Editors' Note

I INTRODUCTION

2020 looked to be an inauspicious year in the life of the Review. The arrival of the COVID-19 virus on New Zealand shores in February precipitated major upheavals in social life. Like many businesses and institutions adjusting to the "new normal", the Review had to adapt. From the need to conduct training remotely and institute circuitous source-finding processes, through to being unable to access our offices and meeting rooms, our workflows were profoundly disrupted. It is to the credit of the Review's staff that all involved met the challenge with enthusiasm and a willingness to embrace unorthodox solutions to logistical problems.

Happily, life eventually returned to relative normality. Businesses reopened. Gathering restrictions were relaxed. And while the virus intermittently threatened to plunge us back into lockdown, we now have a finished journal, none the worse for it all. In fact, we are pleased to say the Review has emerged in robust health. In the fashion of our recent predecessors, we here present a selection of special features, articles, commentaries and a book review for the reader's consideration.

II SPECIAL FEATURES

We first highlight our special features. We are pleased to include, for the second consecutive volume, a contribution by a sitting justice of the Supreme Court of New Zealand.[1] The most recent appointment to the highest court in the land, Justice Joe Williams, here makes his inaugural contribution to the Review.

Williams J, the first Māori judge of the Supreme Court, charts a brief history of the use of the Māori language in the courts of New Zealand. His Honour concludes that the present use of te reo in the courts, while not in itself transformational, is something more than mere tokenism. The speaking of Māori words in our courts, rather, may remind those involved in court processes of the importance of Māori custom and values, open their hearts and minds to the distinctive Māori worldview, and affirm, within our institutions of justice, New Zealand's unique character. The Review has seen the increasing calls for legal education in Aotearoa to transition to a *bicultural*, *bilingual* and *bijural* model that appropriately recognises tikanga

1 The Review was privileged last year to publish an address by Glazebrook J: Susan Glazebrook "The Declaration on the Rights of Indigenous Peoples and the Courts" (2019) 25 Auckland U L Rev 11.

Māori as a freestanding and legitimate source of law.[2] This model would require the mainstreaming of te reo Māori in the teaching of the law, and we think, in legal publications. In asking his Honour to present his remarks in te reo, alongside an English translation of the same, we have tried to contribute to that larger project, if only in a small way.

In response to the COVID-19 pandemic, Professor Janet McLean undertakes an analysis of the sufficiency of New Zealand's legal framework in respect of extraordinary emergency powers. After setting out a brief historical overview of emergency powers in New Zealand, Professor McLean discusses how courts should approach the task of statutory interpretation of such powers. She inspects *Borrowdale*, the judicial review challenge to the New Zealand Government's COVID-19 response. Professor McLean concludes that, given the exigencies of the pandemic, the High Court was right to take an expansive and purposive approach to statutory interpretation. We are pleased to include this timely and enlightening contribution, and note that Professor McLean's presence is felt elsewhere in this volume. She receives acknowledgments from two article authors and one of her earlier works, which remarks on the often glacial pace of change in the common law, is cited in Eesvan Krishnan's piece.

Fifteen years after his last appearance in the Review,[3] Krishnan returns to offer his reflections on decolonising the common law — what would this mean, and how could this be achieved? He positions the common law as a constituent part of the larger project of colonisation, using as a case study a line of Commonwealth cases on native title and the doctrine of foreign act of state. Krishnan's discussion traverses cases and legal literature from New Zealand, Australia, Canada and India to show that, much like other legal institutions facing calls for decolonisation, the common law *itself* should be decolonised. He reflects that the journey towards decolonisation is likely to be a long and uncertain one, and one that may begin with the decolonisation of legal education and the legal profession. Krishnan's thought provoking remarks were first delivered at a very well-received lecture at the Review's annual symposium in October 2020. The piece that appears in this volume is the text of that lecture, with minor amendments.

Our final special feature comes to us from The Hon Margaret Wilson. Professor Wilson delivered an address at the Review's alumni dinner, held on the same evening as the annual symposium. Her speech, concerning the role of the law review in a performance-based research

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2 See, for example, Jacinta Ruru "Bicultural, bilingual, bijural: A plan for a new model of legal education in Aotearoa" (21 October 2020) The Spinoff <https://thespinoff.co.nz>; and Jacinta Ruru and others *Inspiring National Indigenous Legal Education for Aotearoa New Zealand's Bachelor of Laws Degree Phase One: Strengthening the Ability for Māori Law to Become a Firm Foundational Component of a Legal Education in Aotearoa New Zealand* (Michael & Suzanne Borrin Foundation, August 2020). Traversing similar themes, see Williams J's earlier work in the Waikato Law Review: Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Wai L Rev 1.

3 Eesvan Krishnan "A Conversation at an Impasse: Assessing the Value of Contract Economics" (2005) 11 Auckland U L Rev 116.

environment, is reproduced here. Professor Wilson takes aim at the corporatisation of the legal academy and education that emerged out of the neoliberal reforms of the 1980s. The research funding model, she argues, contingent as it is on publishing outputs, is based on a political understanding of legal education and the university. It is an extension of a neoliberal ideology underlying public policy. Within that picture, the law review remains a bastion of resistance and critical legal research, upholding the role of the university as society's "critic and conscience". With this volume, we have tried our best to live up to the responsibility with which Professor Wilson charges us.

III ARTICLES

To our articles. While not an express theme or deliberate design on our part, we note that this year's selection of student work engages with a number of legal topics previously featured in this journal. In the following summary of this volume we note both resonances with, and challenges to, the Review's earlier scholarship — highlighting the durability of these issues in the life of the law.

How can constitutional models of power-sharing be applied in Aotearoa for Māori to express their tino rangatiratanga?[4] In this year's Ko Ngā Take Ture Māori article, Olivia Rapata-Folu raises this question against the background of a false vision of partnership between Māori rangatira and the Crown, as well as racist policies and laws that have oppressed Māori since the signing of Te Tiriti o Waitangi. Rapata-Folu examines the Scottish devolved system, the Belgian federal system and the European Union to conclude that a mixed model combining a "same territory and split competences" approach with joint lawmaking procedures is the ideal means of expressing tino rangatiratanga in Aotearoa.

Jessica Palairet's article, the winner of the MinterEllisonRuddWatts Writing Prize for 2020, places a modern spin on the longstanding issue of reason-giving in administrative law.[5] She asserts that technological developments in administrative decision-making necessitate the development of a duty to give reasons. Such a duty, the author states, would preserve rights to natural justice, incentivise responsible development of artificial intelligence and reaffirm administrative law's democratic legitimacy. Palairet's article captures both the promise and threat of automation in the legal sphere.

Matthew Jackson, commended by the judges of the MinterEllisonRuddWatts Writing Prize, tackles the vexed question: what is

4 Compare Aditya Vasudevan "Restoring Rangatiratanga: Theoretical Arguments for Constitutional Transformation" (2017) 23 Auckland U L Rev 91.

5 Compare Paul Paterson "Administrative Decision-Making and the Duty to Give Reasons: Can and Must Dissenters Explain Themselves?" (2006) 12 Auckland U L Rev 1.

the meaning of "mother" at English law? The author argues that the Family Division of the High Court of England and Wales, in *R (TT) v Registrar General for England and Wales (AIRE Centre intervening)*, failed to give appropriate weight to the psychological and practical implications of registering a transgender man as the "mother" of a child. Jackson proposes that a generic "Parent" field for birth certificates, alongside more sophisticated information collection practices, would improve the accuracy and inclusiveness of England and Wales' birth registration system.

In our fourth article, Josie Butcher examines Fetal Alcohol Spectrum Disorders (FASD) through a criminal law lens.[6] The author argues for tailored treatment of FASD offenders at each level of New Zealand's criminal justice system. Canvassing matters of police questioning, fitness to stand trial, sentencing and repeat offending, the article demonstrates the myriad ways in which individuals with FASD are underserved by current processes and procedures. Absent an innovative approach, Butcher argues, offenders with FASD will remain trapped in the justice system's "revolving door".

In wrongful conception cases, damages awards are stymied by ACC's statutory bar. This exclusion leaves a lacuna in the law for women who face a pregnancy they sought to prevent. Anna Christie advocates for the novel award of vindicatory damages for wrongful conception. Vindicatory damages would mark the wrong rather than compensate the losses flowing from it.[7] Such vindicatory damages would be exempt from the ACC regime. Christie addresses key conceptual and practical obstacles to her argument, showing that vindicatory damages would not only be consistent with the current state of the law but would also recognise the underlying interest in reproductive autonomy.

With pervasive and ingrained global corruption in mind, Devika Dhir confronts the lack of a mechanism to hold those who engage in corruption accountable. Dhir proposes the establishment of an International Anti-Corruption Court (IACC), which would enforce criminal responsibility for corruption, disgorgement of illicit profits and hold legal frameworks to a standard strictly opposing the corrupting influence of private wealth on the political process. Dhir emphasises there is a heightened mandate for the proposed IACC because the current state of global corruption threatens modern democracy.

Luke Sweeney's article concerns company contracting and reasonable reliance on apparent authority.[8] He examines a narrow

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6 For earlier work in the Review traversing similar themes, see Denys Court "Mental Disorder and Human Rights: The Importance of a Presumption of Competence" (1996) 8 Auckland U L Rev 1; Sarah Murphy "The Potential Contribution of Neuroscience to the Criminal Justice System of New Zealand" (2011) 17 Auckland U L Rev 1; and Andrew Becroft "Access to Youth Justice in New Zealand: The Very Good, the Good, the Bad and the Ugly" (2012) 18 Auckland U L Rev 23.

7 Compare C James O'Neill "Damages and the Unwanted Child" (1985) 5 Auckland U L Rev 180.

8 See also Olivia de Pont "Company Contracting: Lord Neuberger and the Deprecation of Constructive Knowledge" (2013) 19 Auckland U L Rev 171.

interpretive point on s 18(1) of the Companies Act 1993. This section provides that a company cannot generally disclaim a contract on the basis that a person held out as having authority to contract did not in fact have such authority, unless it can rely on the proviso to that section. The correct interpretation of this proviso is contested. Sweeney concludes that the proviso has statutorily supplanted the requirement for reasonable reliance, a specific limb of apparent authority at common law. Consistent with leading authority, this interpretation confines *constructive* knowledge of a defect in authority to parties who have an ongoing relationship.

A recent Law Commission review of the Property (Relationships) Act 1976 (PRA) concluded that the legislation no longer serves its purpose in 21st century New Zealand. In light of this, Rachael Yong considers the demographic, social and economic changes that have affected the division of relationship property. The author uses this analysis to critique the loophole that trusts present in allowing the removal of assets from the relationship property pool. Yong concludes that the Law Commission's recommendations on trust law adequately balance the preservation of trusts and the PRA objective of achieving just divisions of property when relationships end.

IV COMMENTARIES

This year's journal also features a typical complement of legal commentaries: three case notes, a legislation note and a book review. In our first case note, Jack Garden dissects the ground-breaking High Court decision *Ruscoe v Cryptopia Ltd (in liq)*, which held that cryptocurrencies can be properly categorised as a form of property and are capable of forming the subject matter of a trust. Garden highlights the difficulties in applying traditional legal concepts of property to technologies designed to subvert traditional means of stored value. He touts the practical approach of Gendall J as encouraging for cryptocurrency enthusiasts seeking comfort that their investments have the benefit of legal protection.

Kasey Nihill, meanwhile, examines the Court of Appeal's decision in *The Kiwi Party Inc v Attorney-General*, concerning a challenge to the lawfulness of the Arms (Prohibited Firearms, Magazines, and Parts) Amendment Act 2019, which was promulgated in the wake of the 2019 Christchurch terror attack. Nihill notes that the case is significant, both for its (perhaps unsurprising) finding that no constitutional right to bear arms exists in New Zealand, and for what it expressly did not decide. The Court's remarks, Nihill says, raise the possibility of a future court, in a worthy case, finding that Parliament has "misfired" in legislating inconsistently with "higher law", or indeed, Te Tiriti o Waitangi. The realisation of this possibility would be consistent with an understanding of the relationship between Parliament and the judiciary as a "collaborative enterprise" and, as

Nihill argues, may be a necessary step to place fundamental and indigenous rights at the core of Aotearoa's constitutional arrangements.

In our final case note, Caitlin Anyon-Peters critically inspects the Supreme Court's recent pronouncements on price fixing in *Lodge Real Estate Ltd v Commerce Commission*. The author states that the decision has clarified the interpretation of ss 27 and 30 of the Commerce Act 1986, helping to achieve the Act's objectives of prohibiting anti-competitive behaviour. Anyon-Peters argues that the Court's decision reflects a pragmatic approach to cartel conduct and should make it easier for the prosecution to prove parties' commitment to a price fixing arrangement.

The legislation note and book review close out the volume. The former, written by Yao Dong, concerns the long-gestating Privacy Act 2020 and guides us through its essential prescriptions and reforms. In the latter, Max Ashmore reviews Associate Professor Treasa Dunworth's book *Humanitarian Disarmament: An Historical Inquiry*, an important new contribution to the public international law canon.

V REFLECTION

Producing a legal journal with this many moving parts is no small undertaking. We have many people to thank in getting this volume to print. We first extend our sincere thanks to Tom Cleary of Chapman Tripp. He delivered an excellent seminar on legal writing to our editorial team, which was fully attended and packed full of practical wisdom.

As ever, we are immensely grateful for the outstanding work of our business managers, advertising manager and editorial team. All involved in the Review this year carried out their responsibilities conscientiously and made excellent contributions at each stage of the editing process. Being surrounded by such a skilled and supportive team has made our jobs immeasurably easier, and we hope our team members return to help next year's Editors-in-Chief with the 2021 volume of the journal.

Our faculty advisors, John Ip and Dr Jane Norton, have been worthy custodians of the Review, providing invaluable guidance whenever we called on them. Professor Michael Littlewood has remained a well of institutional knowledge, despite not formally being a faculty advisor this year. Auckland Law School Dean Professor Penelope Mathew and the wider Faculty have also continued to provide the Review with tremendous support and encouragement. We have greatly appreciated this solidarity in a year otherwise marked by uncertainty and upheaval. Our warmest gratitude to all for their helpful influence throughout our editorship.

The Review is now in its 53rd year. It is a storied institution within the Auckland Law School, with a proud heritage of excellence in legal

scholarship and a distinguished alumni network.[9] We are humbled to have been its caretakers for this brief period of its history. We hope we have done our part to uphold its reputation and that you enjoy reading the succeeding pages of insight, analysis and commentary.

We wish our successors the best and expect the journal will continue to flourish in the years to follow.

Hei konā mai, ngā mihi

Jodie Llewellyn and Louis Norton November 2020

9 For an excellent account of the Review, its origins and its enduring relevance, see Kayleigh Ansell and Jayden Houghton "A Brief History of the Review" (2017) 23 Auckland U L Rev 50.

Eesvan Krishnan delivers his lecture "Decolonising the Common Law" at the Auckland University Law Review Annual Symposium, held on 1 October 2020