legislation can better protect the right to healthcare. Jurisdictions around the world have dealt with conscientious objection to abortion in a range of different ways. It is helpful to view some of

144 World Health Organization *Safe abortion*, above n 124, at 8 and 96.
145 Law Commission, above n 66, at 161.
146 At 162.

these different approaches on a spectrum based on stringency of regulations, as set out below:



The following countries are discussed because, unlike New Zealand, they have each implemented specific regulation of conscientious objection in order to ensure the right to healthcare is sufficiently protected.

1 Italy

Conscientious objection is concerningly widespread in Italy.[147] In 2016, 71 per cent of gynaecologists, and over 85 per cent in certain regions, were registered as objectors and only 60 per cent of hospitals with obstetrics and gynaecology wards were performing abortions.[148] Despite abortion being legal, access to abortion services in Italy is severely restricted because of conscientious objection.[149] The European Committee of Social Rights declared that Italy had violated the right to health and non-discrimination by not sufficiently regulating conscientious objection.[150]

However, Italy's current regulations on conscientious objection require all objecting practitioners to formally register their objection to the local health authority and to the facility at which they work.[151] This registration process allows patients to avoid being assigned doctors that object to abortion. It also provides important statistical data on the prevalence of conscientious objection in the country, which can be used to monitor the extent to which access to healthcare is obstructed in practice.

Objecting practitioners in Italy have no obligation to refer patients to

147 Autorino, Mattioli and Mencarini, above n 73, at 4–5.
148 At 1.
149 International Women's Health Coalition, above n 95, at 10 and 14.
150 *International Planned Parenthood Federation – European Network (IPPF EN) v Italy* European Committee of Social Rights, Complaint No 87/2012, 10 September 2013.
151 See Autorino, Mattioli and Mencarini, above n 73, at 2.

another provider. In 2017, the Human Rights Committee recommended that Italy establish regulations to ensure an effective referral system.[152]

2 The United Kingdom

The Abortion Act 1967 (UK) explicitly allows for conscientious objection, but there is no express duty to refer, nor a formal registration process.[153] However, practitioners are required by professional obligations and the common law to refer patients to another provider.[154] The courts have held that conscientious objection may only be invoked by practitioners directly involved in the provision of the service, and the service must be directly related to abortion care.[155] Employers are allowed to require performance of abortion services in job descriptions.[156]

3 Canada

Abortion law in Canada is unique compared with the other jurisdictions discussed in this article because there is no specific abortion legislation. However, conscientious objections still occur.[157] In *Christian Medical and Dental Society of Canada*, the Ontario Court of Appeal unanimously upheld a professional policy which requires objecting physicians to provide an "effective referral" to patients.[158] Effective referral is "a referral made in good faith, to a *non–objecting*, available, and accessible [practitioner]".[159]

4 Victoria, Australia

Abortion is allowed in every Australian jurisdiction, although specific legal provisions vary.[160] In Victoria, s 8(1) of the Abortion Law Reform Act 2008 (Vic) provides:

> If a woman requests a registered health practitioner to *advise* on a proposed

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152 Human Rights Committee *Concluding observations on the sixth periodic report of Italy* UN Doc CCPR/C/ITA/CO/6 (1 May 2017) at [17].

153 Abortion Act 1967 (UK), s 4.

154 Chavkin, Swerdlow and Fifield, above n 76, at 58.

155 *Greater Glasgow Health Board v Doogan* [2014] UKSC 68, [2015] AC 640; and *Janaway v Salford Health Authority* [1989] AC 537 (HL).

156 Chavkin, Swerdlow and Fifield, above n 76, at 58.

157 Dorothy Shaw and Wendy V Norman "When there are no abortion laws: A case study of Canada" (2020) 62 Best Practice & Research Clinical Obstetrics and Gynaecology 49 at 56.

158 *Christian Medical and Dental Society of Canada*, above n 78.

159 At [2] (emphasis added).

160 Ashleigh Seiler and Nicole Woodrow "In reproductive health, is it unconscionable to object?" (2018) 20(2) O&G Magazine 34 at 34.

> abortion, or to *perform, direct, authorise or supervise* an abortion for that woman, and the practitioner has a conscientious objection to abortion, the practitioner must –
>
> (a) inform the woman that the practitioner has a conscientious objection to abortion; and
>
> (b) refer the woman to another registered health practitioner in the same regulated health profession *who the practitioner knows does not have a conscientious objection* to abortion.
>
> (Emphasis added.)

This provision imposes an express requirement on objecting practitioners to refer their patient directly to another practitioner whom they know does not object. Such a requirement reduces the impact of conscientious objection on access to healthcare, because it avoids the possibility of a patient having to experience subsequent objections or being unable to navigate the health system on their own. Victoria's scope for conscientious objection is also more specific than New Zealand's, because only practitioners who are advising on, performing, directing, authorising or supervising an abortion can object.

5 Portugal

Rates of conscientious objection in Portugal are not well documented. Despite this, abortion is considered to be accessible because of Portugal's stringent regulation of conscientious objection. First, only practitioners who are directly involved in the provision of abortion care can object. Practitioners must provide their hospital's director with a written statement on their reasons for objecting. They are also required to refer patients to a non–objecting provider of the requested service. Lastly, at least one non–objecting doctor must be available in all gynaecological departments.[161]

6 Sweden

Sweden, like Iceland and Finland, has no provision for conscientious objection in healthcare.[162] Institutions and employers can allow exemptions to their

161 International Women's Health Coalition, above n 95, at 23.

162 At 23. See also Christian Fiala and others "Yes we can! Successful examples of disallowing 'conscientious objection' in reproductive health care" (2016) 21 Eur J Contracept Reprod Health Care 201.

employees,[163] but it is not a right protected by law.[164] Abortion services are treated as professional obligations and compulsory training is provided to practitioners. Students who oppose performing abortions are often discouraged from specialising in the fields of obstetrics, gynaecology and midwifery. Hospitals can refuse to hire practitioners who object to providing abortions.[165]

In the case of *Federation of Catholic Families in Europe (FAFCE) v Sweden*, the Federation of Catholic Families in Europe challenged Sweden's legal position on conscientious objection to the European Committee on Social Rights.[166] The Committee held that neither the right to health nor the right to freedom from discrimination under the European Social Charter entitled health practitioners to conscientiously object to providing abortion services.

Sweden has also featured in two cases before the European Court of Human Rights. In *Grimmark v Sweden*, and *Steen v Sweden*, the applicant nurses both argued that not allowing conscientious objections was a breach of the right to freedom of conscience and that refusal to hire them on the grounds that they objected to providing abortions was discriminatory. The European Court of Human Rights held, on the first issue, that the law requires abortions to be carried out as soon as possible. To that end, providing high quality healthcare for patients seeking abortions constitutes a legitimate and objectively justifiable goal to limit the right to freedom of conscience.[167] On the second issue, the Court held the employment criteria were both appropriate and necessary to fulfil the legitimate purpose of providing abortion services swiftly.[168] The Court found that refusal to hire conscientious objectors did not constitute unlawful discrimination against Christians, because allowing these objections could impinge upon the right to access abortion.

D Conclusion

In *New Zealand Health Professionals Alliance Inc,* the High Court held that the current CSA Act does not engage ss 13 and 15 of the NZBORA and, if it does, any limit on those rights would be justified.[169] This section has firstly argued

163 International Women's Health Coalition, above n 95, at 17.
164 At 23.
165 At 23.
166 *Federation of Catholic Families in Europe (FAFCE) v Sweden* European Committee of Social Rights, Complaint No 99/2013, 17 March 2015.
167 *Steen v Sweden*, above n 60, at [20]; and *Grimmark v Sweden*, above n 60, at [25].
168 *Steen v Sweden*, above n 60, at [21]; and *Grimmark v Sweden*, above n 60, at [26].
169 *New Zealand Health Professionals Alliance Inc*, above n 59, at [111]–[124].

that further regulation of conscientious objection in the CSA Act would satisfy the *Hansen* test for reasonable limits on the right to freedom of conscience, noting that a gap in sufficient empirical data exists which currently limits the undertaking of a proportionality analysis. Secondly, upon examination of the above guidance on conscientious objection and overseas legislative frameworks, it is evident that New Zealand requires more robust regulation of conscientious objection in healthcare in order to better balance the various rights at stake. This analysis has been used to form the basis for this article's proposed reforms, set out below.

VI PROPOSALS

A Registration of objecting practitioners

As in Italy and Portugal, New Zealand should impose a requirement on practitioners to register their status as an objector in advance. This would protect patients from having to experience avoidable difficulties, such as delays or stigma, that they may face when encountering an objecting practitioner.[170] This would also promote transparency and eliminate the element of surprise for the patient.

Section 18 of the CSA Act already requires the Director–General of Health to compile and maintain a list of abortion service providers. It is recommended that the CSA Act introduce a requirement on objecting practitioners to register their status as an objector on this list, in order to prevent patients seeking abortion services from them. Although doing so may raise concerns around the privacy of practitioners, the list is managed by the Ministry of Health and is only accessible on request.[171] This may provide a sufficient balance between the privacy of practitioners and access to healthcare. However, a less effective alternative (which avoids privacy concerns) may be to require objecting practitioners to remove their name and contact details from the list of abortion service providers. This alternative is less favourable because it does not provide patients with positive disclosure of objecting practitioners.

Additionally, requiring practitioners to register their objections would also provide the Ministry of Health with essential data on the prevalence of conscientious objection to abortion in New Zealand. This information would be both necessary and valuable in allowing the Ministry of Health to monitor

170 Newman, above n 121, at 33 and 40–41.
171 Section 18(3).

and, if required, rectify any obstructive impact of conscientious objection on access to healthcare.

B The scope of conscientious objection should be narrowed

As is the case in Victoria, the United Kingdom and Portugal, the scope for conscientious objection should be narrowed in New Zealand. The current scope for all health practitioners "providing or assisting with providing" abortion services is vague and does not clearly specify how involved the objecting practitioner must be in order to object. It is recommended that this provision be narrowed to avoid ambiguity, obstruction of access to healthcare and the risk of future litigation. This recommendation could be implemented by changing the provision to apply only to practitioners who are "directly involved" in providing abortion services (including a definition of this term in legislation) or, in the alternative, practitioners who are "advising on, performing, directing, authorising or supervising" an abortion (as in Victoria, Australia).

C A requirement to provide effective referrals should be instated

As in Victoria, Canada and Portugal, and as recommended by FIGO, the WHO and the United Nations treaty monitoring bodies, New Zealand should instate a requirement on objecting practitioners to provide referrals that are both direct and effective. An effective referral is one considered to be made in good faith to a non-objecting, available and accessible health practitioner.[172]

The responsibility to ensure that a patient is able to access the service objected to should fall on the objecting practitioner, rather than on the patient.[173] This approach has been widely accepted as integral to minimising the intrusion of conscientious objection on access to healthcare and minimising consequent harm to persons seeking an abortion. It is recommended that the Canadian definition of an effective referral (as set out above) be adopted in the CSA Act.

Alternatively, practitioners could be required to refer to another health practitioner whom they reasonably believe does not object to providing the requested service,[174] or to a health practitioner whom the objecting practitioner

172 This is the definition adopted by the College of Physicians and Surgeons of Ontario: *Christian Medical and Dental Society of Canada*, above n 78, at [2].

173 Newman, above n 121, at 42–43.

174 At 46.

knows does not object to providing the requested service (as in Victoria, Australia).[175]

This recommendation raises concerns around whether requiring practitioners to provide direct referrals still constitutes a breach of their right to freedom of conscience. It has been argued that practitioners who provide indirect referrals are less causally responsible for the provision of abortion services than practitioners who provide direct referrals. Theoretically, however, a heightened degree of causal responsibility does not necessarily mean an increase in moral responsibility. It may well be the case that both direct and indirect referrals have the same moral impact.[176]

In any case, Ellis J in *New Zealand Health Professionals Alliance Inc* held that the duty to provide indirect referrals under s 14 of the CSA Act does not engage the practitioners' rights to freedom of conscience (or religion) or manifestation of their beliefs.[177] Though direct referrals were not in issue in the case, Her Honour went on to say that an obligation to provide a *direct* referral is rightly regarded as the quid pro quo of the right to conscientiously object at all.[178] In the case of *Christian Medical and Dental Society of Canada*, the Ontario Court of Appeal held that a requirement to provide direct referrals to non–objecting practitioners satisfied the *Oakes* test and was therefore a reasonable limit that is demonstrably justified in a free and democratic society.[179]

VII CONCLUSION

The moral and ethical dilemma posed by conscientious objection in healthcare is not new, nor is it black and white. This area of law presents a challenging conflict between the rights of patients to access legal healthcare and the rights of practitioners to object to performing services which are incompatible with their beliefs. The fairest balance between rights lies in retaining conscientious objection, but only where it is appropriately regulated so that it does not infringe upon the right to healthcare to the degree and extent that it can currently.

This article has revisited the legal debate on conscientious objection in healthcare in order to contextually examine New Zealand's recent abortion

175 Abortion Law Reform Act (Vic), s 8(1)(b).

176 Steve Clarke "Conscientious objection in healthcare, referral and the military analogy" (2017) 43 J Med Ethics 218 at 221.

177 *New Zealand Health Professionals Alliance Inc v Attorney-General*, above n 59, at [88] and [115].

178 At [180].

179 *Christian Medical and Dental Society of Canada*, above n 78, at [187].

law reform in light of the amendments made by the ALA. It has found that inadequately regulated conscientious objection can lead to obstruction of access to healthcare, creating delays and barriers to access which are likely disproportionally greater for women and pregnant persons in rural and lower socio-economic contexts. It also strips women and pregnant persons of their dignity and independence and creates an institutionally discriminatory health system. On close examination of the specific regulations on conscientious objection in New Zealand, it is evident that a stronger regulatory framework is required to protect against such intrusions on the right to healthcare.

Guided by the *Hansen* test, various professional bodies and overseas jurisdictions, this article has offered a range of proposals to better regulate conscientious objection in New Zealand. Specifically, this article has argued that the CSA Act should be amended to require practitioners to register their objections, to narrow the scope of practitioners who can object, and to impose a duty of direct, rather than indirect, referrals.

Overall, the key question is whether the recent reform of abortion law in New Zealand has struck the correct balance between the rights of patients to access healthcare and the rights of practitioners to freedom of conscience. This article has advocated that the current balance does not appropriately protect the right to healthcare in New Zealand and has proposed reforms to provide a fairer balance between the two fundamental human rights.

THE LENS THROUGH WHICH WE LOOK
What of tikanga and judicial diversity?

Chief Judge Christina Inglis*

This paper was delivered by Chief Judge Inglis to the Employment Law classes at Victoria University on 11 May 2021 and the University of Otago on 27 May 2021. The paper has had minor amendments made for publication.

I WHAT OF TIKANGA?

It is fair to say that we have tended to view employment law and practice through a largely single focussed lens. Workplaces in Aotearoa are not, and have never been, one dimensional - nor are employers and employees. To a degree, the Employment Relations Act 2000 (the Act) recognises this, including by requiring the Court to measure the justification for an employer's actions against the yardstick of what a fair and reasonable employer could have done in all of the circumstances.

What might fairly and reasonably be expected within an employment relationship in Aotearoa in 2021? And might it be time to refresh our imbedded approaches to dispute resolution? Might tikanga Māori have a role to play?

Can I begin by making it clear that I claim no expertise in tikanga Māori. My purpose is not to try to set out a roadmap for a possible way forward but to encourage further thought and reflection about the possibilities that tikanga has to offer in employment law and practice.[1]

The Supreme Court has recently dipped its toes into the issue in *Ellis v R*,[2] described as a landmark moment in New Zealand legal history, although the reasons for the decision have yet to be released.

* Chief Judge of the Employment Court, New Zealand. I would like to record my thanks to Michael Kilkelly, Judges' Clerk, for his assistance in the preparation of this paper. Any mistakes are mine, not his.

1 Noting the need to avoid a temptation to equivocate tikanga principles to Pākehā legal concepts and labour issues.

2 *Ellis v R* [2020] NZSC 89. See also Meriana Johnsen "Supreme Court hears why appeal of deceased sex offender Peter Ellis should go ahead" (25 June 2020) Radio New Zealand <www.rnz.co.nz>.

Peter Ellis was a childcare worker. In 1993, he was convicted of a number of child sex offences; three of which were subsequently quashed. A second appeal against the remaining convictions was dismissed by the Court of Appeal in 1999. In 2019, Mr Ellis was granted leave to appeal against those remaining convictions by the Supreme Court but passed away before the appeal could be heard. The issue for the Court was focussed on whether or not Mr Ellis' appeal should still be heard given his death. Following argument at the original hearing, the Court sought further submissions from counsel on whether tikanga was relevant to any aspects of their decision on:[3]

i) whether the appeal should continue;

ii) if so, what aspect of tikanga; and

iii) if relevant, how tikanga should be taken into account.

All of this is interesting, including for present purposes:

i) tikanga was not raised by the parties. Submissions on the matter were sought by the Supreme Court independent of any request from the parties to do so;

ii) the Court invited Te Hunga Rōia Māori o Aotearoa (the Māori Law Society) to intervene and make submissions;

iii) Mr Ellis was Pākehā and did not appear to have had a strong connection or affinity with Māori culture;[4] and

iv) the arguments presented did not appear to have been premised on legislation which incorporated the Treaty of Waitangi or legislated for the application of Treaty principles and/or tikanga.

Until the substantive decision is released, the approach to the application of tikanga and its relationship to the common law remains to be seen.[5] That should not however hold up the conversation. Might tikanga Māori principles

3 Supreme Court of New Zealand "Peter McHugh McGregor *Ellis v The Queen* (SC 49/2019)" (press release, 11 June 2020).

4 It is this aspect of the Court's approach which distinguishes itself from previous cases such *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 or *R v Mason* [2012] NZHC 1849 that engaged with tikanga in the context of proceedings which involved Māori parties.

5 At a panel featuring counsel involved in the case, the idea of a two distinct but interwoven "threads" as sources of law – tikanga and the common law – was widely discussed.

be appropriately engaged in the broad range of cases coming before the Employment Court or does the Court need to wait until a case presents itself for determination where one or other or both parties are Māori? Might tikanga Māori principles have a much earlier role to play, within the employment relationship itself?

What is tikanga Māori? Read "Lex Aotearoa" for the answer.[6] There, tikanga is described as the first law that existed in Aotearoa prior to colonisation:[7]

> …to understand tikanga one must first understand the core values reflected in its directives. It must be remembered that tikanga Māori is law designed for small, kin-based village communities. It is as much concerned with peace and consensus as it is with the level of certainty one would expect of normative directives that are more familiar in a complex non-kin-based community. In a tikanga context, it is the values that matter more than the surface directives. Kin group leaders must carry the village with them in all significant exercises of legal authority. A decision that is unjust according to tikanga values risks being rejected by the community even if it is consistent with a tikanga-based directive.

Tikanga encompasses the interplay of custom, spirituality, lore, procedure, rules and behaviours deeply embedded in the social context.[8] In simple terms, it has been described as setting out accepted rules as to how certain things should be done and ensuring that what is being done meets the standard of being tika (right) and pono (true to the culture and looking right).[9]

The second law is described as the law brought to New Zealand by European settlers which was substantially based on economic factors - contracts, not kinship; and which largely side-lined tikanga.[10]

The third law is hypothesised as the intertwining of the first law (tikanga) with the second law. It does not envision a binary approach requiring each

6 Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Wai L Rev 1.

7 At 3.

8 "Tikanga" Māori Dictionary <www.maoridictionary.co.nz>.

9 Hirini Moko Mead *Tikanga Māori: Living by Māori Values (Revised Edition)* (Huia Publishers, Wellington, 2019) at 14-15.

10 Williams, above n 6, at 6.

New Zealand lawyer to be well trained in conflict of law principles. Instead, it envisions a hybrid approach:[11]

> The recognition of custom in the modern era is different. It is intended to be permanent and, admittedly within the broad confines of the status quo, transformative. For that reason, I consider that this modern period represents a third law, different both from the first law of Aotearoa and the second law of New Zealand, the latter so intent on destruction of its predecessor. This third law is predicated on perpetuating the first law, and in so perpetuating, it has come to change both the nature and culture of the second law. And it is at least arguable therefore that the resulting hybrid ought to be seen as a thing distinct from its parents with its own new logic. I do not have time to trace every subcategory of law in which a Māori dimension can be found, but it is worth tracking the big ones. They provide excellent examples of the tensions in this new fused system: the push/pull of what is after all a very human process of law-making and nation-building – or perhaps law-making as nation-building.

I suggest that the Employment Court, and those appearing before it, have yet to really grapple with tikanga, much less its potential. In the cases which have touched on the role of tikanga, most have involved Māori employers and employees with governance structures based on tikanga. It appears that the Employment Court has never engaged with tikanga in cases where one of more of the parties were not Māori – in other words, tikanga has not been engaged with as a thread of New Zealand's common law but rather only as a term or reasonable expectation of a Māori-oriented employment relationship.

The lack of deeper or wider engagement may be underpinned, at least to some extent, by the way in which the legislative framework is crafted. In this regard, the only mention of tikanga is in sch 1B of the Employment Relations Act (which deals with mutual obligations during collective bargaining in the public health sector).[12] And that is also the only point at which the Treaty of Waitangi is mentioned. This can be contrasted with other areas of the law. For example, the Oranga Tamariki Act 1989, where the purpose and principles

11 At 12. For an understanding of how this third law is developing see also Joseph Williams, "Decolonising the law in Aotearoa: Can we start with the law schools?" (FW Guest Memorial Lecture, University of Otago, Dunedin, 22 April 2020).

12 Employment Relations Act 2000, sch 1B cl 10.

reference mana tamaiti, whakapapa and whanaungatanga,[13] or the Resource Management Act 1991 with its requirement that particular regard be given to kaitiakitanga.[14] In both of those jurisdictions, elements of tikanga have been built into the legislative framework.

The slim pickings in this jurisdiction, in terms of the volume of case law, may also be contributed to by the very low number of cases coming through to the Court involving Māori. The statistics are of considerable concern. They raise serious questions for the employment institutions to reflect on, seek to find answers to, and then address. All of this is pressing, but for another paper.

The apparent disconnect with tikanga in the employment sphere may also be explained by the fact that the concept of employment, as we understand it, did not exist in pre-colonial Māori society.[15] Tikanga Māori emphasises a form of collectivism which contrasts with the individualistic approach of the Western system.[16] The traditional common law concept of the master-servant relationship lacks compatibility with such a worldview. But the common law has moved past the master-servant conception of employment. Where the common law goes may well be informed by tikanga. That would require us to take a more holistic view, rather than searching for specific protocols or corresponding Māori concepts dealing with employment relationships. We may not have to look far. It is, for example, immediately apparent that a number of tikanga values have remarkable synergies with those underlying present-day employment relationships.[17] The importance placed, particularly by whanaungatanga, on relationships and interconnectedness may have particular relevance in the ongoing development of the law, which has for some time been redefining, and refocusing away from, the old paradigms of employment relationships and a strictly contractual approach.[18]

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13 Oranga Tamariki Act 1989, ss 2, 7 and 13.

14 Resource Management Act 1991, s 7(a).

15 Brian Easton "Economic history - Early Māori economies" (11 March 2010) Te Ara- the Encyclopedia of New Zealand <www./teara.govt.nz/>.

16 Eddie Durie "The Land and the Law" Jock Phillips (ed) Te Whenua Te Iwi, The Land and the People (Allen & Unwin and Port Nicholson Press, Wellington, 1987) 78.

17 See Law Commission Māori Custom and Values in New Zealand (NZLC SP9, 2001) at 28-40 for a discussion of these values.

18 Ani Bennett and Shelley Kopu "Applying the duty of good faith in practice, in a way consistent with Te Ao Māori, Treaty and employment law obligations" [2020] ELB 114; See also Christina Inglis, Chief Judge of the Employment Court of New Zealand "Defining good faith (and Mona Lisa's smile)" (paper presented to the Law @ Work Conference, Auckland, 30 July 2019).

Employment law concepts and practices such as good faith may be seen to have close alignments with tikanga. But while the Court has made it clear that good faith obligations require an employer to have some level of cultural awareness, (for example in *OCS Limited v Service and Food Workers Union Nga Ringa Tota Inc*, Judge Shaw found that a good employer would have been alert to the cultural sensitivity of Samoan workers when attempting to introduce new technology[19]), it may be said to require more. In this regard, it is notable that the concept of good faith in employment relationships is broad; it is not strictly defined.[20] It has been observed that:[21]

> The Employment Relations Act 2000 does not refer expressly to a definition of good faith; rather simply stating that it is broader than the "implied obligations of trust and confidence" and requires responsiveness and communication between the parties, with a directive to be active and constructive in that relationship. Accordingly, the legislation leaves a wide berth of interpretation.
>
> Te Ao Māori, through Tikanga Māori, provides a constructive response to that "berth of interpretation". As Tikanga Māori has at its heart relationships and values, both critical components of an employment relationship, it provides a foundation in which both employees and employers may measure their compliance with the duty of good faith.
>
> Importantly, it would be an error to limit the application of the duty of good faith in a way that is consistent with Te Ao Māori to only those Māori organisations and/or employees that whakapapa Māori. Such principles are not restricted to Māori and as a result should not be offered as an "alternative" to "normal" processes. Rather, values and perspectives of good faith that are consistent with Tikanga Māori are beneficial for all; acknowledging and enhancing both employee and workplace. What will be required, however, is a shift in perspective for all those in leadership to represent and apply such values in an authentic manner.

A number of areas in which tikanga may be of particular relevance are identified, including mediation, disciplinary investigations, end of employment and performance review/management. What is noteworthy, but probably not

19 *OCS Limited v Service and Food Workers Union Nga Ringa Tota Inc* [2006] ERNZ 762 at [95]-[96].

20 *NZ Amalgamated Engineering Printing & Manufacturing Union Inc v Carter Holt Harvey Ltd* [2002] 1 ERNZ 597.

21 Bennett and Kopu, above n 18, at 116.

surprising, is that none of these potentially fertile areas for the weaving in of tikanga are focussed on the adversarial components of employment law settings. Rather they lie at the "dispute resolution" stage.

In situations like redundancy and performance management, a good faith approach currently requires substantive justification and procedural fairness. However, as Shelley Kopu and Ani Bennett have posited, these concepts do not directly address the impact felt by the individual on their mana, and mamae (hurt) and whakamā (shame) are almost always consequences of such actions.[22] It has been suggested that where employers are taking actions such as confirming a redundancy, there is still an opportunity, and perhaps an obligation, to do so in a manner which minimises any negative impact on the mana of that person; avoiding default approaches such as impersonal letters and being aware of the fact that a decision of this sort will likely impact not just the individual but the collective.[23]

Mediation is often referred to as the most tikanga compatible approach to conflict resolution. Solutions which reflect Māori values are described as tending to be both more creative and long-lasting whilst preserving future relationships between the parties.[24] While parties to employment relationship disputes are able to request that Mediation Services provide a Māori mediator and that the mediation take place on a marae, ought we to be thinking more broadly - not simply at how mediation can better accommodate Māori but if and how tikanga principles might be inbuilt in the same way as the well-established common law principles of fairness and reasonableness?

And might remedies be looked at through a refreshed lens, more closely interrogating how mana and ea (balance) might be restored and why that might be important? Might the measure for the unjustified loss of a job be seen in much more than purely financial terms?

Employment relationships are generally regarded as one of the most important relationships a person has in their lives. They are dynamic, as is the law which regulates them. The empowering statute injects much flexibility into the legal framework. That enables the law to be applied in a way which responds to developments in the way we work, and the society in which work is undertaken.

22 At 116.
23 At 116.
24 Carwyn Jones "Māori Dispute Resolution: Traditional Conceptual Regulators and Contemporary Processes" 4 VUWLRP 24.

All of this is a long way of suggesting that in relation to employment law and practice, in Aotearoa 2021, it may be time to replace the monocle with a fresh pair of spectacles.

II JUDICIAL DIVERSITY

If we are thinking of changing the monocle for a fresh pair of spectacles, what might that mean for the judiciary itself?

It is now, I hope, well accepted that it is important that the judiciary reflects the society it serves. As Lady Hale said at a recent international conference, diversity on the bench - across all Courts - is vitally important for:[25]

i) democratic legitimacy; and

ii) better decision making.

At the same conference, our Chief Justice emphasised the need to have different voices heard on each bench in each court, including the appellate courts. That, she suggested, is a key component of developing a broad judicial understanding of the complex circumstances of the law and of recognising the people coming before the courts.[26] Others have expressed the concern in terms of legitimacy, that a legal system is challenged when those whose role it is to create and enforce the law systematically underrepresent the more disadvantaged sectors of society.[27]

What might attract a broader range of people to consider a judicial career? Lady Hale emphasised the need for an open and transparent merit-based appointment system; coupled with encouraging lawyers from all walks of legal life and background experience to think about a judicial life; applying the concept of legal merit in the broadest form.

This echoes what I think is a growing awareness that legal ability is not simply reflected in an academic transcript of grades[28] and that the path is not

25 Lady Hale, Former President of the Supreme Court of the United Kingdom (panel discussion at the International Association of Women Judges' 15th International Biennial Conference: Celebrating Diversity, 9 May 2021).

26 Helen Winkelmann, Chief Justice of the Supreme Court of New Zealand (panel discussion at the International Association of Women Judges' 15th International Biennial Conference: Celebrating Diversity, 9 May 2021).

27 Eli Wald "A Primer on Diversity, Discrimination and Equality in the Legal Profession or Who is Responsible for Pursuing Diversity and Why" (2011) 24 Geo J Legal Ethics 1079 at 1101.

28 Imogen Little "Socio-economic Diversity in New Zealand Law Schools: A Case for Adopting a More Nuanced Approach to Admission Schemes" [2020] 3 NZ L Rev 335 at 350-351.

the same for everyone - for some it is well manicured, brightly lit and inclines gently to a clearly-defined end point. For others the track is obscured, riddled with potholes, steep and slippery. Many come from a background that does not have university study, a legal career and a role as a judge as a well-defined pathway. All of this suggests that further thought might usefully be given to the structures and the related ideological underpinnings which underlie the traditional career path of a lawyer.[29]

In doing so, it is important to view judicial diversity, not simply as an endpoint, but as the outcome of a dynamic process that stretches all the way back to high schools and the career choices that those from diverse backgrounds feel empowered to make. Understanding where the barriers lie and devising creative solutions are likely to be key pieces of the puzzle.[30]

In discussing Māori underrepresentation in the legal profession, Keely Gage (a student at Victoria University) recently wrote in the Employment Law Bulletin that:[31]

> It is hard to aspire to be something that you cannot see.

The story she tells about her pathway as a law student will resonate with others:[32]

> For any new graduate, joining the legal profession is nerve-wracking, but this is even more so as a young Māori person. Many of my Pākehā peers have to look no further than their own family to find someone they can share experiences with, ask advice of, and gain institutional knowledge and connections from. They know someone who was, at some point, in their exact position.
>
> It is an isolating feeling to know before you have even entered the workforce that, statistically speaking, the chances of working with, or for, someone like you are extremely low. … The legal profession is a high stress environment

29 See Joseph Williams, "Decolonising the law in Aotearoa: Can we start with the law schools?" (FW Guest Memorial Lecture, University of Otago, Dunedin, 22 April 2020).

30 See for example, Brian Opeskin "Dismantling the Diversity Deficit: Towards a More Inclusive Australian Judiciary" in Gabrielle Appleby and Andrew Lynch (eds) The Judge, the Judiciary and the Court: Individual, Collegial and Institutional Judicial Dynamics in Australia (Cambridge University Press, Sydney, 2020) 83 at 107; Little, above n 29 (for an analysis of these issues as they relate to law schools).

31 Keely Gage "Māori underrepresentation in the legal profession" [2020] ELB 86 at 86.

32 At 87.

> already but the added layer of isolation due to underrepresentation can weigh heavily on Māori.

Deputy Chief Judge Caren Fox of the Māori Land Court has previously identified the following as barriers to the career progression of wāhine Māori:[33]

i) Barriers within the structure and culture of the profession;

ii) Gender perceptions;

iii) Working arrangements and motherhood;

iv) Confidence to act and/or to be at the table (a feeling she later describes as a form of imposter syndrome); and

v) Lack of role models and role modelling for wāhine Māori, (the counter-factual position being that wāhine Māori in senior roles are required to be all things to all people.)

Much is currently being done to address the judicial diversity deficit. None of it is straightforward but encouraging those who may not have thought of judging as a potential career path is an important part of the equation. So, can I leave each of you with one introspective question to ponder:

> Have you thought of the possibility of a judicial career and if not, why not?

You might, after honest (rather than self-doubting) reflection, find that the particular cocktail of attributes, skills and life experience that you have would suit you very well to the judging role.

The role of a judge is one I can genuinely commend – it is endlessly interesting, it is a privilege and it provides an opportunity to serve the community in a meaningful way.

33 Deputy Chief Judge Caren Fox "Mana wāhine – strategies for survival – Māori perspectives" (speech to Hui-a-Tau Conference, 5 September 2015). See too Georgia Neaverson "Are Māori lawyers well-represented in NZ firms?" (13 March 2021) NZ Lawyer www.thelawyermag.com.

A FEMINIST, HUMAN RIGHTS AND INDIGENOUS CRITIQUE OF THE HOLIDAYS (BEREAVEMENT LEAVE FOR MISCARRIAGE) AMENDMENT ACT 2021

Fiona Thorp[*] and Felicity Ware[**]

This article takes a critical view of the Holidays (Bereavement Leave for Miscarriage) Amendment Act 2021, supporting its important step towards providing a compassionate response to people who have suffered a miscarriage or stillbirth, but arguing that it did not go far enough. This article briefly outlines the preceding law and the new provisions. It then considers the legislation from a feminist and human rights standpoint, before examining Te Tiriti o Waitangi and broader te ao Māori implications of the legislation. Finally, the authors recommend that Parliament amend the Holidays Act 2003 to extend bereavement leave to people who have had an abortion and observe that any such amendment should be considered in light of Te Tiriti and other relevant cultural considerations.

I INTRODUCTION

> *People deserve support, compassion and respect no matter what the outcome of a pregnancy and no matter what their decisions around reproduction.*[1]

On 30 March 2021, Parliament passed the Holidays (Bereavement Leave for Miscarriage) Amendment Act 2021 (the Act). This extended the scope of paid bereavement leave in Aotearoa New Zealand to include entitlement to three days' leave following a miscarriage or stillbirth. However, the Act is deficient

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1 Family Planning "Submission to the Education and Workforce Committee on the Holidays (Bereavement Leave for Miscarriage) Amendment Bill (No 2) 2020" at 2.

in two respects: it does not offer the same entitlement to people who have had an abortion, and it fails to consider the indigenous rights of Māori in Aotearoa New Zealand.

In March 2020, Parliament passed the Abortion Legislation Act 2020, which decriminalised abortion in Aotearoa New Zealand and permitted free access to abortion for up to 20 weeks' gestation. This legislation heralded a new era in which abortion is treated as a health issue, reproductive autonomy is enabled and the social stigma around abortion is broken down. However, the recent legislative amendment to provide bereavement leave following a miscarriage or stillbirth has fallen short of this benchmark, instead furthering social division between reproductive decisions.

While the Act is a step in the right direction, this article argues that there are still issues with this reform. This article briefly outlines the previous law and the new provisions. It then considers the legislation from a feminist and human rights standpoint, before examining Te Tiriti and broader te ao Māori implications of the legislation. Finally, the authors recommend that Parliament amend the Holidays Act 2003 to extend bereavement leave for loss of a pregnancy to people affected by an abortion.[2] Any amendment should consider a Māori perspective as the distinct indigenous peoples of Aotearoa New Zealand and the impacts of the proposed changes on their self-determination and cultural preferences.

Separately to bereavement leave, paid parental leave has already been available to people following stillbirth after 20 weeks of pregnancy.[3] This article therefore relates predominantly to pregnancy loss before 20 weeks' gestation and abortions at any stage of pregnancy.

II PREVIOUS LEGAL POSITION

Entitlement to bereavement leave under New Zealand law is dealt with in pt 2, sub-pt 4 of the Holidays Act. An employee is entitled to bereavement leave after they have worked for their employer continuously for six months[4] or if

2 To acknowledge that not all people who become pregnant identify as women, this article adopts gender-neutral language, unless quoting or referring to another source that uses gendered terms, or referring to research that has been undertaken using gendered groups.

3 Parental Leave and Employment Protection Act 1987, pt 7A; and Births, Deaths, Marriages, and Relationships Registration Act 1995, s 2.

4 Holidays Act 2003, s 63(1)(a).

they have, over a period of six months, worked for their employer for:[5]

i) at least an average of 10 hours per week during that period; and

ii) no less than one hour per week during that period or no less than 40 hours per month during that period.

Section 63(3) of the Holidays Act provides the option for an employer and employee to agree for bereavement leave to be taken in advance of that entitlement date. Under the previous provisions, the entitlement was granted to spouses or specified close family members of the deceased, but for other individuals it was left to an employer's discretion as to whether an employee had suffered a bereavement.[6]

If an employee suffered one of the specified bereavements and met the employment threshold, they would be entitled to three days' paid bereavement leave. Under the previous provisions, employees were entitled to bereavement leave on the death of the employee's child,[7] but it was unclear whether this extended to deaths as a result of miscarriage or stillbirth. This ambiguity left some people in the difficult position of entering into disputes with their employers regarding their entitlement to bereavement leave, at what was a profoundly sensitive time in their lives.[8]

III HOLIDAYS (BEREAVEMENT LEAVE FOR MISCARRIAGE) AMENDMENT ACT 2021

The Holidays (Bereavement Leave for Miscarriage) Amendment Act 2021 extended the scope of paid bereavement leave in Aotearoa New Zealand to include bereavement as a result of miscarriage or stillbirth.

A Background to the Act

The Holidays (Bereavement Leave for Miscarriage) Amendment Bill (No 2) (the Bill) was introduced to Parliament in a Member's Bill on 27 June 2019 submitted by Ginny Andersen MP, of the Labour Party. The Bill was passed unanimously by Parliament and received Royal assent on 30 March 2021. This was the Bill's second iteration.

5 Section 63(1)(b).
6 Section 69(2)(a)–(b).
7 Section 69(2)(a)(iii).
8 (10 December 2019) 743 NZPD 15787.

The Bill stemmed from the efforts of Kathryn van Beek.[9] After suffering a miscarriage in 2016, Ms van Beek contacted the Ministry for Women and was told that it would be up to "employer and employee to discuss the nature of the loss and reach an agreement over the use and the amount of bereavement leave".[10] She then approached her local MPs and suggested a change to the law. Clare Curran MP, also of the Labour Party, heeded the call, and after further support had been established from the wider community, the proposed legislative change was brought to Ms Andersen.

B The clarified position

Under the Act, an employee who meets the employment threshold is now expressly entitled to three days' bereavement leave upon the end of their pregnancy by way of miscarriage or stillbirth.[11] This entitlement is extended to employees who: [12]

i) are the spouse or partner of the pregnant person;

ii) are the former spouse or partner of the pregnant person, if they would have been a biological parent of the child;

iii) had undertaken to be the primary carer of the child (such as surrogacy or adoption); or

iv) are the spouse or partner of a person who had undertaken to be the primary carer of the child.

Section 69(4) of the Act defines both miscarriage and stillbirth to exclude abortions undertaken in accordance with the Contraception, Sterilisation, and Abortion Act 1977.[13]

C The justification for excluding abortion from bereavement leave

At the time of introducing the Bill, Ms Andersen confirmed that she personally supported the provision of bereavement leave to employees after an abortion.[14] Andersen's position was reflected in the first iteration of the Bill that she

9 (10 December 2019) 743 NZPD 15788.
10 Kathryn van Beek "Changing the Holidays Act" <www.kathrynvanbeek.co.nz>.
11 Holidays Act, s 69(2)(c).
12 Section 69(2)(d).
13 Section 69(4).
14 Katarina Williams "Bereavement leave proposed for parents affected by miscarriage and stillbirth" (10 December 2019) Stuff <www.stuff.co.nz>.

introduced in August 2018. The first iteration was broader in its terminology and would have entitled employees to bereavement leave for "the unplanned end of an employee's [or their spouse or partner's] confirmed pregnancy by way of the death of the foetus".[15] Ms Andersen withdrew the first iteration on the date that the second Bill was introduced.[16] However, she chose not to include bereavement leave following abortion in the second iteration of the Bill as she felt that it would politicise the Bill and risk it not passing.[17] Instead, Ms Andersen's priority was "to give women and their families the reassurance that they have this in law and [Parliament] can do a small technical change to give that reassurance".[18]

Prioritising people who have had a miscarriage or stillbirth over those who have had an abortion ranks the worth and grief of a person who was pregnant based on the manner in which their pregnancy ended. Allowing additional support to certain grieving people and not to others affects the right to reproductive freedom and perpetuates the stigma and judgement around people who seek an abortion.[19]

IV A FEMINIST AND HUMAN RIGHTS ANALYSIS OF THE ACT

There are a number of compelling reasons, from a feminist and human rights standpoint, why Parliament should extend the entitlement to bereavement leave to people following an abortion. First, the aim of the Act is to allow people to process the psychological pain of losing a pregnancy, which research demonstrates can be as severe for people following an abortion as it is following a miscarriage or stillbirth.[20] Secondly, the human rights to health, equality and freedom from discrimination do not support a distinction being made between reproductive outcomes. Thirdly, there is strong public and parliamentary support for upholding reproductive autonomy. Finally, the restriction does not align with Aotearoa New Zealand's progressive image.

15 Holidays (Bereavement Leave for Miscarriage) Amendment Bill 2018, cl 4(2).
16 (27 June 2019) 739 NZPD 12388.
17 (10 December 2019) 743 NZPD 15788; and Williams, above n 14.
18 Williams, above n 14.
19 Frances Everard "A bill providing leave after miscarriage should extend to abortion" (16 April 2019) Health Central Pokapū Hauora <www.healthcentral.nz>.
20 (10 December 2019) 743 NZPD 15789; and Carlo V Bellieni and Giuseppe Buonocore "Abortion and subsequent mental health: Review of the literature" (2013) 67(5) Psychiatry Clin Neurosci 301 at 307–308.

A The aim of the Act and the experience of grief

1 The purpose of the Act

The express intent of the Bill was to clarify that "the unplanned end of a pregnancy by miscarriage or still-birth constitutes grounds for bereavement leave".[21] However, the commentary provided on the Bill from the Education and Workforce Committee (the Committee) offers valuable insight into the underlying motivations and intention for the Act.[22] The Committee recommended that the Bill be amended to remove several barriers to entitlement to bereavement leave under the Bill as it was then drafted, including:

i) removing the requirement for the person to have known they were pregnant;[23]

ii) clarifying that proof of pregnancy would not be required for an employee to take bereavement leave;[24] and

iii) expanding the categories of people who would be eligible for bereavement leave to include the former spouse or partner of the pregnant person (if they would have been a biological parent of the child), a person who had undertaken to be the primary carer of the child (such as surrogacy or adoption) and the spouse or partner of a person who had undertaken to be the primary carer of the child.[25]

Despite erasing those hurdles, the Committee then recommended that the Bill include clarification that the leave entitlement was not intended to extend to pregnancies ending by abortion.[26]

The Committee's report reflected the aim of the Bill: to give people the space to recover psychologically from a miscarriage or stillbirth. For instance, the Committee's rationale for the recommendation at point (iii) above was that those people "would be adversely psychologically affected by the end of the relevant pregnancy".[27] As demonstrated below, the adverse psychological effects

21 New Zealand Parliament Pāremata Aotearoa "Holidays (Bereavement Leave for Miscarriage) Amendment Bill (No 2)" (27 June 2019) <www.parliament.nz>.

22 Holidays (Bereavement Leave for Miscarriage) Amendment Bill (No 2) 2020 (159-2) (select committee report).

23 At 2.

24 At 2.

25 At 3.

26 At 4.

27 At 3.

and grief experienced can be just as significant for people following an abortion as for those who have suffered a miscarriage or stillbirth. Consequently, the exclusion of bereavement leave following an abortion does not align with the purpose of the Bill.

2 The impact of abortion and the experience of grief

The distinction in the Act between planned and unplanned pregnancy loss also does not align with leading research on the psychological impacts of pregnancy loss, whether through miscarriage, stillbirth or abortion. While there have been a multitude of studies into the psychological effects of abortion, the significance and applicability of their results are often limited as a result of three key factors. This article's summary and analysis of the available research must therefore be read with these factors in mind:

i) Researchers are faced with self-selection bias, as people may refuse to take part and be more likely to refuse if they have been adversely affected by the abortion experience. The level of attrition in participants from most of the large studies is said to be "unacceptable in social science research, especially when the reasons are almost certainly linked to the outcome measures".[28]

ii) It is difficult, if not impossible in a social sense, to conduct a controlled trial to analyse the psychological effects of abortion. To do so would require researchers to place people randomly into two groups — one group to have an abortion and the other to have to carry their pregnancy to term.[29] As a result, observations may be linked to unseen factors.

iii) The available research has used a number of different comparator groups. For example, the mental health of people having an abortion has been compared with that of people who have had a miscarriage, who have given birth, or who have never been pregnant.[30] This makes drawing any comparisons across the studies a difficult task.

The research demonstrates that foetal loss is a traumatic experience for a

28 Gregory Pike *Abortion and the Physical & Mental Health of Women: A review of the evidence for health professionals* (2nd ed, Family First NZ, Auckland, 2021) at 25.

29 At 21.

30 At 23.

person, "whether by miscarriage, induced abortion, or stillbirth".[31] People have abortions for numerous reasons and, for some, it can cause significant grief. While the authors note that bereavement leave should not be based on the reasons for people seeking an abortion, it is important to remember that some situations, such as an abortion following foetal abnormality, can be "particularly traumatic".[32]

In the same way, the majority of the research demonstrates a strong link between mental health issues and abortion. While there are differing views as to whether the impact on mental health stems from the pregnancy being unintended or from the abortion experience itself, a publication from the United Kingdom found that "women who had undergone an abortion experienced an 81% increased risk of mental health problems".[33] In addition, the 2008 report of the American Psychological Association's Task Force on Mental Health and Abortion found that "it is clear that some women do experience sadness, grief, and feelings of loss following termination of a pregnancy, and some experience clinically significant disorders, including depression and anxiety".[34]

With this in mind, there is a strong argument to be made that the adverse psychological impacts of abortion on mental health present a serious public health problem.[35] Providing bereavement leave to people following an abortion would be a compassionate response to these impacts. It would allow people to process the abortion experience in their own way, decreasing the likelihood of adverse mental health outcomes and reducing the resulting burden on Aotearoa New Zealand's public health system.[36] This correlation was illustrated in the submission of a post-abortion counsellor on the Bill — if people are "better supported in their grief, their pain acknowledged and their lost child respected, there would be a reduction in the long term physical and psychological impacts of abortion".[37]

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31 Bellieni and Buonocore, above n 20, at 301–310 as cited in Pike, above n 28, at 22.

32 Pike, above n 28, at 30.

33 Priscilla K Coleman "Abortion and mental health: quantitative synthesis and analysis of research published 1995–2009" (2011) 199(3) Br J Psychiatry 180 at 180.

34 Brenda Major and others *Report of the APA Task Force on Mental Health and Abortion* (American Psychological Association, 2008) at 4.

35 Bellieni and Buonocore, above n 20, at 308. The publication collated data from 22 studies.

36 Pike, above n 28; Coleman, above n 33; and Natalie P Mota, Margaret Burnett and Jitender Sareen "Associations Between Abortion, Mental Disorders, and Suicidal Behaviour in a Nationally Representative Sample" (2010) 55 Can J Psychiatry 239.

37 Catherine Gillies "Submission to the Education and Workforce Committee on the Holidays

Furthermore, legislative acknowledgement that abortion can be a legitimate cause of grief and bereavement would support positive mental health outcomes. Drawing a line between people who have abortions and those who have miscarriages or stillbirths perpetuates the social stigma in relation to abortion, which is likely to exacerbate any negative psychological impact that people are already experiencing following an abortion. It also establishes a legal hierarchy of grief, in which certain categories of loss are seen as more serious or traumatic than others. Making bereavement leave available for people following an abortion would reject that hierarchy and the stigma it represents. For some people accessing abortions, there is also a sense of shame which can result in an environment in which people do not feel able to seek support around an abortion. In that context, legislation should encourage the provision of that support through other avenues.

It should be noted that, in addition to comparable psychological impact, the physical effects of an abortion can also be similar to those during and following a miscarriage.[38] Allowing time to heal from the physical impacts of miscarriage and stillbirth was not an express intention of the Act. However, this equivalence again supports the removal of any distinction being drawn between people who have an abortion and those who have a miscarriage or stillbirth.

Abortions are a highly personal experience, and while there is evidence of a strong link between abortion and negative mental health outcomes, not every person who has an abortion will suffer such outcomes. It is worth noting that an entitlement to bereavement leave does not require a person to take it, but instead gives them the autonomy to assess whether bereavement leave would be beneficial to them and to have the ability to process the experience privately and sensitively. People who have had miscarriages and stillbirths now have the right to make this decision. Denying this right to people who have had abortions reinforces the social stigma of elective pregnancy loss.

(Bereavement Leave for Miscarriage) Amendment Bill (No 2) 2020" at 2.

38 National Women's Health Network "Health Facts: Medical Abortion and Miscarriage" (15 August 2019) <www.nwhn.org>.

B A rights-based analysis of the Act

The Act also engages several fundamental human rights:

i) All people are equal before the law.[39]

ii) All people have the right to be free from discrimination on the basis of sex, which includes pregnancy and childbirth.[40]

iii) All people have the right to the "highest attainable standard of physical and mental health".[41]

iv) "Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave".[42]

As outlined earlier, distinguishing between people who have had a miscarriage or stillbirth and those who have had an abortion perpetuates the social stigma and shame that is attached to abortion. The distinction also does not sit well with the right to equality before the law and the right to freedom from discrimination. People who have had an abortion do not experience the right to mental and physical health to the same extent as those who have had a miscarriage or stillbirth, as they are being denied the time to process the experience. The right to health includes the right to reproductive health, and a person's ability to control their own fertility is an important basis for the exercise of other rights.[43]

A study on the application of the Convention on the Elimination of All Forms of Discrimination against Women reflected on transformative

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39 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 26.

40 New Zealand Bill of Rights Act 1990, s 19(1); and Human Rights Act 1993, s 21(1)(a).

41 International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976), art 12(1).

42 Article 10(2).

43 *Committee on Economic, Social and Cultural Rights General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)* UN Doc E/C.12/GC/22 (2 May 2016) at 1; *Committee on Economic, Social and Cultural Rights General comment No. 14 (2000) on the right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)* UN Doc E/C.12/2000/4 (11 August 2000) at [2], [8], [11], [16], [21], [23], [34] and [36]; Rebecca J Cook and Bernard M Dickens "Human Rights Dynamics of Abortion Law Reform" (2003) 25 Hum Rts Q 21; and United Nations Beijing Declaration and Platform of Action (signed 15 September 1995, entered into force 27 October 1995) at [97].

equality in the context of abortion.[44] When considering what would be required for people to be able to make their own reproductive decisions with dignity and without any barriers from stereotypes and stigma, the authors observed that:[45]

> Transformative equality requires rethinking unintended pregnancy from the perspective of the women affected, recognizing and remedying the disadvantages that women face in making decisions to terminate or continue pregnancy, and removing the barriers faced in seeking services.

In order to pursue transformative equality and reproductive autonomy, it is vital to remove barriers to enable people to freely choose whether or not to have an abortion. While the Abortion Legislation Act made significant progress towards upholding a person's ability to make autonomous reproductive decisions, barriers to the full enjoyment of those decisions remain in place. People who might otherwise seek to terminate their pregnancy may feel that they are unable to do so, as they would not have time to physically and psychologically recover from the process before having to return to work. Those people will either need to draw on their sick or annual leave, or take unpaid leave, if they feel they need time to psychologically recover. Many people are not in a position to take unpaid leave. In reality, socioeconomic concerns are one of the main reasons that people seek abortions.[46]

People who have an abortion arguably should still be entitled to bereavement leave during a reasonable period after the pregnancy ends. Making bereavement leave available to people who experience loss by an unplanned method, but not those whose pregnancy loss is planned, reinforces the social stigma of abortion. This is a barrier to reproductive autonomy which Parliament could remove by making bereavement leave available to all people who experience pregnancy loss irrespective of the manner in which the pregnancy ends.

C Public and parliamentary support for reproductive autonomy

As set out above, bereavement leave entitlement was not extended to abortion due to the risk of the Bill not passing, as the inclusion of abortion would

44 Rebecca Cook and Susannah Howard "Accommodating Women's Differences under the Women's AntiDiscrimination Convention" (2007) 56 Emory Law J 1039.

45 At 1045.

46 Sophie Chae and others "Reasons why women have induced abortions: a synthesis of findings from 14 countries" (2017) 96 Contraception 233 at 235.

"politicise" the Bill.[47] However, the submissions on the Bill, the passing of the Abortion Legislation Act and general public sentiment do not support this argument, particularly not to the extent that would justify discriminating against certain people who are exercising their reproductive autonomy.

1 *Submissions on the Bill*

Of the 37 submissions made on the Bill, 10 commented on the then-implied exclusion of "planned" ends of pregnancies.[48] All of those 10 submissions were in favour of bereavement leave being extended to people following an abortion.

Family First Aotearoa's submission emphasised that the "grief and loss that a woman personally experiences from either a miscarriage or an abortion" should not be underestimated.[49] Other submitters expressed confusion as to the reason for excluding people from the provisions post-abortion, as "it is [not] relevant how or why a pregnancy ended",[50] and the perceived intention of the Bill was "not just to remove ambiguity but to treat grieving parents compassionately and equally".[51]

Submitters observed that people often "feel as though they do not have enough support to choose life and end their unborn child's life by abortion; however the grief is huge."[52] Others saw supporting people's reproductive autonomy and decision-making as encompassing "both the right to grieve pregnancy loss as well as the right to safe, legal abortion."[53] Submissions considered it vital that legislation be "well considered so as not to negatively impact on" that autonomy.[54]

2 *Recent decriminalisation of abortion — the Abortion Legislation Act 2020*

On 23 March 2020, Parliament passed the Abortion Legislation Act 2020,

47 Williams, above n 14.
48 Ministry of Business, Innovation and Employment "Submission to the Education and Workforce Committee on the Holidays (Bereavement Leave for Miscarriage) Amendment Bill (No 2) 2020" at 13.
49 Whanau Tahi Aotearoa Family First New Zealand "Submission to the Education and Workforce Committee on the Holidays (Bereavement Leave for Miscarriage) Bill (No 2) 2020" at 2.
50 Wellington Women Lawyers' Association "Submission to the Education and Workforce Committee on the Holidays (Bereavement Leave for Miscarriage) Bill (No 2) 2020" at 2.
51 Gillies, above n 37, at 1.
52 Frances Posthuma "Submission to the Education and Workforce Committee on the Holidays (Bereavement Leave for Miscarriage) Bill (No 2) 2020".
53 Graduate Women New Zealand and Graduate Women Wellington "Submission to the Education and Workforce Committee on the Holidays (Bereavement Leave for Miscarriage) Bill (No 2) 2020".
54 Family Planning, above n 1 at 3.

decriminalising abortion in Aotearoa New Zealand. While there was debate around the Abortion Legislation Bill in the House, parliamentary support for the matter was evident. The Abortion Legislation Bill passed its first reading with 94 votes to 23, its second reading with 81 votes to 39 and its third reading with 68 votes to 51. An important reason for this, alongside changing social views, may be that the number of women in Parliament had increased from just four to 46 since the previous legislation on abortion was enacted in 1977.[55]

The Abortion Legislation Bill was labelled a "conscience vote" in Parliament, which meant that members were not required to vote along party lines. The cross-party support for abortion reform was demonstrated during the passing of the Abortion Legislation Act.

During the readings of the Bill, there was also cross-party support for bereavement leave to be provided to people who have had an abortion. As referenced earlier, Ms Andersen confirmed that she agreed with the provision of bereavement leave to employees after an abortion.[56] During the second reading of the Bill, Agnes Loheni MP of the National Party raised her concern that the Bill "creates a class of loss, a class of grief, where one is acknowledged and one is not" and was creating "a law which will undoubtedly lead to women having to lie about their abortion so that they can be considered for bereavement leave".[57] At the third reading, Erica Stanford MP of the National Party also expressed her discomfort at "[t]he grief and anguish and trauma experienced during an abortion" not being acknowledged by the Bill.[58]

If the Holidays Act is extended to include bereavement leave for abortion, it is likely that it would similarly be on the basis of a conscience vote and gather cross-party support.

3 General public sentiment towards reproductive autonomy

In addition to the encouraging parliamentary atmosphere, there is broad public support for the upholding of reproductive autonomy. A 2019 article published in the New Zealand Medical Journal analysed the attitudes of New Zealanders towards abortion.[59] The authors found that 65 per cent of people who took part in the study supported the legalisation of abortion without any

55 Contraception, Sterilisation, and Abortion Act 1977.

56 Williams, above n 14.

57 (29 July 2020) 748 NZPD 20156.

58 (24 March 2021) 751 NZPD 1755.

59 Yanshu Huang, Dan Osborne and Chris G Sibley "Sociodemographic factors associated with attitudes towards abortion in New Zealand" (2019) 132(1497) NZMJ 9.

specific reason being required, and 89.3 per cent supported abortion when a woman's life was in danger.[60]

Similarly, in January 2017, the Abortion Law Reform Association of New Zealand conducted a poll on abortion issues and found that the majority of New Zealanders polled supported abortion being legal on all grounds.[61]

This demonstrates that the current political and social climate should favour the extension of the Act to provide bereavement leave to people who have had abortions, as abortion has become a more accepted reproductive decision.

D Comparative overseas approaches and Aotearoa New Zealand's image

While Aotearoa New Zealand has been heralded as leading the international charge with this Act, there are many other countries that have equivalent provisions for leave following miscarriage and stillbirth, and others still that have taken the additional step to provide leave following an abortion.

India and Indonesia offer six weeks' paid leave following a miscarriage.[62] An additional month of paid leave is also available to people in India who suffer an illness arising out of a miscarriage.[63] Mauritius provides three weeks' paid leave following a miscarriage and 14 weeks' paid leave following a stillbirth.[64] Workers in Taiwan are entitled to between five days' and four weeks' paid leave following a miscarriage, depending on the gestation of the pregnancy.[65]

Both Québec and the Philippines provide leave for people who have had an abortion. Employees in Québec are entitled to three weeks' unpaid "special maternity leave" if they terminate their pregnancy before 20 weeks' gestation.

60 Hannah Martin "Legalised abortion generally supported by New Zealanders - Auckland University survey" (21 June 2019) Stuff <www.stuff.co.nz>.

61 Abortion Law Reform Association of New Zealand *Abortion Issues Poll* (Curia Market Research, Wellington, 2017) at 2 as cited in Courtney Naughton "Abort Mission: A Recommendation for Reform of New Zealand's Abortion Law" (LLB (Hons) Dissertation, University of Otago, 2017) at 30.

62 Maternity Benefit Act 1961 (as amended by the Maternity Benefit (Amendment) Act 2017) (India), ss 4 and 9; and Indonesian Labour Law 2003 (Indonesia), art 82(2). The authors acknowledge that while this leave is provided for in legislation, local media articles indicate that in practice it may not be made available to many employees in these countries and is to an extent dependent on an individual employee's knowledge of the availability of the leave.

63 Maternity Benefit Act 1961 (as amended by the Maternity Benefit (Amendment) Act 2017) (India), s 10.

64 Workers' Rights Act 2019 (Mauritius), art 52(4).

65 Regulations on Special Leave for Employees of the Executive Yuan and Subordinated Agencies 2001 (as amended in 2020) (Taiwan); and Labor Standards Act 1984 (as amended in 2020) (Taiwan), art 50.

There is scope for the leave to be extended if the employee can provide a medical certificate indicating that they require further leave, such as if injury or illness had occurred as a result of the abortion.[66] This law has been in place since 2002.

The Philippines is truly paving the way in this arena. Since 2018, Philippine legislation has provided for 60 days of paid leave following a miscarriage, emergency termination or abortion, at any stage of the pregnancy.[67] This legislation provides people with equal recognition of the physical and psychological impacts that the end of a pregnancy has, regardless of the way that the pregnancy ended.

Since the passing of the new legislation in Aotearoa New Zealand, the Australian federal government has also passed a Bill that provides for two days of paid compassionate leave following a miscarriage before 20 weeks' gestation.[68] This built upon their existing legislation that provided for unpaid parental leave following a stillbirth over 20 weeks' gestation.[69]

In contrast to the above jurisdictions, Aotearoa New Zealand's legislation grants only three days of paid bereavement leave and denies that to people who have had an abortion.[70] Multiple media reports lauded Aotearoa New Zealand for being "one of the first nations to bring such a forward-thinking [l]aw".[71] However, it is clear that while this legislative step was much needed, it is not as cuttingedge as the media has portrayed, and it does not go far enough.

V MĀORI PERSPECTIVES AND IMPACT

Throughout the development and passing of the Act, it is not clear that Parliament undertook any consideration of the Bill's alignment with Māori (indigenous to Aotearoa New Zealand) perspectives of abortion, the founding document Te Tiriti o Waitangi (Te Tiriti) or how the Act would impact on Māori and other cultures.

66 Act Respecting Labour Standards RSQ 2021 c N-1.1 at 81.5.2.
67 Republic Act No. 11210 2018 (Philippines), s 3.
68 Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 (Cth), sch 1 pt 1.
69 Fair Work Amendment (Improving Unpaid Parental Leave for Parents of Stillborn Babies and Other Measures) Act 2020 (Cth).
70 As noted in this article's Introduction section, the authors acknowledge that people are also entitled to paid parental leave if they have a stillbirth after 20 weeks' gestation.
71 Ananya Varma "New Zealand not the first to provide paid miscarriage leave; India has a law since 1960s" (7 April 2021) Republic World <www.republicworld.com>.

In Aotearoa New Zealand, Māori are the indigenous peoples who migrated from Polynesia from as early as the 1200s and who have developed distinct knowledge, language, and culture in response to the local environment.[72] The colonisation of Aotearoa New Zealand by the British Crown is founded upon a treaty that rangatira (chiefs) signed in 1840.[73] Te Tiriti guarantees continued Māori rangatiratanga (sovereignty), protects Māori interests, promotes Māori wellbeing, and provides for Crown settlement and limited kāwanatanga (governance).[74]

The third article of Te Tiriti sets out the right to equal citizenship — a right that "may be imperilled by policy that has a differential impact on Māori".[75] This provision places an obligation on the Crown to ensure that Māori can enjoy, at minimum, the same health and wellbeing as nonMāori.[76] In addition, the ritenga Māori declaration (commonly referred to as the "fourth article" of Te Tiriti) provides for the protection of both religious freedom and traditional spirituality and knowledge in order to "enable Māori to live, thrive and flourish as Māori".[77] Te Tiriti is central to ethical public health and legislation that affects health.

All policy and legislation should be considered in light of Te Tiriti to contribute towards fulfilling these rights and obligations and to avoid negative outcomes that disproportionately impact on Māori. This need for consideration is affirmed by the latest Cabinet Manual, which provides that Ministers must "draw attention to any aspects of a bill that have implications for, or may be affected by … the principles of the Treaty" when submitting bids for bills to be included in the legislation programme.[78]

Currently, Māori make up a significant proportion of the population, at 15 per cent. The available statistics on Māori women who have had an abortion suggest a disparity in relation to their proportion of the Aotearoa New Zealand

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72 Atholl Anderson "Speaking of migration, AD 1150–1450" in Atholl Anderson, Judith Binney and Aroha Harris (eds) *Tangata Whenua: An Illustrated History* (Bridget Williams Books, Wellington, 2014) 30.

73 Claudia Orange *Te Tiriti o Waitangi: The Treaty of Waitangi*, 1840 (Bridget Williams Books, Wellington 2017).

74 Te Tiriti o Waitangi 1840.

75 JustSpeak *Māori and the Criminal Justice System: A Youth Perspective* (March 2012) at 37.

76 Ministry of Health *Achieving Equity in Health Outcomes: Summary of a discovery process* (Ministry of Health, Wellington, August 2019) at 2–3.

77 Ministry of Health *Whakamaua: Māori Health Action Plan 2020–2025* (July 2020) at 13.

78 Cabinet Office *Cabinet Manual 2017* at [7.65(a)].

population. In 2018,[79] Māori women made up 16.60 per cent of the female population, but 22.43 per cent of abortions that took place that year.[80] Any legislation that impacts on people who have had an abortion may therefore disproportionately impact members of Māori communities.[81]

Provisions that may disproportionately exclude Māori from entitlement to leave to heal from and process loss of life such as an abortion must be carefully scrutinised and justified. Considered legislation in this area should aim to support Māori people's tino rangatiratanga (selfdetermination) when making reproductive decisions.[82] It is vital that these factors are considered by Parliament in passing new legislation.

Looking at the Act through a te ao Māori lens could raise additional considerations. For example, a distinction between Māori and Pākehā attitudes towards miscarriage and abortion can be seen in the language that is used. In te reo Māori, abortion and miscarriage are not linguistically distinguished from one another: both are referred to using the terms tahe, whakatahe, materotanga and taiki.[83] The terms can be used to refer to the outcome of a loss of a pregnancy and do not indicate how this process occurred or whether it was initiated intentionally or not.

In addition, while little research has been done into the attitudes of Māori towards abortion, one perspective is that abortion "disrupts the spiritual element conferred in the conception of a new life … considered to be whakanoa i te mauri o te tāngata" (extinguishing the life principle).[84] In te ao Māori, women hold a highly cherished role as te whare tapu o te tangata (the bearers of humanity).[85]

79 This is the most recent date that consistent data is available for.

80 Statistics New Zealand Tatauranga Aotearoa E*stimated resident population (ERP), national population by ethnic group, age, and sex, 30 June 1996, 2001, 2006, 2013, and 2018* (23 September 2020) [*ERP*]; and Statistics New Zealand Tatauranga Aotearoa *Abortion statistics: Year ended December 2019* (16 June 2020) [*Abortion statistics*] at table 7.

81 The authors note that, as Māori have a younger demographic, higher pregnancy rates and a younger birthing population, this disparity might be lessened if the rate of abortion was compared to the proportion of Māori in the birthing population.

82 Rebekah Laurence *Māori women and abortion: A Kaupapa Māori literature review* (Health Research Council of New Zealand and Te Whāriki Takapou, March 2019) at 3–4.

83 T Smith "Aitanga: Maori Precolonial Conceptual Frameworks and Fertility: A Literature Review" (2009) in Paul Reynolds and Cherryl Waerea-i-te-Rangi Smith *The Gift of Children: Maori and Infertility* (Huia Publishers, 2012) as cited in Jade Sophia Le Grice "Māori and Reproduction, Sexuality Education, Maternity and Abortion" (PhD Thesis, University of Auckland, 2014) at 35.

84 Le Grice, above n 83, at 44 (footnotes omitted); and (28 June 2007) 640 NZPD 10359–10360.

85 Naomi Simmonds and Kirsten Gabel "Ūkaipō: Decolonisation and Māori maternities" in Jessica Hutchings and Jenny Lee-Morgan (eds) *Decolonisation in Aotearoa: Education, Research and Practice* (NZCER Press, Wellington, 2016) 145 at 148.

In this role Māori women have also determined their reproductive outcomes. There are many examples in oral traditions, such as pūrākau (narratives), waiata (song), and karakia (incantations), of women making reproductive choices such as choosing partners and initiating conception. Although less common, there are also examples of women choosing to discontinue a pregnancy that has begun under suboptimal conditions and performing interventions during labour and birth to ensure a particular outcome.[86] Due to the pivotal role of women in determining whakapapa (genealogy and the key principle underlying te ao Māori), it is likely these reproductive decisions would have been made within a safe and supportive context that would have considered the overall health and wellbeing of the mother and infant. Any loss of life would have been grieved accordingly.

However, the active and systematic suppression of Māori people, knowledge, land and culture by Western frameworks and Crown institutions during colonisation has had a devastating cumulative and ongoing effect on Māori, particularly for women.[87] The loss of land and economic base, and introduction of new diseases, has negatively impacted on the health of Māori, who continue to carry inequitable health and social outcomes compared with the settler population.[88] Crown policies of assimilation enforced the view that Māori culture and language were irrelevant, Māori practices were actively discouraged and discarded, and Māori ideologies were no longer perceived as valid.[89] The impacts of urbanisation on family composition, intergenerational support and knowledge of childrearing, help to explain current reproductive decisions such as abortion. Government policies have heavily affected the ability of whānau, hapū, iwi and Māori communities to support Māori making reproductive decisions.

It is well-established and widely accepted that Māori have poorer healthcare outcomes than non-Māori in Aotearoa New Zealand.[90] Lack of cultural competence in abortion services and in the care provided around an

86 Indiana Shewen "Tahe; Tikanga and Abortion" (2020) 4 NZWLJ 36.

87 Simmonds and Gabel, above n 85, at 149–150.

88 P Reid, D Cormack and S-J Paine "Colonial histories, racism and health–The experience of Māori and Indigenous peoples" (2019) 172 Public Health 119.

89 Robert Webb "Māori Experiences of Colonisation and Māori Criminology" in Antje Deckert and Rick Sarre (eds) *The Palgrave Handbook of Australian and New Zealand Criminology, Crime and Justice* (Palgrave Macmillan, Cham, 2017) 683.

90 Health Quality & Safety Commission New Zealand *A Window on the Quality of Aotearoa New Zealand's Healthcare 2019 – a view on Māori health equity* (Wellington, May 2019) at 6.

abortion may well result in the subsequent physical and psychological effects being worse for Māori than for Pākehā. It is therefore even more important that legislation relating to abortion is drafted with particular care to empower people to protect their wellbeing.

Parliament should also consider other cultures when progressing legislation. For example, Pasifika women made up 8.17 per cent of the population in 2018, but 10.19 per cent of abortions.[91] A study of Samoan women highlighted the cultural veil of secrecy surrounding the topic of sex and sexuality.[92] This veil may lead people to seek an abortion in order to avoid bringing shame on themselves or their families.[93] The Samoan language used to describe miscarriage and abortion is very different. In response to a miscarriage, people say "*talofa e ia … ua fafano pe ua pau lana* pepe", meaning "the poor woman had lost her baby by miscarriage".[94] On the other hand, abortion is seen as an act of evil to which people say "*o le fiamama*",[95] referencing women terminating a pregnancy because of the need for them to pretend to be pure or perfect.

VI RECOMMENDED AMENDMENTS TO THE HOLIDAYS ACT 2003

Considering the above, the authors recommend that the Holidays Act be amended in the following ways:

i) In ss 69(2)(c) and (d), replace "by way of a miscarriage or still-birth" with "by way of a miscarriage, still-birth or abortion";

ii) In s 69(4), remove "other than as a result of abortion services provided in accordance with the Contraception, Sterilisation, and Abortion Act 1977"; and

iii) In s 69(4), add "abortion means an abortion within the meaning of section 2 of the Contraception, Sterilisation, and Abortion Act 1977".

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91 Statistics New Zealand Tatauranga Aotearoa ERP, above n 80; and Statistics New Zealand Tatauranga Aotearoa *Abortion statistics*, above n 80, at table 7.

92 Ausaga Epho Fa'asalele Tanuvasa "The Place of Contraception and Abortion in the Lives of Samoan Women" (PhD Thesis, Victoria University of Wellington, 1999) at 8, 38–39, 90–91, 106 and 399–404.

93 Auckland Women's Health Council "Abortion in Pacific Cultures" (2018) Auckland Women's Health Council <www.womenshealthcouncil.org.nz>.

94 Tanuvasa, above n 92, at 180.

95 At 180.

The amended provision, in line with the approach taken in the existing Act, should not require an employee to identify whether their pregnancy has ended by way of miscarriage, stillbirth or abortion. The authors also suggest that no distinction should be drawn between the various reasons a person might have had an abortion. This would ensure that the provision upholds people's right to privacy and freedom from discrimination in relation to their reproductive decisions. Any such amendments should be considered in light of Te Tiriti and other relevant cultural considerations.

VII CONCLUSION

The Holidays (Bereavement Leave for Miscarriage) Amendment Act 2021 has taken an important step towards recognising the grief that people experience following a miscarriage or stillbirth. However, by excluding bereavement leave for people following an abortion, it fails to provide equality before the law to people suffering bereavement and perpetuates the social stigma and shame surrounding abortion in Aotearoa New Zealand. The Act has now passed — it is time to acknowledge and support all reproductive decisions.

The legislation should be further scrutinised from a Māori understanding of abortion and Te Tiriti obligations to ensure that Māori rights are being upheld and Māori are not being disproportionally impacted. Te Tiriti obligations such as tino rangatiratanga for Māori when making reproductive decisions should be supported. Māori should be able to take leave to heal and grieve all loss of life and receive culturally safe care.

EMERGING CHALLENGES IN THE IMPLEMENTATION OF PAY EQUITY LAW IN NEW ZEALAND[†]

Megan Vant[*]

In 2018, Charlotte Doyle wrote a thought-provoking article published in this Journal on the "reactivation" by the Court of Appeal of the concept of pay equity.[1] Ms Doyle concluded that the legal mechanisms intended to progress gender equality must be supported by broader political, social and economic concerns. Three years on from Ms Doyle's article, and a year after the enactment of the new legislation, she has so far been proven right. Political support enabled the enactment of new pay equity legislation, but without social support for the concept of pay equity, change will be slow. The law alone cannot "fix" pay inequities.

I INTRODUCTION

For generations, "women's work" has been undervalued. The New Zealand Public Service Association Te Pūkenga Here Tikanga Mahi has campaigned for pay and employment equality for women since 1913.[2] We are now well past the time when it was permissible to openly pay women less than men performing the same role simply because they were women.

It is only recently that there has been judicial and then statutory acknowledgement of the fact that skills generally associated with women have commonly been overlooked, undervalued or not considered to require monetary compensation, and that this should be corrected. Judicial acknowledgement

† Parts of this article have appeared in two previous works: Kylie Dunn and Megan Vant "Pay equity: the past informs the future" (paper presented at the Employment Law — Justice at Work? Conference, Wellington, 22 October 2020); and Megan Vant "Pay equity — the emerging challenges six months on" (2021) 2 ELB 30.

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1 Charlotte Doyle "The Reactivation of Pay Equity in New Zealand by *Terranova*: Why did it take so long?" [2018] NZWLJ 129.

2 See the New Zealand Public Service Association Te Pūkenga Here Tikanga Mahi "Campaigning for Equal Pay" (23 January 2020) <www.psa.org.nz>.

came with the *Terranova* line of cases and led to legislative reform through amendments to the Equal Pay Act 1972 (EPA), which came into force on 6 November 2020.[3] The purpose of these amendments is to facilitate resolution of pay equity claims by providing "a simple and accessible process to progress a pay equity claim".[4]

At a high level, the EPA now provides a relatively straightforward, step-by-step process for managing and resolving pay equity claims. It is now easy for employees, or unions acting on behalf of their members, to raise a pay equity claim with an employer. Further, the legislative scheme requires good faith collaborative relationships between the parties involved in a pay equity claim in a manner consistent with New Zealand's existing collective bargaining framework.[5]

This article provides some brief background and context to the undervaluation of women's work and the concept of pay equity. The main focus of the article is on the new legislation and the challenges likely to be faced in its implementation. The requirements of the claim process are set out step-by-step, demonstrating how pay inequities can be redressed by the law. Experience suggests that there may be significant teething issues with the claim process as parties come to grips with the implementation of the EPA. Further, redressing pay equity is about more than having the right process, and consideration is given to whether the new legislation has any chance of resolving the complex underlying issues that it seeks to address.

II TERMINOLOGY

It is important to understand the different, but related concepts, that are used when talking about sex-based pay. [6]

A *Equal pay*

A legal obligation to ensure "equal pay" has existed in New Zealand since 1961 for the public service,[7] and since 1972 for the private sector.[8] Equal pay is the

3 Equal Pay Amendment Act 2020.
4 Equal Pay Act 1972, s 13A(b).
5 Section 13C; see also Employment Relations Act 2000, pt 5.
6 I use the term "sex" rather than "gender" as this is the terminology used in the Equal Pay Act. See for example s 2AAC(b): "An employer must ensure that there is no differentiation, on the basis of sex …".
7 Government Service Equal Pay Act 1960, s 3. Repealed on 6 November 2020 by the Equal Pay Amendment Act, s 34.
8 Equal Pay Act, s 4.

requirement that men and women working in the same job under the same conditions (and typically for the same employer) should be paid the same.[9] Establishing equal pay involves an assessment of whether the jobs are the same. If they are, the pay should be the same too.

B Pay equity

"Pay equity" is a different concept from equal pay. Rather than requiring the same pay for the same job, it requires the same pay for work of equal value.[10] Work of equal value is work that involves substantially similar skills, responsibilities, working conditions and degrees of effort.[11] Men and women performing work of equal value should be paid the same. Establishing pay equity involves assessing whether the work is of equal value. If it is, the pay should be equal too.

C The gender pay gap

The gender pay gap is a basic indicator that compares the median hourly earnings of men and women.[12] Statistics New Zealand calculates New Zealand's official gender pay gap as the difference between the median hourly earnings of women and men in full- and part-time work, and measures the difference between the pay of men and women over time.[13] New Zealand's gender pay gap has been trending down and has decreased from a gap of 16.2 per cent in 1998 to 9.1 per cent in 2021.[14]

The resolution of pay inequities using the pay equity process in the EPA will not eliminate the gender pay gap, although it will reduce it. The gender pay gap is a broader and more complex issue than pay equity, which only deals with the value of work. In a recent research report commissioned by the Manatū Wāhine Ministry for Women, authors Gail Pacheco, Chao Li and Bill Cochrane note that previous studies have attributed a substantial proportion of the historical gender pay gap to factors such as differences in education, the occupations and industries that men and women work in, and to the fact that women are more likely to work part-time.[15] However, Pacheco, Li

9 See s 2 definition of "equal pay"; and s 2AAC(a).
10 See s 2AAC(b).
11 Section 2AAC(b).
12 Statistics New Zealand *Organisational gender pay gaps: Measurement and analysis guidelines (second edition)* (July 2020) at 5.
13 Statistics New Zealand *Measuring the gender pay gap* (June 2015, updated August 2021) at 3.
14 Statistics New Zealand "Gender pay gap unchanged" (18 August 2021) <www.stats.govt.nz>.
15 Gail Pacheco, Chao Li and Bill Cochrane *Empirical evidence of the gender pay gap in New Zealand*

and Cochrane assess that these factors only explain around 20 per cent of the current gender pay gap.[16]

Pacheco, Li and Cochrane attribute the remaining 80 per cent of the gender pay gap to "unexplained" factors.[17] These are harder to measure, but the Ministry for Women considers that they include conscious and unconscious bias (impacting negatively on women's recruitment and pay advancement) and differences in men's and women's choices and behaviours.[18]

The resolution of pay equity claims is likely to directly affect the gender pay gap by increasing the median hourly earnings of women. Further, having the concept of sex-based discrimination and the value placed on women's work more widely talked about and understood may assist in bringing conscious and unconscious bias out into the open and thereby indirectly assist in further decreasing the gender pay gap.

III THE UNDERVALUATION OF THE WORK OF WOMEN

The work of women has traditionally been undervalued. Women have long been subject to structural and systemic discrimination arising from the historical and structural features of the labour market.[19] Further, the traditional and historic position of women in the paid workforce continues to have an impact on the value placed on work performed predominantly by women today. Historically, women were not expected to compete with men for work. Men were perceived as the breadwinners who supported families with their earnings. A woman may work temporarily as a "stopgap until marriage", but her wages would reflect the fact that society valued her work less and that it was "not deserving of higher earnings".[20] Once a woman was married, her role was to look after the home and children, not to go out to work. Of course, this ignores the reality for widows and other women who were not financially supported after marriage.

(Ministry for Women, Research Report, March 2017) at 12.

16 At 20.

17 At 7–8.

18 Manatū Wāhine Ministry for Women "Gender pay gap" (10 September 2012, updated 20 August 2021) <www.women.govt.nz>.

19 *Service and Food Workers Union Nga Ringa Tota Inc v Terranova Homes and Care Ltd*, [2013] NZEmpC 157, (2013) 11 NZELR 80 [*Terranova* EmpC] at [44] and [118].

20 *Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2014] NZCA 516, [2015] 2g NZLR 437 [*Terranova* CA] at [36].

The term "women's work" is generally used to refer to work traditionally undertaken by women and tends to focus on the traditional domestic role of the wife and mother, including caring for the home and family.[21] Where women's work extends beyond the home, it involves using many of the same domestic skills in the paid workforce, including caregiving, child raising, nurturing, patience, empathy, and caring for others etc. These skills have long been considered as natural or innate skills of women, as opposed to acquired skills, and therefore less valuable.[22] Because these skills are associated with the domestic role, they are not considered to be deserving of the recognition of remuneration, reflecting the entrenched cultural perceptions as to the relationship between skills and economic productivity. Domestic and caring roles were not viewed as being economically productive, so have historically been considered less valuable and therefore, less worthy of remuneration.

Gender stereotypes and biases also meant that even when the skills performed were not of a caregiving or homemaking nature, they were still regarded as less skilled and less valued when they were predominantly performed by women (for example, typing).

Prior to the enactment of the EPA and Government Service Equal Pay Act 1960, the New Zealand labour market was characterised by an industrial awards system.[23] Awards (which set out minimum pay rates and conditions of employment for an industry or sector) often expressly provided for women to receive a lower rate of pay than male employees.[24] In some awards, different job titles were allocated to men and women undertaking substantially the same work — with the women receiving lower rates of pay.[25]

The undervaluation of women's work in today's market is due to gender stereotypes, cultural norms, and historic discriminatory labour practices. Pay equity requires an objective consideration of the value of work undertaken by women, actively rejecting the social biases and discrimination that have led to systemic undervaluation.

21 *Oxford English Dictionary* (online ed, Oxford University Press), definition of "women's work".
22 *Terranova* CA, above n 20, at [36].
23 At [20]–[21].
24 Commission of Inquiry into Equal Pay *Equal Pay in New Zealand* (September 1971) at [1.5] and [1.12] as cited in *Terranova* CA, above n 20, at [22].
25 Ministry of Women's Affairs *Report on the Effectiveness of the Equal Pay Act 1972* (September 1994) at [30]–[34]; and Urban Research Associates, PJ Hyman and A Clark *Equal Pay Study Phase One Report* (Department of Labour, 1987) at 35–41, as cited in *Terranova* CA, above n 20, at [22].

IV THE GENDER LEGACY

In the recent case of *New Zealand Post Primary Teachers' Association Inc v Secretary for Education*, the Employment Court suggested that gender domination in a workforce can leave a legacy.[26] Although this case was heard prior to the legislative reforms coming into effect, the concept of a gender legacy is likely to have relevance in the area of pay equity.

The case involved a claim from the union that part-time secondary school teachers were unlawfully discriminated against on the basis of sex. This was because of the way they were paid under the collective agreement which was different from the way full-time teachers were paid under the same collective agreement.[27] The union considered full-time teachers to be an appropriate comparator for part-time teachers on the basis that male teachers had historically dominated the teaching profession and that this had manifested itself in the collective agreement.[28] This was despite acceptance that female full-time teachers had outnumbered male full-time teachers for the last 20 years.[29] The Court concluded that the union had failed to establish that the collective agreement created a detriment for part-time teachers and therefore there was no inequity.[30]

The Court considered whether the legacy of male gender incumbency ("the male legacy") continued to influence the terms and conditions of the secondary teaching profession despite the profession no longer being male dominated.[31] However, the Court determined that it did not have sufficient evidence to make such a determination.[32] Therefore, the Court concluded: "We would not conclude that the teaching profession today could reliably be said to retain the trappings of male domination evident from many years ago."[33]

The Court accepted that "the trappings of male domination" can work their way out of the system over time.[34] This means that a profession that has

26 *New Zealand Post Primary Teachers' Association Inc v Secretary for Education* [2021] NZEmpC 87 at [174].
27 At [19]–[29].
28 At [120].
29 At [128].
30 At [185]–[186].
31 At [134].
32 At [134]–[135] and [159].
33 At [162].
34 At [162].

been historically male dominated but is now female dominated, may no longer be subject to undervaluation on the basis of gender. This concept of a gender legacy and whether it continues to influence the remuneration of a profession will be a relevant consideration in assessing a pay equity claim and establishing whether there is an undervaluation in pay based on sex.

V THE PATH TO PAY EQUITY IN NEW ZEALAND

A The Terranova litigation

In 2012, Kristine Bartlett and a number of other aged care workers claimed that the wages paid by Terranova Homes and Care Limited (Terranova) to aged care workers did not constitute "equal pay" within the meaning of the EPA as it stood at that time.[35] This was not because they were paid less than men doing the same work — which was traditionally understood to be the limit of the scope of that EPA.

Rather, Kristine Bartlett's argument was one of pay equity — that the systemic undervaluation of work historically performed by women meant that aged care workers were paid less than roles with similar skills and responsibilities which were traditionally performed by men.[36] The claim was that the pay rate of $13.75– $15.00 per hour was significantly lower than it would be if the aged care sector was not a female dominated sector.[37]

The Employment Court agreed with the pay equity argument, referring to the "dual" or "twin" purposes of the EPA and concluding that the EPA was intended to include the concept of pay equity as well as that of equal pay.[38]

The Employment Court considered that men in the same workplace or sector could be an appropriate comparator if their pay was "uninfected by current or historical or structural gender discrimination".[39] If a comparator "uninfected by gender discrimination" could not be found within the workplace or the sector, the Employment Court acknowledged that it may be necessary to look more broadly, to jobs to which a similar value could be attributed using gender neutral criteria.[40] Abstracting from skills, responsibility, conditions and degrees of effort, as well as from any systemic undervaluation of the work

35 *Terranova* EmpC, above n 19.
36 At [5].
37 At [3] and [5].h
38 At [42] and [44].
39 At [46].
40 At [46].

derived from current or historical or structural gender discrimination, the pay for work predominantly performed by women was to be determined by reference to what men would be paid to do the same work.[41]

The Employment Court's decision was a landmark one for pay equity — radically departing from the previous understanding of the scope of the EPA.

Terranova appealed the Employment Court's decision and the Court of Appeal was required to determine whether the answers given by the Employment Court to the two questions based on the premise that the EPA provides for pay equity were wrong in law.[42] The Court of Appeal held that the Employment Court had not misinterpreted the EPA and had correctly answered the two questions.[43] The case was subsequently directed back to the Employment Court for resolution.[44] Terranova sought leave to appeal to the Supreme Court, which was declined in 2014.[45] A Crown settlement resolved the financial issue so that further litigation was unnecessary. However, critically, both the Employment Court and the Court of Appeal had determined that the EPA as it stood at that time could include a claim for pay equity.

This decision was momentous and led to the establishment of a Joint Working Group on Pay Equity Principles, which in turn, led to legislative reform.

B Legislative reform

Although the Courts had determined that the EPA could include a claim for pay equity, both the National and Labour parties considered legislative reform was appropriate to provide a process for raising and resolving pay equity claims that would not require immediate resort to litigation. The EPA was therefore amended to specifically prohibit differentiation on the basis of sex between the rate of remuneration for work that is predominantly performed by women and the rate of remuneration that would be paid to men who have the same, or substantially similar, skills, responsibility, experience, conditions of work, and degree of effort.[46]

The EPA now explicitly incorporates this concept of pay equity, although

41 At [118].

42 *Terranova* CA, above n 20, at [69] and [71].

43 At [81].

44 At [239]–[240].

45 *Terranova Homes and Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2014] NZSC 196, [2015] 2 NZLR 437 at [18]–[19].

46 See the Equal Pay Amendment Act, which came into force on 6 November 2020.

it has retained its original title, which refers solely to equal pay.[47] Employees or unions are now able to raise pay equity claims under the prescribed regime set out in the EPA and seek to resolve the pay inequity with the employer without recourse to litigation.[48] The purpose of the reformed EPA is to set a low threshold for raising a claim and provide a "simple and accessible process to progress a pay equity claim".[49] In effect, the legislation makes pay equity a common goal to be pursued by employers and employees working together.

VI THE PAY EQUITY CLAIM PROCESS

The pay equity claim process is comprised of three key parts — raising a claim, assessing the claim, and settling the claim. The stages that make up each of these parts of the claim process are addressed below.

A Raising a pay equity claim

Either unions or employees are able to raise a pay equity claim.[50] A pay equity claim must be in writing, state that it is a pay equity claim made under the EPA and (among other required information) include a brief description of the work to which the claim relates.[51] Under the EPA, unions play a crucial role in the raising, assessing and settling of pay equity claims. Although individual employees are entitled to raise a claim, it is clearly anticipated that in general it will be unions who work with employers to progress pay equity claims on behalf of an entire workforce or sector. It is likely through sector-wide union-raised claims that systemic undervaluation will be most effectively redressed on a significant scale.

1 Arguability

Once an employer receives a pay equity claim, they have 45 working days (unless extended) to determine whether the claim is arguable.[52] A claim is arguable if:[53]

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47 Equal Pay Amendment Act, s 18. Section 18 inserted a new part 4 to the EPA titled "Pay equity claims".

48 Equal Pay Act.

49 Section 13A.

50 Section 13E.

51 Sections 13G–13I.

52 Section 13Q(1). See also section 13J which requires the employer to acknowledge receipt of the claim and give notice of the claim to every union with members who perform work the same as, or substantially similar to, that referred to in the claim no later than five working days after receiving the claim.

53 Section 13F(1).

i) it relates to work that is or was predominantly performed by female employees; and

ii) it is arguable that the work is currently undervalued or has historically been undervalued.

The employer is required to take a "light-touch approach" to this assessment as the purpose of the legislation is to set a low threshold for raising a claim.[54] The EPA assists by defining the meaning of work "predominantly performed by female employees" as being "work that is currently, or that was historically, performed by a workforce of which approximately 60% or more members are female".[55] In considering whether it is arguable that work is currently undervalued or has historically been undervalued, any relevant factor can be taken into account, including the following, non-exhaustive list of factors set out in section 13F(3) of the EPA:[56]

i) The origins and history of the work, including the manner in which wages have been set;

ii) Any social, cultural, or historical factors;

iii) Characterisation of the work as women's work;

iv) That the nature of the work requires an employee to use skills or qualities that have been generally associated with women and regarded as not requiring monetary compensation; and

v) Any sex-based systemic undervaluation of the work as a result of a dominant source of funding, a lack of effective bargaining, occupational segregation or failure to properly assess or consider the remuneration that should have been payable to account for the nature of the work, the levels of responsibility associated with the work, the conditions under which the work is performed and the degree of effort required to perform the work.

Deciding that a pay equity claim is arguable does not mean that the employer agrees that there is a pay equity issue or that there will be a pay equity claim

54 Section 13Q(2).
55 Section 13F(2).
56 Section 13F(3)(a)–(e).

settlement as a result of following the pay equity claim process.[57] Rather, it is simply an acknowledgement by the employer that there may be an issue, and the parties can enter the pay equity process to determine whether undervaluation exists.

If an employer determines that a claim is not arguable, it must notify the claimant of that decision, and provide the claimant with information on how to challenge that decision.[58] The claimant may seek further details from the employer as to the reasons for the decision.[59] Fully understanding the employer's justification for rejecting the claim as "not arguable" may assist the claimant in subsequently raising a claim that will be accepted. For instance, if the employer has rejected the claim on the basis that it is too broad and does not cover an identifiable workforce, the claimant may be able to narrow the claim — and thereby meet the threshold of arguability.

If an employer determines that a claim is arguable, it must notify the claimant of that decision, provide information about the pay equity bargaining process, and enter into the pay equity bargaining process with the claimant.[60]

2 *Affected employees*

The employer must give notice of an arguable claim to all affected employees.[61] "Affected employees" are employees who perform work that is the same as, or substantially similar to, the work covered by the pay equity claim.[62] The information that must be provided to affected employees in relation to a union-raised claim is extensive and is set out in pt 2 of sch 2 to the EPA.[63] This information must be given in writing and expressed in plain language.[64]

For union-raised pay equity claims, all affected employees are automatically covered by the claim.[65] Furthermore, the duty of good faith in s 4 of the Employment Relations Act 2000 applies to the relationship between the union

57 Section13Q(3).
58 Section 13S(3). To challenge the arguability decision, the claimant is able to refer the question of arguability to mediation, the parties may together refer the question to the Authority for facilitation, or the claimant may apply to the Authority for a determination as to whether the claim is arguable.
59 Section 13S(3)(b)(i).
60 Section13S(2).
61 Sections 13U and 13V.
62 Section 13B.
63 Schedule 2, pt 2.
64 Section 13V(3)(c).
65 Section13W(1). See also section 13ZA which provides that all new employees performing work covered by a union-raised pay equity claim will also be automatically covered by the claim and must be given notice of the claim when they commence employment.

and all employees covered by the union-raised pay equity claim (including those who are not members of that union).[66] This represents a significant departure from the way the good faith duty usually applies to unions. Unions are expected to be active and constructive in establishing responsive and communicative relationships with non-union member employees.

Despite the fact that unions are required to involve non-union members covered by the claim in the process, they are not able to require fees to be paid, although they are able to request a voluntary contribution towards the costs of bargaining.[67] It is likely that the new pay equity process will put significant pressure on unions, without the corresponding advantage of additional resources or revenue.

For individual-raised pay equity claims, all employees performing the same, or substantially similar, work must be notified of the claim and how they can raise their own claim, but they are not automatically joined to the claim or covered by the claim.[68]

3 *Opting out*

Although affected employees are automatically covered by a union-raised claim, non-union member employees are entitled to opt out of that coverage by giving notice in writing.[69] Union member employees are unable to opt out while remaining a member of the union but may opt out if they cancel their union membership first.[70] Employees can opt out of the pay equity claim right up until the point at which the vote is taken to determine whether a proposed settlement is approved or declined (including union member employees if they resign from the union first).[71]

The most obvious reason for an employee to opt out is if they are not comfortable with the direction of the pay equity process, the proposed settlement the parties have negotiated, or both. They may wish to reserve their rights to raise their own pay equity claim in the future or to raise a discrimination claim under the Employment Relations Act or the Human Rights Act 1993.

66 Section13C(3).
67 Section 13X.
68 Section 13V.
69 Section 13Y(1).
70 Section 13Y(3).
71 Section 13Y(2)(a)

4 *Multi-employer claims*

Unions are able to raise pay equity claims with more than one employer for substantially similar work. Such claims must be dealt with as a multi-employer claim.[72] The employers must enter into a single multi-employer pay equity process agreement (between the employer parties) to decide whether the claim is arguable and to then work through the pay equity bargaining process together with the union(s).[73] The duty of good faith requires the employers to use their best endeavours to enter into that agreement in an effective and efficient manner.[74]

Individual employers are able to opt out of a multi-employer claim if they have genuine reasons, based on reasonable grounds, to do so.[75] The claim against that employer must then be progressed as a separate claim.[76]

5 *Multi-union claims*

If more than one union raises a pay equity claim with the same employer for the same, or substantially similar, work, those claims must be consolidated by the unions.[77] The duty of good faith requires the unions to use their best endeavours to agree on how they will progress the consolidated claim.[78] However, unlike in relation to multi-employer processes, there is no requirement for the unions to enter into a written agreement setting out how this will occur.

B Assessing a pay equity claim

Once an employer has determined that a claim is arguable, the duty of good faith requires the parties to use their best endeavours to enter into an arrangement setting out a process for conducting the bargaining in an effective and efficient manner.[79] However, there is no obligation on the parties to enter into a written bargaining process agreement or terms of reference-type document. This is similar to the collective bargaining framework, in which the parties are required to use their best endeavours to enter into an arrangement setting out a

72 Section 13K(2).
73 Section 13K(2).
74 Section 13C(2)(d).
75 Section 13L(1).
76 Section 13L(2).
77 Section 13M(1)–(2).
78 Section 13C(2)(c).
79 Section13C(2)(d). This applies both to a pay equity claim raised by a union and a pay equity claim raised by an individual. For an individual-raised claim, the bargaining process agreement would be negotiated and agreed between the individual and the employer.

process for conducting the bargaining in an effective and efficient manner, but a written agreement is not actually required.[80] It will be best practice to have a written agreement between the parties setting out the process for conducting pay equity bargaining, as it is for collective bargaining. However, even if such an agreement is not reached, the parties will still be required to engage in the pay equity process in good faith.

The pay equity process requires the parties to undertake an assessment to determine whether, and to what extent, the relevant work is undervalued when considered against appropriate comparators.[81] This assessment is the most substantive part of the pay equity process. It is where the parties consider and determine the value of the work in order to ensure pay equity — in other words, to ensure that employees receive the same pay for work of equal value.

Only three sections of the EPA are devoted to explaining the assessment process despite the fundamental importance of this step in the process to pay equity outcomes: s 13ZC deals with the provision of information between parties, s 13ZD deals with what matters the parties must assess during the assessment phase, and s 13ZE deals with the identification of appropriate comparators.[82] Very little guidance is provided as to how the assessment process will occur or how comparators will be identified. Rather, these vital matters are left to the parties to manage between themselves. For a pay equity claim raised by an individual, the parties managing the assessment process are the individual employee and the employer; for union-raised claims, the parties are the union(s) and the employer(s).[83]

The EPA does require that all assessments must be objective and free from assumptions based on sex. It specifically states that it must not be assumed that prevailing views as to the value of work are free from such sex-based assumptions.[84] The point of the pay equity process is to remove undervaluation due to sex-based discrimination. A work assessment process that is not gender-neutral and cognisant of the fact that prevailing views may not be gender-neutral risks the work remaining undervalued, thereby defeating the purpose of the pay equity process.

Te Kawa Mataaho Public Service Commission (Te Kawa Mataaho) has

80 Employment Relations Act 2000, s 32(1)(a).
81 Equal Pay Act, s 13ZD.
82 Sections 13ZC–3ZE.
83 Section 13B definitions of “claimant” and “party”; and s 13ZD.
84 Section 13ZD(2).

produced a paper entitled "Pay Equity Work Assessment Process Guide", which provides some guidance as to how work assessments could occur.[85] Te Kawa Mataaho recommends a "factor-based analysis" of work which involves separating the work into its constituent parts (the factors) which describe elements of what the work entails, including skills used, responsibilities undertaken and the conditions and demands placed on someone who is carrying out the work.[86]

Te Kawa Mataaho also recommends one of three gender-neutral work assessment tools be used to assess the work covered by the claim and the work of potential comparators.[87] This involves gathering information about the relevant roles, particularly via interviews of those who perform the work, and then analysing that information using the gender-neutral tool.[88]

Using a purpose designed gender-neutral tool is a part of ensuring that gender-bias and historical or prevailing views as to the value of work are not reflected in the outcome. One interesting example Te Kawa Mataaho refers to is that in most traditional job evaluation systems, the only consideration for the factor involving people leadership is whether someone has direct reports.[89] The creation of gender-neutral work assessment tools recognises that the traditional job evaluation approach overlooks the hidden or undervalued skills more commonly the purview of women. For example, a gender-neutral tool is likely to consider whether workers must lead without authority, therefore requiring them to be skilled influencers and consensus builders.[90]

In undertaking the assessment process, the parties need to actively consider the so-called "soft-skills", or skills or qualities that have generally been associated with women. Section 13ZD of the EPA specifically refers to recognising the importance of skills, responsibilities, effort, and conditions that are or have been "commonly overlooked or undervalued in female-dominated work".[91] Some examples provided include social and communication skills, taking responsibility for the well-being of others, cultural knowledge, and

85 Te Kawa Mataaho Public Service Commission *Pay Equity Work Assessment Process Guide* (November 2020).
86 At 5.
87 At 5.
88 At 6–7.
89 At 6.
90 At 6.
91 Equal Pay Act, s 13ZD(2)(b).

sensitivity.[92] Section 13F must also be taken into account in the assessment process, and refers to the characterisation of work as "women's work".[93] The point of the pay equity process is to ensure that these skills are suitably valued and, ultimately, remunerated.

All parties must actively and consciously set aside any bias or subjective views as to the value of certain roles if they wish to achieve pay equity. This is true even when using a gender-neutral work assessment tool. The assessment process is also no place for advocacy if the goal is pay equity. Unions and employees are likely to have strong views on the value of the work that is the subject of the claim (and employers may also). However, those strong views need to be disregarded to enable an objective consideration of the information that has been collected during the interview process and the analysis of that information by way of the gender-neutral work assessment tool.

If subjectivity, personal views, and bias creep into the work assessment process then the value of the work will not be properly ascertained, and any pay equity outcome will not reflect the principles of pay equity or the purpose of the EPA.

The gender-neutral work assessment process is used for both the work covered by the claim and for potential comparator workforces. Potential comparators must be identified and information gathered for analysis. The goal is to find male comparators who are doing work of equal value to that covered by the pay equity claim. What may be considered to be the work of "male comparators" is not defined in the legislation.

Comparable work can include the same, or substantially similar work, performed by male comparators, or different work performed by male comparators but requiring substantially similar skills, experiences, responsibilities, working conditions and degrees of effort to the work under investigation.[94] The parties may also consider work performed by any other comparators that they consider to be useful and relevant.[95]

Choosing comparators and assessing them against the applicable workforce is likely to be the most labour-intensive part of the pay equity process. To

92 Section 13ZD(2)(b).

93 Section 13ZD(2)(c) provides that in making the assessments required s 13ZD(1), the parties must consider the list of factors in s 13F(3). Section 13F(3)(c) provides that a relevant factor will be the "characterisation of the work as women's work".

94 Section 13ZE(1)(a) and (b).

95 Section 13ZE(1)(c).

determine whether a workforce is an appropriate comparator, substantial information is required from and about that workforce. There is no compulsion in the legislation for this to be provided, rather employers are relying upon the good will of other employers to enable staff to attend interviews, complete surveys, and provide information. While this may be relatively smooth in the public sector due to the overarching expectations of Te Kawa Mataaho, it may be difficult to persuade non-public sector employers to assist other employers in the process.

The Ministry of Business, Innovation and Employment has created a central repository of pay equity data and information about pay equity claimants and comparators, where parties have agreed to share this information.[96] The ability to access relevant data from previous pay equity processes, rather than the parties to each claim needing to undertake the entire process from scratch, may enable claims to be assessed more easily. In addition, it may prevent comparator fatigue where data can be reused rather than potential comparator organisations being requested to work through the process numerous times. Data should only be used from the central repository if it matches closely with the process that the parties are using for the collection of new data to ensure that there is consistency in the process used and data gathered within the claim.

As an example of comparators, the Teacher Aide Pay Equity Claim that was settled between the Ministry of Education Te Tāhuhu o te Mātauranga and the New Zealand Education Institute Te Riu Roa in May 2020, prior to the amendments to the EPA, assessed comparator workforces including Corrections Officers, Customs Officers, Oranga Tamariki Youth Workers, and School Caretakers.[97] Clearly, these comparator roles perform significantly different work from each other, and from Teacher Aides. However, the knowledge, skills, responsibilities, demands, and working conditions were assessed as having similarities in certain areas — and consequently, the roles were considered to be suitable comparators.[98]

Once the work covered by the claim and the work of appropriate comparators has been considered, the parties are able to establish whether the work covered by the claim is undervalued on the basis of sex. The remuneration of the comparator roles has been determined by market forces but as the work

96 Employment New Zealand “Pay equity” (29 July 2021) <www.employment.govt.nz>.

97 Ministry of Education Te Tāhuhu o te Mātauranga *Teacher Aide Pay Equity Claim Report — Processes, evidence and information for assessing pay inequity for teacher aides* at 18 and 25–27.

98 At 28.

is predominantly performed by male employees, it is highly unlikely that it has been negatively affected or undervalued by sex-based discrimination. The remuneration of comparator workforces can therefore be compared with the remuneration of the workforce covered by the claim to establish whether undervaluation exists.

Terms and conditions of employment other than remuneration can also be compared and factor into the determination of whether the work covered by the claim has been undervalued.[99]

C Settling a pay equity claim

If the assessment process establishes that the work that is the subject of a pay equity claim is undervalued, the parties are able to turn their minds to correcting that undervaluation.[100] The comparison of the rates of remuneration and terms and conditions of employment of comparator workforces, with the rates of remuneration and terms and conditions of the work covered by the claim, provides a good starting point for negotiations.

In order to settle a pay equity claim — and achieve pay equity — the parties must agree on a rate of remuneration that ensures there is no differentiation on the basis of sex.[101] A pay equity settlement must also include agreement on a process to review remuneration, including the agreed frequency of reviews, to ensure that pay equity is maintained.[102] This requirement recognises that the gender stereotypes and biases which may have historically led to undervaluation have not been entirely eliminated. A pay equity claim settlement may also include terms and conditions of employment other than remuneration, if the parties agree, but an employer may not reduce any terms and conditions of employment of an employee who has raised a pay equity claim when settling that claim.[103] This means that there can be no trade-offs in bargaining, which is appropriate given that the purpose of a pay equity claim settlement is to redress an undervaluation.

Prior to settling a union-raised claim, the union is required to obtain a mandate to settle from the employees covered by the claim.[104] This includes

99 Equal Pay Act, s 13ZD(1)(b) and (c).
100 If undervaluation is not established, the pay equity process concludes on the basis that there is no sex-based discrimination needing correction.
101 Equal Pay Act, s 13ZH(1)(a)(i).
102 Section 13ZH(1)(a).
103 Section13ZH.
104 Section 13ZF.

both union members and non-union member employees who have not opted out of the claim.[105] Once a proposed settlement has been reached, to obtain the mandate, the union must arrange for a vote to take place, enabling all covered employees to vote on whether to approve or decline the proposed settlement.[106] The votes of union and non-union employees covered by the claim are of equal value.[107] If the outcome of the vote is that a simple majority of those who voted approve the proposed settlement, then the union must sign it.[108] Non-union member employees are entitled to opt out of the process right up until the final date by which their vote must be cast.[109]

D Implementation

Once signed, a pay equity settlement is implemented by way of automatic variation to all relevant employment agreements.[110] In this regard, the employment agreement, whether individual or collective, of an employee covered by a pay equity claim settlement is deemed to be varied to take account of the settlement.[111] This includes the new remuneration and any other terms or conditions of employment more favourable to the employee that were agreed in the pay equity claim settlement.[112] Although this sounds easy, it may be challenging in practice for large-scale union-raised claims where many different employment agreements are required to be automatically varied by the same settlement agreement.

In practice, as well as amending employment agreements, an employer must ensure that it has processes and procedures in place to give effect to the new rates of pay and any other terms and conditions agreed to. In addition, the benefits of a union-raised pay equity claim settlement must be offered to all other employees performing the work covered by the claim.[113] This includes employees who had previously opted out of coverage of the claim and all new employees employed to perform the work to which the settlement relates. Offering the benefit of a pay equity claim settlement requires that the same remuneration and other terms and conditions covered by the settlement are

105 Section 13ZF(1)(b).
106 Section 13ZF(5).
107 Section 13ZF(4)(a).
108 Section 13ZF(4)(c)(iv).
109 Section 13Y(2)(a).
110 Section 13ZM(3).
111 Section 13ZM(2).
112 Section 13ZM(2)(a) and (b).
113 Section 13ZL(2).

offered, including any back pay that is part of the settlement.[114] Employees must be informed that accepting the offer will have the effect of barring the employee from raising their own claim in relation to pay equity.[115] An employee could refuse such an offer with a view to pursuing their own claim if they consider that the offered settlement does not appropriately redress the undervaluation.

However, employees are prevented from double-dipping. Employees who are pursuing an unlawful discrimination complaint under the Human Rights Act or an unlawful discrimination personal grievance under the Employment Relations Act, are not entitled to any benefits obtained as part of a pay equity claim settlement.[116] Similarly, employees who have already settled a pay equity claim with the employer or accepted the benefit of a pay equity claim settlement from the employer are not entitled to the benefits of another pay equity claim settlement.[117]

The legislative requirement to pass on the benefit of a pay equity claim settlement relates to union-raised pay equity claims only. The benefit of the settlement of a pay equity claim raised by an individual employee may be offered to other employees performing the work to which the claim relates, but this is not a requirement.[118]

However, it is important to remember that pay equity is not simply about negotiating an increase to pay rates. Rather, it is about ensuring employees are appropriately remunerated for the value of the work that they perform, and that they are not discriminated against on the basis of sex. This means that when an employer settles a pay equity claim (with a union or with an individual employee), it is on the basis that undervaluation of the work due to sex-based discrimination has been established and that the new agreed rate of pay corrects that undervaluation.

The EPA requires that an employer ensures there is no differentiation on the basis of sex, between the rate of remuneration for work that is predominantly performed by women and the rate of remuneration that would be paid to men who have the same, or substantially similar, skills, responsibility, experience,

114 Section 13ZL(1)(a) and (b).
115 Section 13ZL(1)(c).
116 Section 13ZL(2)(c)
117 Section 13ZL(2)(d).
118 Section 13ZL(4).

conditions of work, and degree of effort.[119] Not offering the benefit of an individual-raised pay equity claim settlement to other employees therefore leaves the employer in the position of knowingly discriminating on the basis of sex against its other employees performing that work as the employer knows (due to having undertaken the pay equity assessment) that the work is undervalued. This could leave the employer exposed to a personal grievance claim for discrimination under the Employment Relations Act[120] or a complaint under the Human Rights Act.[121]

Consequently, although the EPA does not require the benefit of the individual-raised claim settlement to be passed on, it may be prudent for employers who have worked through an individual-raised claim and established undervaluation to act to ensure that undervaluation is corrected for all its employees who perform the same or substantially similar work. To not do so means that the employer leaves itself open to future discrimination claims. In addition, employees who accept the benefit of such an offer will be barred from raising their own claim, so passing on the benefit may prevent the employer from having to undertake the same pay equity exercise in relation to other employees performing the same work.

1 New employees

An employer who is party to a pay equity claim settlement with a union must offer the benefit of that settlement to new employees at the same time as they are offered employment.[122] Accepting the benefit of that offer prevents the employee from raising their own pay equity claim in respect of that work (unless the Authority or court determines otherwise in accordance with s 13ZY(5) which requires exceptional circumstances).[123] New employees must be employed pursuant to the 30-day rule where there is an applicable collective

119 Section 2AAC(b).

120 Employment Relations Act, s 103(1)(c).

121 Human Rights Act 1993, s 76(2)(a) provides that a member of the Human Rights Commission has the ability to receive and assess a complaint alleging that there has been a breach of pt 1A or pt 2, or both, of the Act. Section 22(1)(b), which forms part of pt 2, provides that it shall be unlawful for an employer, or any person acting or purporting to act on behalf of an employer to offer or afford the applicant or the employee less favourable terms of employment, conditions of work, superannuation or other fringe benefits, and opportunities for training, promotion, and transfer than are made available to applicants or employees of the same or substantially similar capabilities employed in the same or substantially similar circumstances on work of that description by reason of any of the prohibited grounds of discrimination, one of which is discrimination on the basis of sex.

122 Equal Pay Act, s 13ZL(5) and (6).

123 Section 13E(6).

agreement, which requires that they are employed on the terms and conditions in the collective agreement and any additional terms and conditions mutually agreed to.[124] They therefore effectively have no choice but to accept the benefit of the pay equity claim settlement if they want to accept employment with the employer (as the collective agreement will have been varied to include the terms of the settlement).[125]

Accepting employment on the basis of these terms and conditions means they are immediately barred from raising their own pay equity claim. Existing employees have a choice whether to be covered by a pay equity claim settlement, and consequently can choose to give up their right to raise their own pay equity claim. New employees do not get that choice. They were not part of the pay equity process but by accepting employment with the employer, they automatically give up their right to raise their own claim. Their only choice is whether to accept employment with the employer, and thereby be covered by the settlement and give up the right to raise their own claim, or not to accept the offer of employment at all.

2 *Reviewing and maintaining pay equity*

A pay equity settlement must include agreement on a process to review remuneration to ensure that pay equity is maintained, including the frequency of those reviews.[126] Reviews must be aligned with any applicable collective bargaining rounds or, if no collective bargaining round applies, must be at least every three years.[127]

A requirement to review is intended to ensure that where undervaluation has been redressed, that undervaluation is not permitted to creep back in over time. Reviewing pay equity is not going to require the parties to work through the full pay equity process every three years. While the EPA is silent on what process should be followed, the parties may choose to first look at the comparator workforces that were chosen for the claim and consider any movement in these pay rates since the claim was settled. The parties will also need to consider any reasons for such movement and whether these reasons may be entirely disconnected from the value of the work. For example, a shortage in the sector may have led to a marked increase in pay rates to attract

124 Employment Relations Act, s 62(3).
125 Equal Pay Act, s 13ZM(2).
126 Section 13ZH(1)(a)(ii).
127 Section 13ZH(3)(b)(ix).

employees. However, this does not mean the value of the work itself in terms of required skills, responsibilities, experience, working conditions, and degrees of effort has changed since the time the pay equity settlement was reached. In this scenario, the pay rate has increased disproportionately for other reasons.

E Judicial assistance and dispute resolution

There are many points in the process set out above when the parties may find themselves with opposing or conflicting views. Mediation is available to the parties to assist them in working through such disagreements.[128] If mediation is insufficient, the parties can refer disputes to the Employment Relations Authority for facilitation,[129] or apply for a determination.[130] The Authority is entitled to consider any matter relating to a pay equity claim and importantly, can make a determination that fixes (that is, determines) remuneration, ensuring pay equity for the parties.[131]

VII CHALLENGES FACING PAY EQUITY

The process of raising, assessing, and settling a pay equity claim is intended to be straightforward and accessible. However, parties working through the process are likely to face some significant challenges.

A Changing societal norms

Work typically performed by women has been, and still is, systemically undervalued due to social, cultural, and historical factors. Naturally, this has affected the remuneration paid for that work and resulted in fundamental pay inequities. The "market rate" for people working in traditionally female dominated occupations may not be a fair or equitable rate. A free-market economist might say that it is for the market — a deregulated and flexible market — to solve this undervaluation. In a perfect world, such undervaluation ought to work its way out of the system through the market forces of supply and demand. A proponent for the free market would likely argue that this would be a fairer mechanism for achieving pay equity, as it negates any need for government intervention.

However, the market pays "women's work" less than it would if it was work performed by men because "women's work" is less valued by society.

128 Section 13ZO.
129 Section 13ZQ.
130 Section 13ZY.
131 Section 13ZY(1)(d)(i).

The market reflects and reproduces the societal sex-based discrimination and unconscious bias against women, and it takes a long time for the ingrained views of society to change. To counter this, pay equity legislation attempts to force that change in the market.

Parliament can enact legislation to influence the free market to target systemic sex-based discrimination, but it cannot forcibly alter ingrained societal norms, cultural understandings or unconscious bias. In this regard, pay equity is a social issue, and legislation has limited ability to advance a social issue or be an instrument for social change. Changing the law does not automatically change prevailing social attitudes, but it may play an essential role in driving that change over time.

1 Unconscious bias

It is important that the parties implementing pay equity legislation actively consider their own potential biases and the impact societal norms may have on their perspective when working through the pay equity process. As an example, one of the comparators used for the settlement of the Teacher Aide Pay Equity Claim (prior to the enactment of the current legislation) was Corrections Officers.[132] The instinctive reaction may be one of surprise that the work of Teacher Aides and that of Corrections Officers were considered by the parties to be of equal value. However, the question is whether this instinctive reaction comes from an unconscious, ingrained view of the value of the role of a Teacher Aide, a view that is likely shaped by the fact that it is a role predominantly performed by women.

To properly assess pay equity claims, it is necessary for all parties to put aside, or at least question, any instinctive reaction as potentially being influenced by ingrained societal norms or unconscious bias. This can be hard and uncomfortable. Parties should explore, rather than ignore, the value that society has traditionally put on such work. Parties working together to resolve pay equity claims should be talking about why it is that "soft skills" or "women's work" are generally considered to be of less value and worthy of lower remuneration. It is only through airing these hard questions that parties will be able to put aside any societal sex-based discrimination and get to the true value of the work itself.

The EPA is intended to guide parties towards these discussions, directing

132 Ministry of Education Te Tāhuhu o te Mātauranga, above n 97.

the parties away from an acceptance of the status quo and towards a new understanding of the value of work and how we attribute value. Nonetheless, it is still up to the parties themselves to consciously question and remove any unconscious bias.

2 The effect of the law

It is not a new idea that changes in the law may not change the public mindset. Changing societal norms happens in the hearts and minds of the people, and it is a much slower and more personally challenging process than the enactment of legislation.

Ms Doyle's article in the 2018 edition of this Journal, prior to the introduction of the current legislation, concluded that the legal mechanisms intended to progress gender equality must be supported by broader political, social and economic concerns.[133] Effectively, the law alone is not enough to engender social change. Nonetheless, there is hope that the law can be used as a tool to increase the remuneration for "women's work" via the resolution of pay equity claims, which may eventually increase the social value of that work. Over time, if the undervaluation of "women's work" is driven out of the market, the social attitude towards the value of that work is likely to change also. In addition, once the work of female dominated workforces is more highly remunerated and valued by society, these roles may become more attractive to men which in turn will help with changing social attitudes to the work.

The EPA attempts to resolve discrimination in pay on the basis of sex only. It does not consider the impact of ethnicity on pay, and specifically, where gender and ethnicity intersect, even though such intersectionality has the potential to result in intensified undervaluation. However, by reducing the undervaluation of women overall, the appropriate resolution of pay equity claims for female-dominated workforces should also make progress towards reducing the undervaluation of women in minority groups.

3 Maintaining relativities

Relativities exist within the market. Pay equity necessarily disrupts these relativities and this can be a challenging concept. As an example, male-dominated Workforce A is used to earning more than female-dominated Workforce B. However, following female-dominated Workforce B's pay equity

133 Doyle, above n 1, at 166–167.

claim, Workforce B is assessed as performing work of equal value to Workforce A. As part of the settlement of the pay equity claim, Workforce B's pay rate is lifted to be equivalent to Workforce A's pay rate. Workforce A becomes disgruntled to learn that Workforce B now earns the same amount as them, always having considered themselves to be a higher paid workforce. Workforce A considers that they should be paid more than Workforce B, and therefore that their pay should increase. However, maintaining the relativities between the workforces defeats the goal of removing undervaluation. If Workforce A's pay rate is lifted, Workforce B once again falls behind and earns less than a workforce assessed as doing work of equal value. It is important to appreciate that an increase in remuneration due to the settlement of a pay equity claim is not a pay rise. Rather, it is a correction of an historical undervaluation.

This is not a challenge faced by the parties progressing a pay equity claim, but a challenge faced by society to accept the outcome of those claims. A change to the law is unable to change the public mindset. A mindset shift is required for people to understand that when the undervaluation of a role is corrected, this does not mean that other roles should receive the same pay adjustment to maintain existing relativities.

B Funding and affordability

Pay equity is a common goal that should be pursued by employers and employees working together. However, only the employer party will be required to fund the outcome of a pay equity claim settlement. Although there may be a general acceptance against sex-based discrimination in pay, employers may not be quite so magnanimous when the principle of pay equity is applied to their own workplace and balance sheets.

In *Service and Food Workers Union Nga Ringa Tota Inc v Terranova Homes and Care Limited*, the Employment Court considered the cost to employers of achieving pay equity but determined that such concerns were overshadowed by "the unquantifiable cost (including societal cost)" of perpetuating discrimination.[134] The Court stated:[135]

> History is redolent with examples of strongly voiced concerns about the implementation of anti-discrimination initiatives on the basis that they will spell financial and social ruin, but which prove to be misplaced or have

134 *Terranova* EmpC, above n 19 at [109].

135 At [110].

> been acceptable as the short term price of the longer term social good. The abolition of slavery is an old example, and the prohibition on discrimination in employment based on sex is both a recent and particularly apposite example.

The Court of Appeal also considered the cost issue, stating that an employer's source of revenue or ability to pay, could not form part of the "conditions" that could be taken into account when considering pay equity.[136] The EPA does not allow affordability to be a consideration for pay equity. Pay equity is not based on an employer's ability to pay, but the level of pay that an employee's work deserves. Employers must accept the requirement to pay a higher rate of pay in occupations undervalued on the basis of sex, not in the expectation of greater output, but because it is the fair, lawful, and just thing to do.

It is possible for a pay equity settlement to put an employer out of business. While regrettable, the law considers it to be more important to pay women in accordance with the value of the work they are performing than to protect employers from increased wage costs. This is the tension between social justice and fiscal constraints.

1 Government funding

The vast majority of pay equity claims that have been raised to date are for workforces either within the public sector or in the Government-funded sector. In determining whether a pay equity claim is arguable, an employer may have regard to any sex-based undervaluation that may have resulted from (among other factors) a dominant source of funding across the relevant market, industry, sector, or occupation, or a lack of effective bargaining in the relevant market, industry, sector, or occupation.[137]

By enacting the EPA, Parliament appears to be seeking to "fix" the Government's and the funded sector's undervaluation of women's work brought about by the desire to keep public and funded sector wage costs down. Despite the anticipated cost, the New Zealand Government considers achieving pay equity to be a priority.[138] In fact, the Public Service Pay Guidance 2021 makes

136 *Terranova* CA, above n 20, at [174].
137 Equal Pay Act, s 13F(3)(e)(i) and (ii).
138 Te Kawa Mataaho State Services Commission and the Ministry for Women *Eliminating the Public Service Gender Pay Gap 2018-20: Action Plan Progress Report* (July 2020) at 4.

it clear that although the Government is in a time of fiscal constraint, the importance of addressing gender and ethnic pay inequities is unaffected.[139]

2 *Affordability for unions*

The significant time and resource that will be required from unions to progress a pay equity claim means that unions are also likely to see increased cost under the new legislation. As explained above, under the new legislative framework unions are expected to represent their fee-paying members and also ensure that the views of non-union members are taken into account. The legislation does not go as far as requiring unions to represent non-union members, but it does create a good faith relationship between unions and non-union members covered by a claim.[140] However, non-union members cannot be required to assist in funding the cost to the union of progressing the claim, although they can be asked to make a voluntary contribution.[141] Unions may find themselves facing an additional high workload but with nowhere to fund it from. If substantial resources are directed toward pay equity claims, unions run the risk of not being able to progress other critical issues or business as usual.

C The high-level nature of the legislation

The new legislation has been in force for nearly a year and during that time, many questions have been raised as to how to implement the new provisions. Unfortunately, the legislation does not provide mechanisms for dealing with the detail, despite appearing straightforward and process-based. In some respects, the legislation is highly prescriptive but in others, it is silent or unclear. For example:

i) Does an employee who resigns their employment remain covered by a pay equity claim, and therefore remain able to vote on any proposed outcome and receive any backpay?

ii) What happens to a union-raised claim if all employees covered by that claim opt out?

iii) Can an employee who has opted out of a claim subsequently opt back in?

139 Te Kawa Mataaho Public Service Commission *Public Service Pay Guidance 2021* (May 2021) at 1.
140 Equal Pay Act, s 13C(3).
141 Section 13X.

iv) What might constitute a genuine reason based on reasonable grounds enabling an employer to opt out of a multi-employer claim?

v) What makes work "substantially similar" to other work?

vi) Should a claim cover a specific role or occupation, or can it be broader, encompassing a common purpose within a large number of different roles?

vii) How do employer parties progress a multi-employer claim when another employer party does not engage in the process?

Further, the legislation does not provide the mechanics for how a claim will be assessed and settled as it is limited to outlining the process that must be followed. As an example, unions are expected to "consolidate" their claims when more than one union raises a claim for the same work with the same employer.[142] This can happen at any point in the pay equity process. No guidance is provided as to how unions should go about this other than that they owe each other a duty of good faith and must use their best endeavours to agree on how they will progress the consolidated claim.[143]

1 Multiple employers

A claim that involves multiple employers must be managed collaboratively by the employers with whom that claim has been raised.[144] Ultimately, the legislation presumes a high level of co-operation between all parties who may be involved in a pay equity process. This is also the case with collective bargaining, but it is becoming apparent that large-scale pay equity claims are likely to include substantially more employers, and potentially more unions, in the same process than collective bargaining tends to. The level of collaboration required will be difficult to achieve on a practical level and time-consuming.

There are claims currently progressing through the pay equity process involving multiple employers as well as multiple unions, and it is becoming clear that the anticipated level of collaboration is not occurring. It is one thing for legislation to state that multiple employer parties or multiple union parties will work together, but it is quite another for those employer parties or union parties to demonstrate such cooperation.

142 Section 13M(1)–(2).
143 Section 13C(2)(c).
144 Sections 13C(2)(b) and 13K.

The legislation is necessarily complex due to the complex nature of the problem it seeks to address, and there is no perfect answer or solution. This leaves the parties to each claim to resolve questions and complexities, either through collaboration and cooperation, or litigation. Given that the legislation leaves some matters either open to negotiation or unaddressed, litigation is likely to be necessary to guide parties in how to apply the legislation and embed its implementation.

D The broad scope of claims

The legislation aims to enable pay equity across workforces or occupations rather than simply within the workplaces of individual employers. To this end, unions have the ability to raise claims with multiple employers at the same time, and the employers must work together to assess and process the claim. To make the most of this workforce or sector approach, unions are raising large-scale pay equity claims to redress the potential undervaluation of the work of large groups of their members. However, umbrella claims that cover vast workforces, such as the claim from the New Zealand Public Service Association Te Pūkenga Here Tikanga Mahi (PSA) to the public service for clerical and administrative work, are potentially unwieldy. The PSA's claim for clerical and administrative staff covers over 100 roles at over 40 different government departments, agencies and entities.[145] Roles named in the claim include Payroll Officers, Legal Secretaries, Human Resource Coordinators, Logistical Support Officers, Weathertight Administrators, and Transport Officers — to name just a few.[146]

The complexity of large-scale pay equity claims raises difficult questions. For example, whilst the roles named in the PSA claim all fall under the umbrella of clerical and administrative work, it is presumably questionable whether these employees (and the 100 other named roles) all do the same or substantially similar work. Even if the work is similar, it is highly likely that the pay structure and terms and conditions for these staff will be diverse. Reaching a settlement that achieves pay equity for so many different positions is likely to be challenging, time consuming, costly, and potentially result in

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145 Template letter from Kerry Davies (National Secretary of the New Zealand Public Service Association Te Pūkenga Here Tikanga Mahi regarding the claim for the implementation of equal pay on behalf of PSA members who predominantly perform clerical and administrative work (31 October 2019). Departments, agencies and entities subject to the claim are listed in Appendix 1; indicative roles included in the claim are listed in Appendix 2.

146 Appendix 2.

some groups being disadvantaged. In addition, under the new legislative framework employment agreements are deemed to be automatically varied from the date the parties enter into a pay equity claim settlement.[147] Reaching a pay equity claim settlement that results in the variation of a number of different employment agreements, while achieving pay equity for all employees concerned, will be a complex operation.

It will be essential to keep settlements as simple as possible. Having settlements solely focused on remuneration rather than amending other terms and conditions is likely to be the most practical approach, although the legislation does provide for the amendment of other terms and conditions of employment in achieving pay equity.[148] Even amendments to remuneration will need to be straightforward, perhaps providing for minimum pay rates, in order to ensure the settlement can easily be incorporated into a variety of different structures. The more roles a claim covers, the more complex the settlement and variation is likely to be.

VIII CONCLUSION

Following the decisions of the Employment Court and Court of Appeal in the *Terranova* cases, pay equity became an operative concept in New Zealand. The EPA was amended to incorporate the concept of pay equity more clearly into the existing legislation with the intention of making pay equity simple and accessible.[149] Despite this intention, the legislation is complex, which is not surprising given the inherent complexity and ingrained nature of the issue that it seeks to address. Since the new pay equity legislation came into force, the challenges inherent in attempting to redress sex-based discrimination in pay are being felt.

Although the law has changed, that does not automatically change societal views on the value of women's work. Changes in the hearts and minds of the people may be slower to materialise. Regardless, the change in the law and each settled claim will assist in moving us towards a society where "women's work" is valued despite, or even because of, its traditional association with women. The natural result of legislating to "fix" an issue as complex and deep-seated as sex-based discrimination in pay is that it will take substantial time, effort,

147 Equal Pay Act, s 13ZM(2).
148 Section 13ZH(2).
149 Equal Pay Amendment Act.

collaboration, and ultimately judicial clarification to achieve progress. Despite the challenges, this author considers it to be a step in the right direction.

NEW RULES, SAME CULTURE?

Commentary on the changes to the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008

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I INTRODUCTION

From 1 July 2021, amendments to the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 and the Lawyers and Conveyances Act (Lawyers: Ongoing Legal Education – Continuing Professional Development) Rules 2013 came into effect (collectively, the Rules). These amendments came about due to a changing social context that brought well overdue revelations regarding the legal profession into the public eye. The changes signal there should be no tolerance for unlawful behaviour between members of the profession.

The global #MeToo social movement stimulated a national debate in Aotearoa about sexual abuse and sexual harassment. In mid-February 2018, allegations began to surface of sexual harassment and assault at one of the country's biggest law firms, Russell McVeagh. The complainants were summer clerks at the time, who all alleged a former partner of the firm indecently assaulted them at the Wellington firm's Christmas functions in 2015. It soon became clear these allegations were not isolated to one individual, nor to one firm, but rather formed part of a larger systemic cultural issue that required serious and urgent change.

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As part of its response to the revelations, the New Zealand Law Society (NZLS) circulated a consultation document about proposed changes to the Rules in early June 2020 and a draft of the changes was prepared. It is important to note there was no wider political will from the Government to change the Lawyers and Conveyancers Act 2006 (the Act). Therefore, NZLS was required to do what it could to update the Rules, without making changes to the Act. Feedback was given by many groups, such as women's legal associations, the Aotearoa Legal Workers' Union and the In-House Lawyers Association (ILANZ). The final version of the Rules became available on 1 April 2021.

The amended Rules include definitions of bullying, discrimination, harassment, including racial and sexual harassment, and other unacceptable behaviour within the legal profession. New mandatory reporting requirements have also been introduced for firms, requiring notification to the NZLS of this type of conduct to ensure there is an appropriate response (and accountability) from the legal profession. There are express references to firms' compliance with their health and safety obligations being reported to the NZLS.

Whilst it should always have been obvious such conduct was manifestly unprofessional and potentially amounted to misconduct, the fact that this was not expressly articulated in the Rules allowed for ambiguity in interpretation (whether genuine or feigned). Recognition of the scale of the problem of unlawful conduct within the profession, making a strong statement that it is not to be tolerated, and addressing it, are long overdue. However, in our view, questions arise as to whether these new Rules go far enough and what the impact of the changes will be.

Although the definitions and ambit of the Rules have been improved by amendments following the consultation period, the restricted scope, novel definitions, and finer detail of the reporting regime may create some concern. The effect of the Rules and the new mandatory reporting regime is yet to be seen. It is possible we may see both an overreaction and underreaction under these new Rules, as the profession takes time to better understand their function, application and purpose.

II SOCIAL CONTEXT TO THE CHANGES OF THE RULES

The allegations of sexual misconduct in law firms, most notably at Russell McVeagh, signified the starting point for a long overdue public discussion about inappropriate conduct within the legal profession. Forming part of the larger "#MeToo" movement against sexual abuse and harassment that swept across the globe, the legal profession (in Aotearoa and in other jurisdictions) was forced to acknowledge and reflect on revelations about bullying and sexual harassment in the profession. It emerged from the ensuing surveys and public discourse that many people had experienced a range of inappropriate conduct in the legal profession.[1] However, the public debate also showed many people did not regard sexual harassment, bullying, racism and other forms of unlawful and harmful behaviour towards colleagues as warranting disciplinary action.[2]

It is difficult to believe that abusive behaviour within the legal profession, as experienced by the five young women at Russell McVeagh,[3] was not already formally expressed as capable of being held to be professional misconduct. The fact such conduct was unacceptable was made abundantly clear by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal in the James Gardner-Hopkins case, stating:[4]

> This decision affirms what has always been the case, namely that indecent, unconsented or unwelcome touch by a lawyer on another, breaches the standards of conduct expected of a member of the profession. Intimate non-consensual touch connected with the workplace, on someone that the lawyer has power over, has always been unacceptable.

As publicity spread, there was an outpouring of stories and discussion about sexual harassment, bullying, violence and discrimination experienced by individuals within the legal profession.[5]

The NZLS Legal Workplace Environment Survey (the Survey) of 3516 lawyers found that nearly one third of female lawyers have been sexually

1 Colmar Brunton *Legal Workplace Environment Survey 2018* (New Zealand Law Society, 28 May 2018).
2 *Report of the New Zealand Law Society Working Group* (NZLS Report) (New Zealand Law Society, December 2018) at 36.
3 *National Standards Committee No.1 v James Desmond Gardner-Hopkins* [2021] NZLCDT 21.
4 At 172.
5 For example the stories posted on Zoë Lawton's #Metoo Blog: Zoë Lawton "#Metoo blog" (2018) <zoelawton.com>.

harassed during their working life.[6] Such experiences are not recent developments; widespread discrimination and sexual harassment of women in the profession has been reported since the first nationwide survey of lawyers in 1992.[7] In addition, the Survey showed that bullying, racism and other forms of discrimination were widespread, with 52 per cent of lawyers reporting bullying at some point in their career.[8] The Survey showed that race and culture plays a role in bullying, with Māori, Pasifika, and Asian lawyers reportedly experiencing bullying more frequently than Pākehā lawyers.[9] At the same time, 40 per cent of lawyers under the age of 30 believed major changes were needed to improve the culture of their workplace.[10] The Survey indicated there are entrenched cultural, structural and historical issues which have continued to create barriers to achieving equality and diversity within the legal profession. A comprehensive review of the regulatory framework was clearly necessary to address these barriers, which had become woven into the fabric of the profession.

In response NZLS commissioned an enquiry undertaken by a Working Group chaired, by Dame Silvia Cartwright. The report completed by the Working Group (the Report) stressed the importance of not being complacent in the wake of the Gardner-Hopkins case. The Report emphasised the importance of rebuilding public trust in the NZLS after a previous lack of oversight, and increased revelations of bullying, sexual violence, harassment and discrimination.[11]

III CHANGING THE RULES – NO POLITICAL WILL TO CHANGE THE ACT

One important thing to note is that the statutory definition of 'misconduct' has not been amended. The Report recommended changes to both the Act and the Rules. However, only the Rules have been amended. Although the NZLS said it was in close communication with the Government, and the prospect of changes to the Act was initially considered, ultimately the advice from the Government was this was not possible at this time.[12] As a result, the changes to

6 Colmar Brunton, above n 1, at 21.
7 NZLS Report, above n 2, at 22.
8 Colmar Brunton, above n 1, at 6.
9 At 7.
10 At 13.
11 NZLS Report, above n 2, at 8.
12 New Zealand Law Society "Key proposals for change to the Conduct and Client Care Rules" (2020)

the Rules include the addition of the statement below in order to clarify the purpose and nature of the principal rules:[13]

> 1.5.1 These rules set the minimum standards of professional conduct and client care that all lawyers are required to observe in order to maintain the reputation and integrity of the profession so as to ensure public confidence in the provision of legal services. The rules provide a reference point for discipline.
>
> 1.5.2 The preservation of the integrity and reputation of the legal profession is the responsibility of every lawyer.

Further rules have been introduced to signpost to the profession what is unacceptable behaviour. The expressly prohibited behaviour is defined as bullying, harassment, discrimination, sexual harassment or violence (which includes all forms of physical, psychological and sexual abuse or assault).[14] The definition of sexual harassment is broadly similar to the legal definitions under the Employment Relations Act 2000 and Human Rights Act 1993.

By way of context, in 2019 the Lawyers Standards Committee (the Committee) made a finding of unsatisfactory conduct against a lawyer who sexually harassed two law firm employees at work social functions.[15] The Committee was prepared to broaden the ambit of the definition of regulated services to social occasions connected to the lawyer's workplace.[16] The Committee unanimously determined the lawyer's conduct amounted to unsatisfactory conduct.[17] However, the Committee decided that a charge of misconduct was not justified due to the following mitigating factors: the lawyer had acknowledged the behaviour, taken responsibility for his actions, shown remorse and resigned from his job.[18] Additionally, the two employees concerned had indicated they were happy with the way the firm had dealt with the matter.[19]

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941 LawTalk at 8.

13 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (LCCC Rules), r 1.5.

14 Rule 1.2.

15 *Re Mr X* (Concerning Part 7 of the Lawyers and Conveyancers Act 2006) National Standards Committee ZTUVK, 16 March 2018.

16 At [32].

17 At [52].

18 At [61]

19 At [61].

It is interesting to consider whether a similar finding would be made under the Rules if such a case were to come before the Committee today, given the amendments that have been made. Hopefully, under the new Rules, this behaviour would clearly be identified as misconduct, regardless of the mitigating factors, and that any mitigating factors would be considered in terms of outcomes, rather than assessing whether the threshold for misconduct has been met.

Unfortunately, the complaints process is still governed by the Act, not the Rules. Despite the Working Group concluding in the Report that the process under the Act is not fit for the purpose of dealing with complaints about harassment, sexual harassment, discrimination, bullying or violence, no changes to the Act have been made.[20] This is a major failing of the reforms. In our experience, many people who make formal complaints of sexual harassment and assault report the legalistic, lengthy, opaque and often adversarial complaints process they endured caused them as much harm, or more, than the original conduct.[21] This is supported by the Citizen's Advice Bureau who report that from their experience, people who experience harassment and bullying at work are more likely to move to a different job, rather than going through the process of raising a complaint.[22]

The NZLS has since stated that changes to the Act were not possible at the time, and substantive changes could follow an "independent review of the structure and function of the Law Society which was announced in October 2019".[23] This review is ongoing. Changes have been introduced into the make-up of Standards Committees and internal Law Society processes to try to improve the experience of complainants in sensitive cases.

The ambiguities of new definitions and responsibilities, and the failure to amend the Act in addition to the Rules, raises the possibility the Courts will read the Rules down in any legal challenge about the application of the changed Rules. If a challenge were to be taken to the High Court, the risk

20 NZLS Report, above n 2, at 12.

21 Steph Dyhrberg, Debbie Francis and Alison Mau *"Eliminating Sexual Harassment in the Workplace: Time for a Fresh Approach"* (papers presented to the 2020 CLE Conference Employment Law – Justice at Work?, 22 October 2020).

22 Ministry of Business, Innovation and Employment *Issues Paper: Bullying and Harassment at Work* (2020)at [39].

23 New Zealand Law Society "Key proposals for change to the Conduct and Client Care Rules", above n 12, at 8.

remains that the Court could take a different interpretation approach than intended by the NZLS in enacting the changes.

IV DEALING WITH CLIENTS

An important protective measure for the staff of law firms has been added to the Rules. The grounds for terminating a client retainer now include situations where a client is subjecting any employee or associated person (for example, a contractor or barrister) to any risk of violence, harassment, sexual harassment, bullying, discrimination or threatening behaviour.[24] Previously, there were limited and ambiguous grounds for terminating a retainer, such as inappropriate client behaviour towards staff and colleagues.

Firms are often reluctant to terminate a retainer due to financial constraints. However, together with the health and safety obligations on a Person Conducting a Business or Undertaking (a PCBU), the Rules will now form a basis for holding firms to account in relation to how they address inappropriate client behaviour. Firms should make it clear to clients and staff that harassment and other inappropriate behaviour towards employees and others in the workplace by clients will not be tolerated and may result in termination of the retainer. However, we imagine many firms will be reluctant to do this and people may feel pressure not to raise these issues where it could result in terminated retainers and a loss of fees. There should be safe and accessible processes for dealing with any issues if and when they arise. It would be helpful to include what behaviour is expected, and other health and safety requirements (for example, around Covid-19), in initial engagement terms for new client retainers.

V MANDATORY REPORTING REGIME

The other key change to the Rules is the new reporting and compliance obligations imposed on legal partnerships, incorporated firms and entities offering regulated services to the public. Each firm must have a designated person who is a lawyer qualified to practise on their own account, such as a partner.[25] This person is responsible for notifying the NZLS within 14 days if any lawyer is issued with a written warning or dismissed for any of the following conduct:[26]

24 LCCC Rules, above n 13 , r 4.2.1(f).
25 Rule 11.3.
26 Rule 11.4.

i) Harassment

ii) Sexual harassment

iii) Discrimination

iv) Bullying

v) Violence

vi) Theft

The designated partner will also need to give an annual undertaking of compliance with the Rules.[27] If these requirements are breached, there could be disciplinary consequences for the designated person, and any other lawyer who knew about the behaviour and failed to report it. Firms must certify every year that they have complied with these obligations, including having the policies and systems in place and meeting health and safety obligations.[28] The designated partner must also advise the NZLS if a lawyer or other staff member leaves and, within the previous 12 months, the firm had raised issues with that person regarding their conduct,[29] or intended to investigate allegations of that conduct. This includes situations where there is an end of a contract, fixed term engagement or on resignation. It would therefore be unwise to give an unqualified positive reference for a departing employee when such issues have been raised. Notably, this requirement extends to non-legal staff. This raises a question as to why non-lawyer employees of a law firm should be reported to a body which does not have any regulatory power over them.

We consider it a significant shortcoming that, whilst the Rules governing conduct apply to all lawyers holding a current practising certificate, the mandatory reporting obligations do not apply to barristers' chambers and in-house legal teams. The NZLS adopted an entity reporting approach. In a 2020 survey of 14,981 New Zealand practising certificate holders, 1,702 identified themselves as barristers and a further 3,598 classed themselves as in-house lawyers.[30] The mandatory reporting scheme therefore excludes a significant proportion of practising lawyers.

ILANZ commented on this in its feedback to the NZLS on the proposed

27 Rule 11.4.4(c).
28 Rule 11.4.4(a)–(b).
29 Rule 11.4.1.
30 Compiled by Geoff Adlam "Snapshot of the Profession 2020" (2020) 940 LawTalk 28.

changes, noting that beyond the universal requirements for all lawyers to uphold the rules and the individual reporting obligation of Rule 2.8, the changes focused largely on those who are working in a legal practice as opposed to as barristers or in-house.[31] Although ILANZ acknowledged the nature of the in-house employment relationship means there are inherent difficulties in terms of the reach of the NZLS as a regulator, it emphasised that not applying the same standards across the profession is a significant omission and lost opportunity.[32]

ILANZ welcomed an opportunity to work with the regulatory team to produce best practice guidelines that would work towards the same outcome for all lawyers and groups of lawyers.[33] This would provide in-house lawyers and barristers with clear guidelines, and an opportunity to review and enhance their current ethical guidance to ensure consistency as far as possible with the changes to the Rules.[34] To date there has been no notable work in progress.

In addition, the reporting requirements do not apply to lawyers without practising certificates. This was raised by the Report, which ultimately decided that those without practising certificates should not be subject to the reporting requirement.[35] Instead, the Report recommended that clear information should be given to people in the legal community who are not lawyers, about the standards expected, complaints process and available assistance.[36] Although there were concerns from the Working Group this would create a disproportionate burden and unintended negative impacts, arguably, without a clear approach across the legal community, it may be difficult to create the necessary structural change.

The NZLS has recently clarified that it will engage a Screening Panel process via the Legal Complaints Review Officer to assess whether information provided under the mandatory reporting regime should be referred to a Standards Committee.[37] A Standards Committee can decide to open an own-motion investigation. Further guidance provided by the NZLS recently also

31 Feedback from the ILANZ Committee (ILANZ, 3 August 2020) at 1.
32 At 1.
33 At 1.
34 At 2.
35 NZLS Report, above n 2, at 40.
36 At 40.
37 Katie Rusbatch "Rules of Conduct and Client Care" (paper presented at Wellington Women Lawyers' Association workshop – New Rules Governing Lawyers' Behaviour, 5 November 2021).

sets out the process that must be followed when making a report or a complaint and provides the resources to do so.[38]

Ultimately, the NZLS needs to spell out how this information is intended to be used, how the Screening Panel system will work (and who is on this Panel) and ensure the privacy principles around collection, storage, accuracy, access and correction are complied with in accordance with the Privacy Act 2020.

VI OVERREACTING AND UNDERREACTING?

As is often observed in other regulatory contexts, imposing mandatory reporting may have significant unintended consequences. Ironically, the consequences of the amendments to the Rules may actually increase the power imbalance between law firm partners and their more junior staff. There is a lack of clarity and guidance for practitioners about the types of incidents or behaviours, other than where a warning or dismissal results, that must be reported. It is not clear what the threshold is for reporting behaviour. There is a disconnect between the reporting obligations, particularly for unsubstantiated allegations or concerns, the threshold for issues that are likely to be considered by a Standards Committee to warrant disciplinary action, and the serious impact such issues could have on the employment prospects of law firm employees.

Sexual harassment, discrimination and bullying cover a multitude of sins that exist along a spectrum. It is suggested to nip low level behaviour (noting the difficulty in determining what is "low-level") in the bud to prevent worse and more damaging behaviour from occurring. However, with mandatory reporting, there is a risk of hypersensitivity and over-reporting, with serious consequences. The designated partner, or the firm, may decide they would rather report everything, regardless of seriousness, to avoid risking censure for not reporting. Although reporting is an important tool to assist employees who are experiencing sexual harassment, discrimination and/or bullying, misusing the mandatory reporting tool could have implications for employees' careers. Allegations may be genuinely trivial, or may be false or raised for the purpose of "encouraging" an employee to resign, yet may trigger mandatory reporting.

The ambiguity of the level of seriousness required for reporting has a flow on effect for firms making decisions about raising and investigating alleged

38 New Zealand Law Society *Guidance on professional standards and reporting obligations* (November 2021).

misconduct. Interpersonal disputes that could readily be resolved through low level meetings, coaching or facilitation may be escalated into investigations. Even raising the issue or investigating it may have consequences in terms of annual reporting, and whatever is going to be done with that information.

In our work we have already witnessed investigations of conduct that, in our view, were clearly not at the level of seriousness requiring reporting. Yet we have also seen young lawyers who are too scared or intimidated to report bad behaviour as they are being warned that reporting an incident may "go on their permanent record". Conversely, people experiencing or witnessing unacceptable behaviour may be even more reluctant to report it because they are worried about the potential dire consequences for the other lawyer involved. Often, people experiencing sexual harm say they do not want to destroy the perpetrator's career.

Equally, law firms may not raise issues or investigate them because then they have to report them which could cause reputational damage, among other consequences, for the firm. Even with the amended Rules, a confidential conversation or a mediated settlement could still be used to slide people out the door without triggering reporting. Confidentiality agreements and non-disclosure agreements cannot override the Rules. All firms must ensure they have the proper systems in place and comply with them.

Under-reporting and backlash from the profession and alleged perpetrators remain very real concerns. The legal profession has enabled a culture that has long allowed unacceptable behaviour to flourish behind closed doors. The people who own, manage and work in legal practices should not tolerate the sort of behaviour that sadly is commonplace in many legal workplaces. Yet senior lawyers are often the ones demonstrating inappropriate behaviour. It is concerning that there are still issues with workplace behaviour, which can have a severe impact on the individual, particularly when the complaints and reporting processes are unsafe. Lawyers already have a mandatory obligation to report professional misconduct but often do not. All lawyers need to take note of the new required standards of behaviour and hold ourselves and our colleagues to account.[39] It will be interesting to see whether the new Rule

39 Note under the Rule changes, mandatory reporting will be subject to exceptions where the information has been received in the course of providing confidential advice, support or guidance to another lawyer, including as a member of the Friends' Panel, unless necessary to prevent fraud or any crime or to prevent a serious risk to the health and safety of any person. The victim of misconduct has no obligation to report misconduct.

prohibiting victimisation makes lawyers feel they can more safely report misconduct.[40]

VII CONCLUSION

Changing the Rules is a major step forward. These changes set a new tone and send a strong signal to the profession that treating other people unlawfully and disrespectfully is career threatening. This is a welcome change to the social landscape where survivors felt that speaking up was career threatening.

The current ambiguities in definitions and thresholds should be resolved by clear guidance, rather than awaiting litigation. Although the recent guidance released by the NZLS provides some assistance, more work is needed in this area. The profession needs to fully understand what will be done with information reported to the NZLS and the potential implications of both unacceptable conduct and the obligation to report it.

Excluding barristers' chambers and inhouse legal teams from the mandatory reporting regime should be re-evaluated in the wider structural review.

Although the new Rules are a step in the right direction, they alone will not affect the fundamental culture shift the legal profession needs. We need broader and deeper conversations, education and commitment to understanding the obligations on lawyers and firms. Through these types of actions, hopefully ingrained attitudes and behaviour will start to change. We all have a role to play in creating a safer workplace, but there needs to be better guidance about how to deal with the serious issues that have to be reported to the NZLS by lawyers generally and the designated person in each firm.

Much more education is required, including as a mandatory component of the Legal Professional Studies course and Stepping Up programme. The NZLS needs to use its new discretion to introduce a mandatory bullying, harassment and racism prevention component of continuing professional development (CPD). The complaints and disciplinary processes need to be changed to make them more humane. People involved in complaints processes, particularly complainants, need far more support. Safe processes must be put in place for all involved. Some firms are starting to recognise this, for example by engaging independent investigators, consulting on terms of reference and paying for independent representation.

40 LCCC Rules, r 2.10.1.

Regardless of any Rule changes, if we keep doing the same things the same way, nothing will change. Every single person involved in the profession has to do the mahi. Particularly the NZLS, senior lawyers, managers and HR should look closely at workplace behaviours, structures and practices. On an individual level, we need to have the honesty and integrity to acknowledge we need to change many aspects of the legal profession. There still needs to be major structural change to disrupt the power imbalances within legal practice that allow inappropriate conduct to flourish, and that silence the victims of bullying, discrimination and harassment.