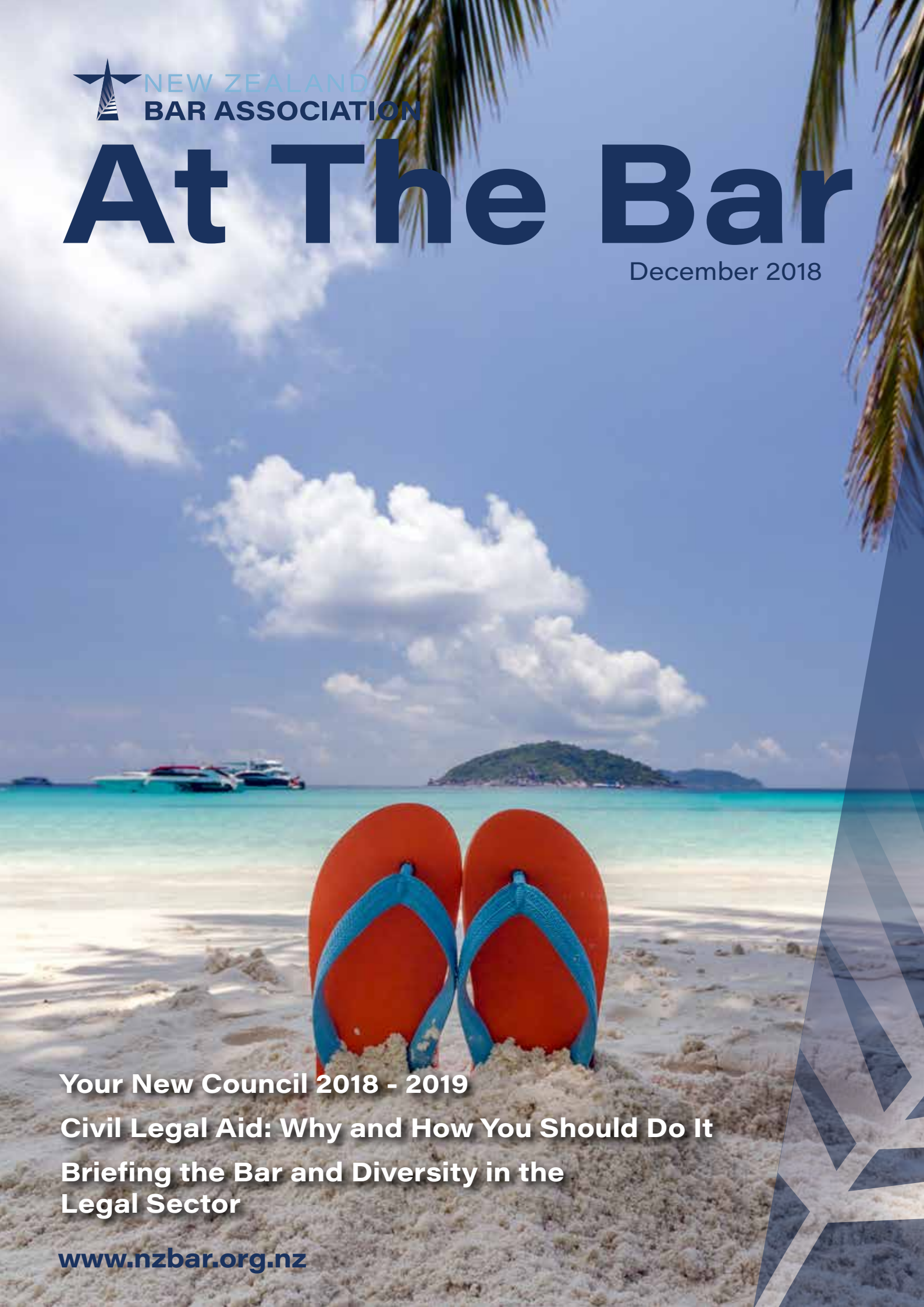
NEW ZEALAND
BAR ASSOCIATION

At The Bar

December 2018



Your New Council 2018 - 2019

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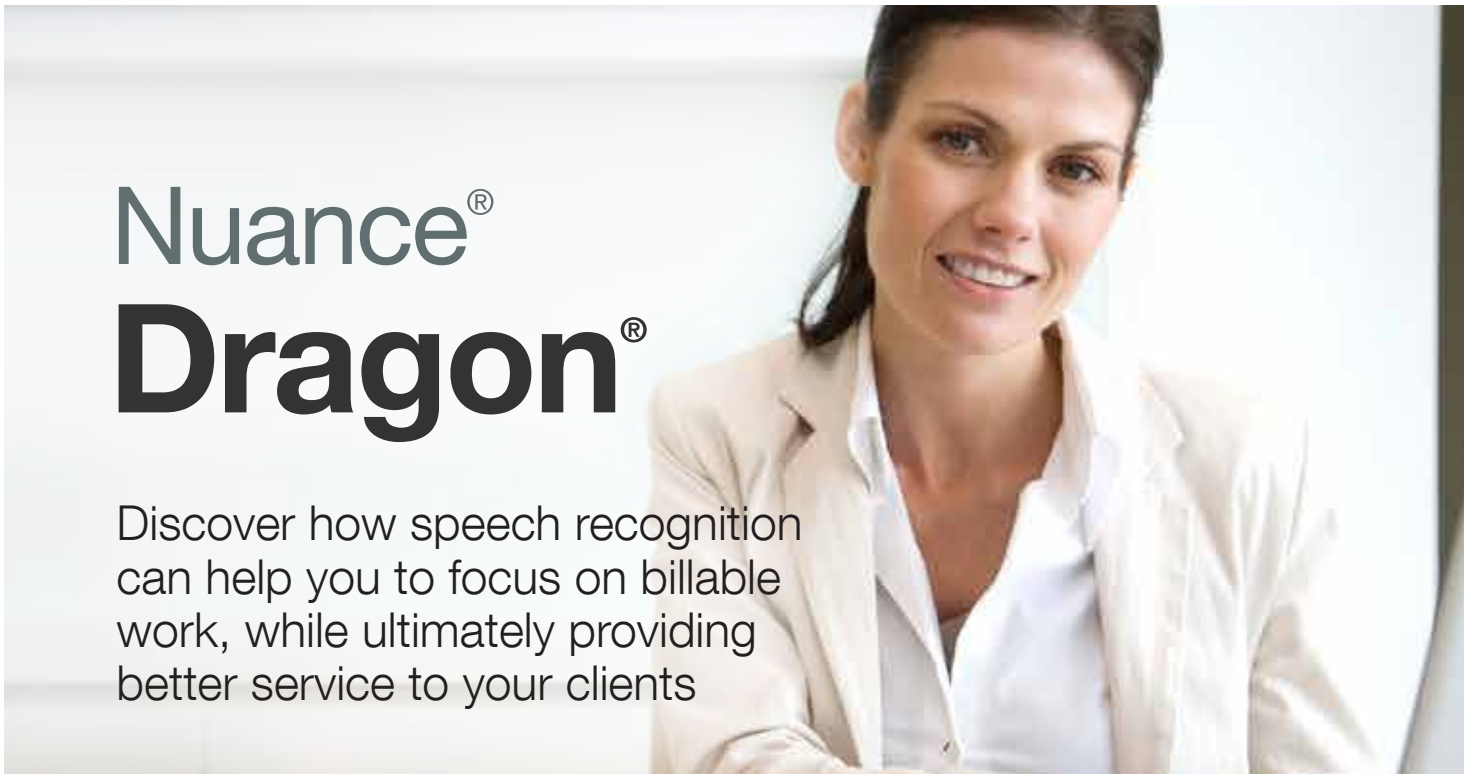

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From the President

Kate Davenport QC*

Tēnā koutou.

This is my first column at the end of my first two months as President of the NZBA. What a time it has been!

My first job is to congratulate the 2018 Queen's Counsel. This is a significant achievement for those involved and we will be holding celebratory dinners shortly to mark the occasion.

In late September I attended the 30th Anniversary celebrations of the Bar Association in Rotorua. It was a well organised, friendly and action-packed weekend. I even had to humiliate myself by thumping up on stage in my moon-boot to have the flaws and strengths of my personality dissected!

But despite the humilation, I had the pleasure of meeting so many attendees, all to a person interesting, funny and devoted to the law. I had the privilege of giving a speech at the Saturday dinner – it seemed to go ok - but after reviewing the photographs all I can say is I shouldn't have worn a sparkly gold dress and I should have stood on a (big) box while having my photograph taken with the former Presidents.

That Sunday I travelled to London to represent the NZBA at the official opening of the legal year in the UK which took place on 30 September and 1 October. This takes the form of a dinner, a conference and a service at Westminster Abbey to mark the opening of the year. Kathryn Beck from NZLS also attended. I hasten to say that not a penny of NZBA funds were spent on sending me to London.

It was a very interesting conference with sessions on diversity, women in the profession, and the future of the legal profession. The problems that we experience in NZ are very similar to most common law countries. However we seem to be leading the way in our approaches to solving many of the recurring issues. The service at Westminster Abbey was beautiful with music to match. We have posted photos on our new Instagram page @nz_bar_assoc. Follow us and like our photos and feel free to comment.

On my return I attended the New Zealand Law Society Council meeting as the NZBA representative. We welcome the election of Tiana Epati as the future President of the New Zealand Law Society. Tiana will continue the excellent work done by Kathryn Beck and the NZLS to address the difficult and culture changing issues that we are facing in the profession. Tiana is young, she is energetic, she is from a Pacifika background, she lives in Gisborne and is a criminal solicitor – I have no doubt she will be an excellent President of the New Zealand Law Society. While in Wellington I visited the Minister of Justice and spoke to him about our access to justice project, gender equity and other issues of relevance to the Bar.

In early November, in conjunction with the ANZ, we hosted a session on briefing the bar and equitable briefing. Sir John Key spoke, as did a panel which included the Hon. Justice Winkelmann, Dr James Farmer QC, Jenny Cooper QC, Kathryn Beck, and David Bricklebank (General Counsel for the ANZ). It was a great evening – with debate, humour and a real energy. Thanks to the ANZ, the panel and our great team of Melissa, Lisa and Jacqui who did a great job of organising it.

I have been working with Melissa and Jacqui to consolidate our workplan for 2018/19. As I outlined in my speech to the Association in Rotorua there are a number of areas that I wish to emphasise from our strategic plan:

1. Education. We need to educate ourselves on what our working lives will look like in the future at the Bar. That means embracing technology, learning what can be automated and dealing with the

challenges to access to justice that some of this technology may bring. We need to ensure that the Bar Association is at the forefront of education for members.

2. Taking better care of ourselves. The legal profession suffers from one of the highest rates of depression and self-harm. We overuse alcohol and underuse exercise and stress busting techniques more than almost any other profession. Long hours are expected and indeed demanded. We need to commit to taking better care of ourselves, of our colleagues and our staff. We need to acknowledge that we are one legal community. Our mantra ought to be respect and kindness towards all and we need to foster this. We will be working on providing access to information and seminars on wellbeing, stress management, mindfulness and general wellbeing. The UK Bar's expert in this area has developed many excellent tools that the UK Bar Council is using to ensure wellbeing at the UK Bar. We are discussing shared access to these and other online services.

3. Improving gender equity and diversity generally. There is no place in the profession for harassment, for bullying, and for treating one lawyer differently just because they are a different gender or colour. The old ways have to change to produce a profession that is leading a balanced life. The need for change is also evidenced by the significant fallout rate of our best and brightest young lawyers. They report they do not want to belong to a profession which has clung so devotedly to the social mores and beliefs of the last century. This is a great profession with intelligent, socially aware members who are committed to helping others. We focus on achieving the best for our clients and need to turn that focus inward to our own lives and those of our work mates, and staff. I am committed to continuing and fostering this work.

4. Access to justice. This is a huge topic but vital to the continuation of a fair and equitable society. We will continue to promote changes in legal aid, work to increase pro bono work and other ways of making the law accessible.

So – the end of a very busy time. Let me know your thoughts please and how you want to be involved by emailing me at President@nzbar.org.nz. Please also join us on social media - Instagram, LinkedIn and Twitter.

** If you have any questions or comments about this column, please email Kate at President@nzbar.org.nz or our Executive Director, Melissa Perkin, at melissa.perkin@nzbar.org.nz.*

New Members

Mr Gurbrinder Aulakh	AUCKLAND
Mr David Ballantyne	CHRISTCHURCH
Mr David Bates	TAURANGA
Miss Kelly Beazley	TIMARU
Ms Frances Boyd	CHRISTCHURCH
Dr Andrew Butler	WELLINGTON
Mr Oliver Collette-Moxon	AUCKLAND
Ms Kathryn Dalziel	CHRISTCHURCH
Mr Simon Dench	AUCKLAND
Mr Martin Dillon	HAMILTON
Mr Warren Forster	DUNEDIN
Ms Moira Green	AUCKLAND
Ms Jane Greenhill	TAURANGA
Ms Katie Hogan	AUCKLAND
Ms Mireama Houra	AUCKLAND
Mr Ashok Kumar	AUCKLAND
Mr Simon Lamain	AUCKLAND
Mr Chris Lange	CHRISTCHURCH
Ms Lorraine MacDonald	AUCKLAND
Ms Molly McCarthy	WELLINGTON
Mr Duncan McWilliam	ROTORUA
Mr Todd Nicholls	CHRISTCHURCH
Ms Anne O'Brien	RANGIORA
Mr John O'Keeffe	DUBLIN
Mr Jared Ormsby	CHRISTCHURCH
Ms Sue Petricevic	AUCKLAND
Ms Rachel Pinny	WELLINGTON
Dr Rhonda Powell	CHRISTCHURCH
Ms Carole Smith	AUCKLAND
Mrs Elizabeth Smith	TAURANGA
Mr Brintyn Smith	AUCKLAND
Ms Hannah Stuart	AUCKLAND
Mr Truc Tran	HAMILTON
Ms Tracey Walker	AUCKLAND
Mr Joon Young Yi	AUCKLAND

Your New Council 2018 -2019

KATE DAVENPORT QC (President)
Kate has previously served on the NZBA Council as Vice-President, Auckland. Although she nominally stepped back from the Council in 2014 for three years, during that time she continued to assist the NZBA with advocacy training and gender equity issues.

Kate is a member of Bankside Chambers in Auckland. She is a civil and commercial litigator with more than 23 years' experience at the independent bar. Kate also has a special interest in professional regulation.

Kate took Silk in 2013 and was admitted to the UK Bar by the Middle Temple in July 2015.

JENNY COOPER QC (Auckland)
Jenny is a member of Shortland Chambers. She specialises in companies and securities law, fair trading and consumer finance law, competition law, and insolvency.

Jenny joined the NZBA Council in 2016. She has been closely involved in the Gender Equity Committee's work on the Gender Equitable Engagement and Instruction Policy which was launched in late 2017 and has been widely adopted by firms, chambers and corporate clients. She is Chair of the Diversity Committee, co-Chair of the Gender Equity Committee and co-Chair of the Conduct and Values Committee which prepared the NZBA's recently issued Conduct and Values Policy.

ANGELA CORRY (Christchurch)
Angela practises from a specialist family law chambers, Atticus Chambers, in Christchurch. She went to the bar in 1992. After practicing in Auckland for 22 years, she moved to Christchurch in 2005, in pursuit of a more relaxed lifestyle. She continues to undertake family law, child law, relationship property and trust litigation, at first instance and on appeal.

80% of Family Court work involves care and protection, parenting and guardianship disputes and domestic violence. Good advocacy, strong ethics and effective representation are as important in these contexts as they are in other areas of litigation, such as criminal, civil and resource management. Angela aims to advocate for the interests of the Family Court Bar and its ongoing pursuit of excellence. She will also be a voice for Christchurch, which has the busiest Family Court registry in New Zealand.

MARIA DEW (Auckland)
Maria was appointed a QC in the recent Silks appointment round. Her practice covers civil, employment and professional misconduct litigation. Currently, she also is a Deputy Chair of the Health Practitioners Disciplinary Tribunal.

Prior to moving to the independent bar, Maria worked as a litigator for law firms in Christchurch, Wellington and London.

Maria was appointed to the NZBA Council in 2017. She co-chaired the Conduct and Values Committee alongside Jenny Cooper QC as they introduced for chambers the Association's model policy on harassment and discrimination.

Maria helped with the refresh of our Mentoring Scheme that saw the NZBA hosting successful meetings in Auckland and Wellington and led to a positive jump in mentor and mentee numbers. Finally, together with Simon Foote and Gretta Schumacher, she co-authored the NZBA *Access to Justice Report* which was released in September this year.

JONATHAN EATON QC (Christchurch)
Jonathan has been a member of the Council and Vice-President South Island since 2015. He was also a member of Council from 2005 to 2010. He is the Chair of the Criminal Law Committee of the NZBA and, together with outgoing President Clive Elliott QC, he has the responsibility for the implementation of objective 4 of the Strategic Plan, namely to ensure

the NZBA is recognised as the voice of the independent bar. Jonathan is also the President of the Canterbury Branch of the Criminal Bar Association of New Zealand.

Jonathan represented the NZBA as intervenor in the Court of Appeal in *Hall v R* with Vicki Scott (competence of counsel) and *Fahey v R* with Tiho Mijatov (amicus curiae in the criminal trial) and led the NZBA response to the Law Commission's Second Review of the Evidence Act 2006.

Aside from representing members' interests in relation to criminal law and evidence law reform, Jonathan has a strong interest in training and in the development of pathways for a career at the independent bar.

CLIVE ELLIOTT QC (Immediate Past President)

Clive is a barrister, registered patent attorney and arbitrator and practises out of Shortland Chambers. Before going to the Bar in 2000, he was a partner and headed the litigation team at the firm now known as Baldwins. Clive was appointed Queen's Counsel in 2013. In addition to serving on various committees related to intellectual property, information technology and e-commerce, Clive has authored chapters in various publications on those topics and is President and a member of the management board of the Intellectual Property Society of Australia and New Zealand (IPSANZ).

As NZBA President, Clive drove the introduction of the NZBA strategic plan, oversaw the new membership and website platform, chaired the Access to Justice Committee and was the International Liaison representative.

SIMON FOOTE (Auckland)

Simon is a barrister at Bankside Chambers and practises commercial litigation and arbitration. He went to the Bar in 2002, prior to which he worked at major firms in Wellington, Auckland and London and as a Crown Prosecutor in Palmerston North.

Simon was Deputy Chair of the committee that organised the 2014 World Bar Conference in Queenstown and the 2015 Conference at Napier. Since 2016 he has chaired the conference committee.

Simon is committed to the ongoing success of the annual conference. He sees it as a vital platform for all members to discuss current issues important to the Bar such as access to justice, the rule of law and the challenges of, and skills required for life as a barrister. It is also a central part of the Association's suite of events that enhance collegiality and cohesion within the profession. Simon also serves on the Association's Gender Equity Committee, Membership Committee and participates as an advocacy trainer.

In 2018, Simon appeared together with Tim Mackenzie in the Supreme Court for the NZBA as intervener in *McGuire v Secretary for Justice*, a case that dealt with the ability of self-represented litigants who are lawyers to claim costs.

LISA HANSEN (Wellington)

Lisa joined the bar in February 2010 and was previously a Crown Counsel at the Crown Law Office for 13 years. She has been on the NZBA Council since 2010 and is the 2017/18 Wellington Vice President.

Lisa has represented the Council at many functions and events over the years which has enabled her to promote its value to the wider profession, including to law students, and recently admitted lawyers.

Lisa particularly enjoyed the experience of helping organise the annual conferences (including the 2014 World Bar Conference in Queenstown), and being a member of various subcommittees (including the Management and Gender Equity Committees).

LARA MANNIS (Co-Opted, Junior Rep[1])

Lara joined Richmond Chambers in February 2016 after three years in the litigation department at Bell Gully. She has experience working on a wide range of general civil disputes, including construction, property, contractual, employment and insurance matters, and has appeared as junior counsel in a number of High Court trials and in the Court of Appeal.

Since her move to the independent bar, Lara has assisted with defending a number of criminal matters in the District and High Courts

[1] A Junior Barrister is one who has been in practice for less than seven (7) years since admission.

and has appeared in arbitral proceedings. In addition, she has been involved with a number of regulatory investigations by the Commerce Commission, Serious Fraud Office, and Financial Markets Authority.

This is Lara's third term as a Junior Representative on Council and she is also a member of the NZBA Gender Equity, Diversity, Training and Junior Committees. Lara has contributed to several of the NZBA initiatives in recent months.

JOSHUA McBRIDE (Auckland)

Josh was admitted to the bar in 1998 and has worked at litigation practices in Auckland, Sydney and London. He joined the independent bar in 2010 and was a founding member of Richmond Chambers in 2014. His practice is largely focussed on commercial litigation, although he also has an administrative law practice.

Barristers, like other professionals, are increasingly at risk of being side-stepped by emerging and disruptive technologies. Faced with these changes and challenges, Josh believes that the NZBA must ensure that the independent bar remains a relevant and vital component of the justice system, and that barristers can continue to offer meaningful and effective services.

Josh thinks that the NZBA can offer a fresh perspective on three key challenges:

- how to best utilise technologies and work practices that will improve client care, foster collegiality and wellbeing, and improve overall professional excellence;
- how to ensure that the bar is properly consulted about any proposed changes to the way barristers practise, and that they move forward collectively and with a common purpose, when and if any changes are implemented; and
- how to ensure that members have access to excellent training and educational resources, to ensure that they understand and can effectively implement changes to their own practices, when these are required.

TIHO MIJATOV (Wellington, Junior Rep)

Tiho is a barrister at Stout Street Chambers, Wellington. His particular expertise and interest is in providing public law advice and advocacy. Before joining chambers, Tiho was a judge's clerk at the Court of Appeal, where he gained wide experience in civil and criminal law.

Tiho has been a junior barrister representative on Council since 2016. He is an active member of the NZBA and its Council. He has worked on a number of initiatives including as junior counsel (written submissions) for the New Zealand Bar Association and New Zealand Law Society as interveners in *Fahey v R* (Court of Appeal). He contributes the NZBA's rule of law and access to justice initiatives, media statements, and junior barrister membership and mentoring.

DAVID O'NEILL (Waikato/Bay of Plenty, Treasurer)

David was admitted to the bar in 1980 and worked initially for a law firm in Napier for three years, returning to the Waikato in 1984 to work in the family firm of O'Neill Allen & Parker. He became a partner in October 1985 and ran the litigation section of the firm until October 1995 when he left to become a barrister sole.

David's practice includes civil/commercial litigation, intellectual property and insolvency law. He is also an arbitrator and has recently, with barrister Melanie O'Neill, launched an online dispute resolution service called "Setting the Bar" which focuses on mediating a dispute, and if that fails, the dispute is then arbitrated. It is aimed at debts below $100,000.

David has served on the NZBA Council for several years now and in that time has served as Vice-President (Waikato/Bay of Plenty), Secretary, Treasurer and Editor in Chief of the Association's Newsletter, *At the Bar*. David also heads the Member Benefits and Bar Care Committees.

ROB STEVENS (Associate Member Rep, Waikato/Bay of Plenty)

This is Rob's second term on Council. He is a member of the Annual Conference Committee and advises the Council and committees on criminal law matters and issues relevant to training. Rob is also the NZBA's Associate Member Representative and a member of the Membership Committee.

Rob graduated from Victoria University of Wellington and was admitted in 1986. He was a founding partner and principal at Fanselows Solicitors in Wellington from 1991 until January 2012, when he left to join the Public Defence Service as a Deputy Public Defender in its Tauranga office.

In March 2013, Rob took up the post of Public Defender for the Northern Region. He was appointed an inaugural member of the Legal Aid Tribunal and has served on the New Zealand Law Society Legal Services Committee. He has a particular interest in Bill of Rights issues.

ESTHER WATT (Wellington)

Esther was motivated to join the independent bar by her wish to focus on advocacy and the ability to promote access to justice by acting on a range of matters and for a range of clients, including in a pro bono capacity.

Esther wants to become involved in the initiatives outlined in the NZBA strategic plan. She is keen to foster the collegiality of the independent bar and to promote it as a fulfilling career option to other litigators, particularly those at an intermediate level.

Esther started her career in 2006 as a Judge's Clerk to the Hon. Justice Arnold in the Court of Appeal, before joining the Crown Law Office. After completing her LLM at the University of Cambridge, she spent four years in the London office of a leading US litigation firm, and then joined the litigation team at Russell McVeagh.

Since joining Stout Street Chambers, Esther has acted on a range of matters, including as lead counsel in several judicial review and human rights cases, and as junior counsel in significant regulatory and commercial proceedings and a complex criminal tax evasion trial.

MICHAEL WEBB (Auckland)

Michael commenced practice at the independent bar in 1995. He works principally in the areas of commercial, financial markets and government law, including advice, negotiation, and dispute resolution as well as law and policy reform. Michael is based predominantly in Auckland and Wellington, as well as in the Pacific.

Michael has governance experience on the boards of public and private sector entities, including, until 2016, the Financial Markets Authority.

Michael believes that a strong and independent bar is a key part of our legal system. He thinks that the Bar Association is particularly important as a body to provide services to barristers to meet their needs, address the various challenges they face, provide opportunities for their development and practice, and to speak with credibility and authority on important issues of the day.

Michael also believes it is important that rich diversity of the bar is at the forefront of the Association's work, in terms of gender, ethnicity and types of practice or location. He thinks that the Bar Association is relevant to all barristers, throughout all stages of their careers. It should be the body which all barristers intuitively wish to join.

SAM WIMSETT (Auckland)

After nine years working in law firms and as a senior Crown prosecutor, Sam joined the Independent Bar in 2012. He practises predominately in criminal law. The civil work that he does is related to asset forfeiture proceedings typically brought in conjunction with criminal charges.

Sam formerly practiced from 22 Lorne Chambers. In 2017, he decided to 'do his own thing' and now operates from 9 High Street in the Auckland CBD. He employs one junior barrister.

Sam is prepared to advocate for the NZBA membership. In recent times he has been vocal about the state of some of our Courts and the facilities provided to all participants. He sees the Bar Association as a potential voice of reason on criminal law matters. He believes that the Bar Association is not constrained by being aligned to a particular side of the criminal law and can therefore offer credible and independent insights on all issues. Sam welcomes contact from any member by email or phone.

** Contact details for Council members appear on the back page of this issue of At the Bar.*

Civil Legal Aid: Why and How You Should Do It

By Shane Elliott*

Shane Elliott explains how civil legal aid provides the opportunity to pursue merit-based work free from the usual financial constraints and gives a cheat-sheet for how to do it without tearing your hair out.

At the NZBA conference in Rotorua this year there was some discussion about the difficulties inherent with civil legal aid and the effect that has on access to justice. Significantly, the presenters noted that while civil legal aid shares the same issues as criminal legal aid in terms of low-provider rates and so on, the biggest problem is in fact the very limited number of active providers.

The Ministry of Justice website provides a searchable list of all approved legal aid providers (civil and criminal). That list identifies approximately 500 individuals nationwide qualified to do civil legal aid unsupervised. However, a significant number of those are no longer active, notwithstanding that their names remain on the list. This presents real difficulties in trying to find a legal aid lawyer. Providers are listed alphabetically by first name. My first name begins with "S", so sits fairly far down the list. Yet I have received calls from several individuals who started at the top of the list and have gotten all the way down to me without finding someone who could help.

Such were the sobering facts discussed at the conference, that by the end the weekend at least two senior members of the bar had stated in their later presentations that they intended to re-commit to doing some civil legal aid. The aim of this article is to encourage others to do so as well, by briefly outlining the benefits of doing so, and providing a quick "how to" guide.

So why should you do it?

It is more effective than pro bono – one of the biggest problems affecting access to justice is connecting those who need legal services (but can't afford them) with those willing/able to provide them. Pro bono does a poor job of achieving that: the people who need it the most rarely know how and where to look for it, and where lawyers do undertake pro bono work it tends to be for those closer to home – e.g. community groups, your child's school. Civil legal aid already has an entire framework set-up to connect people who need help and genuinely cannot afford it with qualified providers.

It provides value-driven work free from financial constraints – we have all been in a situation where our client has a good argument, but the commercial realities if they lose (or even win) are such that it is not economic to pursue it. Legal aid does not have that problem. Provided there is merit to it, you can always pursue an argument on legal aid. It might not pay handsomely, but it is liberating, and allows you to pursue genuine grievances without having to worry about the financials.

The work is widely varied, complex and interesting – the cases covered by civil legal aid are infinitely various and extend to all court levels. For example, an interesting example that some might not immediately think of as within the ambit of civil legal aid would be a prisoner bringing a compensation claim for abuse while in state care or wrongful imprisonment. These are areas where the Crown is being proactive in providing compensation but without a lawyer to assist them, many of these individuals will never receive what they are entitled to.

Signing up won't open the floodgates – registering to do civil legal aid does not mean it has to take over your whole practice. You can limit your provider status to a specific area (e.g. intellectual property or property) and can turn down briefs if you are too busy in the normal way. If only every other civil lawyer did just one legal aid case a year, it would make a huge impact on the total number of providers.

It honours the 'cab rank' rule – confining your practice to only those that can pay what (at the top of the bar) are reasonably hefty fees, automatically excludes a large part of the public from engaging you. A "corporate cab" if

you will. While the inability of a client to pay a lawyer's normal fee is a valid ground for refusing instructions, providing some civil legal aid services holds much truer to the obligation that all lawyers be "available to the public".

Negotiating the administrative headache

Perhaps the most significant factor discouraging lawyers from undertaking civil legal aid (after the low hourly rates) is the administration and paper-work required: different forms for applying for and amending applications, invoicing, and for each different court level – all add to the frustration involved.

In the hopes of making the process a little more streamlined, below is a brief "cheat sheet" explaining the steps in a civil legal aid file and some tips for navigating those efficiently.

Making the initial application for legal aid

Unlike criminal legal aid, where defendants complete the application themselves, an application for civil legal aid (which can be found here[1]) includes a section that must be completed by the prospective legal aid provider. There the lawyer must set out the nature of the proposed proceeding, the issues involved, the prospects of success and a cost estimate for the steps required. In order to provide such advice, it will of course be necessary for the lawyer to review the file and likely meet with the client at least once – and all this is before legal aid has even been granted!

The point to remember is that the advice required in this section can be kept brief. All the Legal Services Agency (LSA) wants to know is that the case is not frivolous or vexatious. For defended matters it will often be enough to simply state that the proceeding has been brought and the client is required to defend it. For complex matters – particularly where the client is the one wishing to bring proceedings – more explanation will be required. Although LSA will not tell you this, it is possible in complex cases to ask for an interim grant (e.g. 10 hours) to undertake the upfront review work necessary to complete the application.

The application also requires the lawyer to provide a cost estimate. This is based on hourly rates which vary by court level and experience (the current rates can be found here[2]). Again, keep this simple. It is best to limit the estimate to only the immediately identifiable steps – e.g. preparing a statement of claim and notice of proceeding – and note that a further application for an amendment to grant (for further hours) will be made in due course.

Providing a lifetime estimate is just as hard for a legal aid file as it is for a private one, and LSA tends to balk at the higher numbers inherent in one. Limiting the application (and subsequent amendments to grant) to smaller more specific chunks of work will get your client's application approved faster and reduce the chance of you short-changing yourself on hours.

Amendment to grant: how to apply for more hours along the way

As further work arises, you need to apply to LSA for more hours to complete that. This is done by filing an "amendment to grant" application. Beware, there are different forms for different types of civil legal aid – e.g. family, ACC and employment - and you need to use the right one or LSA won't accept it. All the forms can be found here[3] but the main one is Form 19.

The process for completing an amendment to grant is much the same as for the original application. Limit it to the steps for which you can reasonably predict the hours required. In the "funding sought" section you don't need to break down every little step; it is enough to group them into categories such as:

> Step 1 - review plaintiff's evidence; discuss with client (7 hours);
>
> Step 2 - brief witnesses and prepare evidence in response (10 hours);
>
> Step 3 - review plaintiff's submissions; legal research; prepare submissions and other preparation for hearing (15 hours).

Further explanation of those steps and why the hours sought are required must be given on page 2 of the form under "Reasons". The more detail you can give the more likely the application is to be accepted. But a few paragraphs are generally sufficient. The main point to note is that the need for the work referred to has arisen since the grant was made, or as a result of further "unforeseen" issues arising.

[1] https://www.justice.govt.nz/assets/Documents/Forms/Family-civil-legal-aid-application-0911-v2.pdf
[2] https://www.justice.govt.nz/about/lawyers-and-service-providers/legal-aid-lawyers/provider-rates-and-special-rates/
[3] https://www.justice.govt.nz/about/lawyers-and-service-providers/legal-aid-lawyers/forms/pdf-legal-aid-forms/

Disbursements

Legal aid funding for disbursements is generally very good – arguably better than from smaller private clients. Some basic disbursements (such as photocopying) are pre-approved up to a certain amount. Major items such as plane travel, accommodation, expert witnesses or translation services need to be applied for in advance via an amendment to grant (there is a separate section for disbursements on page 1 of the form).

This must include an explanation of why the disbursement is necessary and a quote from the proposed service provider. Provided some reasonable justification can be given as to the need for a disbursement, LSA will rarely object to or quibble over the amount of a disbursement. That includes even such things as expensive expert evidence.

Invoicing

One of the up-sides of legal aid, is that once you have received approval for hours on a file, there is rarely an issue with invoicing and receiving payment for those provided they are within the pre-approved amount. Only the hours actually worked should be billed, but those should be rounded up to the nearest half hour.

Again, there are a number of different invoice forms depending on the type of civil legal aid being conducted. All the forms can be found here[4], but for standard civil work Form 20 is the applicable one.

It is not necessary to provide full narrations on the invoice as often done on private files. In fact, it can create issues with getting paid. Instead, the "steps" and "activities" you list on the invoice should mirror those identified on the original application or amendment to grant to which the work relates. This ensures LSA applies your invoice to the correct step and deducts the right hours. If the narrations on your invoice don't match up with a step identified in the application/amendment to grant, you may get LSA refusing to pay your invoice on the basis that no hours have been approved for the work described.

Hearing time is invoiced on an "actual time" basis and is in addition to your pre-approved hours. List it on the invoice as a separate step (rounded up to the nearest half hour) with a note saying, "actual time". LSA should then not deduct it from your hours on other steps.

As noted above, LSA prefers that amendments to grant are sought prior to the work being carried out. Sometimes, however, that is not possible. For example, if an interlocutory or privilege issue arises that must be dealt with urgently. In those circumstances, the process is to complete an invoice and an amendment to grant (for the same amount) and submit them together. There is a box at the bottom of the invoice which says, "is an Amendment to Grant submitted with this invoice?" – tick that. Then explain in the amendment to grant why it was not possible to submit it in advance of the doing the work – e.g. because the matter was urgent. There is not normally an issue with this, but it may take longer for your invoice to be paid because the amendment has to be approved first.

Make it a point of pride

Hopefully this article will help encourage at least a few at the bar to get involved in legal aid work. One comment that has stuck with me from an attendee at the NZBA conference was that when she asked many senior lawyers about doing legal aid work, their response – almost as a point of pride – was that they didn't do it. I would argue the opposite should be true. Legal aid work is possibly one of the most meaningful ways in which we, as lawyers, can give back to the community and those that do it should be proud of it.

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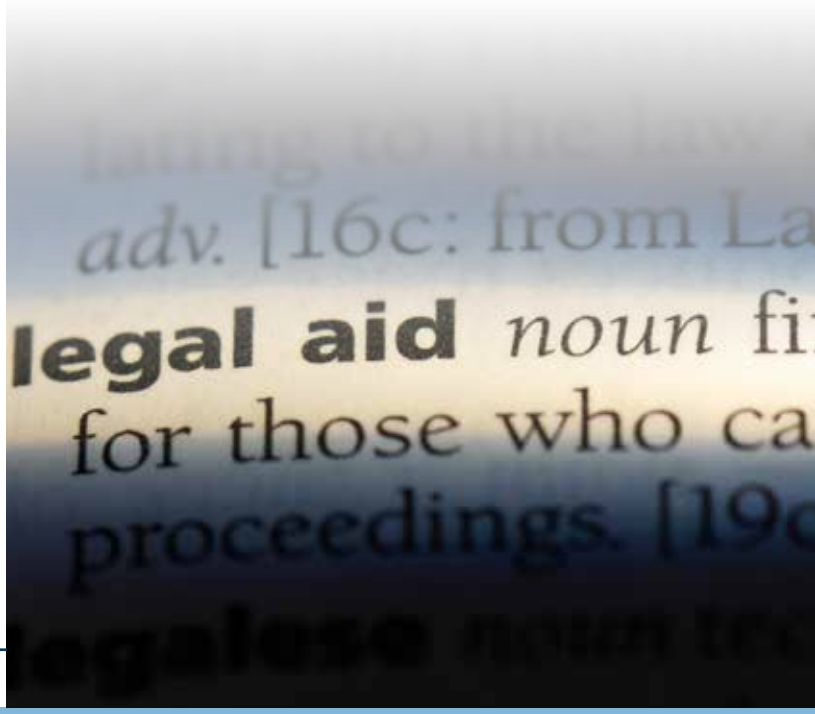

[4] https://www.justice.govt.nz/about/lawyers-and-service-providers/legal-aid-lawyers/forms/pdf-legal-aid-forms/

Hong Kong Arbitration Week 2018: the New HKIAC Arbitration Rules

Lauren Lindsay*

It is no great secret that the determination of international disputes is big business. Arbitral institutions compete with each other and their local courts to attract potential litigants. Commercial parties can choose where and how their dispute is determined. Although arbitral tribunals and parties often rely on the domestic courts at the seat of arbitration for example, to assist with an arbitration (for example in the obtaining of evidence) or to enforce the arbitral award, this does not stop arbitral institutions from developing their rules to render arbitration more attractive than court litigation in the first instance.

The development of emergency arbitrator provisions is a case in point. In response to parties' concerns that the unavailability of urgent interim relief before a tribunal was constituted forced parties in need of urgent relief to go to the local courts, arbitral institutions incorporated emergency arbitrator provisions. Those provisions are akin to obtaining urgent interim relief from the courts, but on a with notice basis and before a so-called emergency arbitrator. The Singapore International Arbitration Centre (**"SIAC"**) was the first institution to adopt the concept of an emergency arbitrator in 2010. Fast forward a few years and the availability of an "emergency arbitrator" is now common to most institutional rules (the Arbitration Rules of the New Zealand International Arbitration Centre, **"NZIAC"**, is arguably an exception[1]).

Cue the seventh annual Hong Kong Arbitration Week, which took place between 29 October and 2 November 2018. The conference covered a considerable amount of ground; the increasing use of artificial intelligence in international arbitration; arbitration's compatibility with disputes arising out of the Chinese Belt and Road Initiative; the sanctions available to tribunals for procedural non-compliance. Ultimately, however, it was an opportunity for the Hong Kong International Arbitration Centre (the **"HKIAC"**) to showcase the updated version of the HKIAC Arbitration Administered Rules (the **"HKIAC Rules"**), which came into effect on 1 November 2018.

The amendments have three key objectives, to (1) save time and costs; (2) facilitate efficiency in complex arbitrations; and (3) respond to a number of developments in the arbitral and international landscape.[2] The full scope of the changes can be viewed elsewhere.[3] I focus on two immediately below.

First, one may now apply for an emergency arbitrator before a party has filed its notice of arbitration, the document that commences the arbitration. This seemingly innocuous change has important practical implications for the lawyers preparing the relief application. The previous approach under the HKIAC required the applicant for emergency relief to prepare both a notice of arbitration (the document that identifies a party's choice of arbitrator) and an application for emergency relief. The practical burden created by this ignored the often extraordinary urgency under which these documents are drafted. I invite you, for example, to pull together an anti-suit injunction application, together with supporting evidence and documents, while also having to decide irrevocably on the person that will determine the outcome of your substantive dispute. The HKIAC has identified a helpful compromise by requiring a notice of arbitration to be filed within 7 days of the application for emergency relief (see, paragraph 21 of Schedule 4 to the HKIAC Rules). The additional breathing room will no

[1]The NZIAC Rules do provide for the urgent appointment of an arbitrator (within one working day if possible) where a party is seeking urgent relief before the tribunal is constituted (see NZIAC Rules 6.9-6.18). One important difference between the NZIAC Rules for urgent appointments and emergency arbitrator provisions included in other institutional rules is the default status of the arbitrator once the application for urgent relief has been decided. The NZIAC Rules provides that the "urgent" arbitrator will remain and determine the substantive dispute unless the parties agree otherwise (Rule 6.18). The default position under other institutional rules is the opposite. The emergency arbitrator is *functus officio* unless the parties agree otherwise (see, e.g. paragraphs 18-19, Schedule 4 to the HKIAC Rules).

[2]Sarah Grimmer, the Secretary-General of the HKIAC, speaking at Hogan Lovells "Making Arbitration Fit for the Future", Tuesday 30 October 2018.

[3]See, for example, Joe Liu "The HKIAC Introduces New Rules", Kluwer Arbitration Blog (available at: http://arbitrationblog.kluwerarbitration.com/2018/10/22/hkiac-new-rules/) (as at 11 November 2018).

doubt be appreciated by many an arbitration lawyer. Seven days can make all the difference.

Secondly, the HKIAC has enhanced its consolidation wording. Under Article 29 of the HKIAC Rules, a claimant may now make claims arising out of more than one contract in a single arbitration, even if the underlying arbitration agreements are different (although they must be "*compatible*"). Under the previous rules, a claimant would have had to commence multiple arbitrations, obtain the consent of their opponent and the approval of the tribunal to consolidate. This provided difficult respondents with a significant tactical advantage. Refusing to consolidate subjected the claimant to multiple parallel arbitrations on substantively the same subject matter, often arising out of the same transaction or series of transactions. In addition, even where multiple arbitrations fall short of the standard of consolidation required under Article 28 of the HKIAC Rules, tribunals are now imbued with an express power to conduct multiple arbitrations concurrently or sequentially. If the same tribunal is presiding over two or more arbitrations and a "*common question of fact or law*" arises in all of the arbitrations, the tribunal may conduct those arbitrations concurrently or sequentially. These are welcome changes and will hopefully promote the efficient management of multi-party, multi-contract disputes.

These recent amendments to the HKIAC Rules are an example of the ongoing refinement of arbitral rules to take into account the views of its users. It remains to be seen whether other arbitral institutions follow suit and if so, to what degree. Dispute resolution is a competitive marketplace. International arbitration's agility and ability to adapt quickly is fundamental to its appeal.

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Exchange Square, Hong Kong

Reflections from the Public Law Conference 2018

Yvonne Wang and Matthew Mortimer*

The third biennial Public Law Conference, co-organised by the University of Melbourne and the University of Cambridge, was held at Melbourne Law School from 11-13 July 2018. The Public Law series is the pre-eminent forum for the discussion of public law matters in the common law world. This year's theme was the "Frontiers of Public Law". The conference brought together academics, practitioners, as well as a large number of judges, all of whose work continues to shape the fields of public law.

The New Zealand contingent was the usual suspects of academia, as well as those who have left full-time academic positions for the Crown Law Office or the bench. Two-fifths of our Supreme Court also made the trip.

Major contributions at the conference will be developed and published in a collection of papers.[1] Many speakers will also distribute their own essays based on the ideas presented at the conference. The purpose of this article is not to pre-empt that academic work. The contributors can and will present the arguments more accurately and elegantly than us.

The purpose of this article is simply to outline two important themes that we consider emerge from the conference as a whole. The first is the growing strength of the idea that government contracting decisions are and should be amenable to public law principles and judicial review. The second is that this illustrates how much good can come from a profession that is in touch with the frontiers of scholastic innovation. Although neither point is new, the conference emphasised their currency and relevance for the New Zealand profession.[2]

Public law principles in the government's private life

The issue

Everyone agrees the government's "public life" can be scrutinised. Public decision-making, the exercise of statutory powers, even the royal prerogative; these can be and are the subject of judicial review. But does the government have a "private life" when it enters into a contract with a private party, and to what extent is either the contracting process or the terms of that contract amenable to review?

The answers to the question make a difference in terms of the avenues of legal challenge available. If the government is acting in a "private" capacity when it makes a contract, then a person who seeks to challenge that contract traditionally can only resort to private law. That brings restrictions both on the grounds of challenge and the parties who can challenge. Privity gets in the way.

But if a government contract is seen as a public decision, suddenly the doctrine of privity is replaced by the law of standing in judicial review. At the same time a claim of judicial review in this context veers dangerously close to scrutinising the substance of a contract. That is not traditional territory for judicial review.

To complicate things further, government contracting decisions are not all one or the other. A government "contract" to buy paperclips for the office might seem of a different character to the situation where a government hands over tens of millions of dollars to a private housing provider which replaces the public function of a state housing provider. In this context, the source of the government's power to contract may also be a relevant point of distinction.

In New Zealand, the question of whether a government can have a "private life" when it contracts as a private party immune from public law scrutiny is not new. Professor Michael Taggart posed variants of the question in the

[1]The books resulting from the two previous conferences are: Bell, Elliott and Varuhas (eds), *Public Law Adjudication in Common Law Systems* (Hart Publishing, 2016); Elliott, Varuhas and Stark (eds), *The Unity of Public Law Doctrinal, Theoretical, and Comparative Perspectives* (Hart Publishing, 2018).
[2]Due to the citation restrictions attached to the speakers' draft papers presented at the conference, we have not a substantive reference to them. If you are interested in any specific topic discussed in this article, please contact the relevant speaker directly.

1980s. Academics have been questioning this since at least that time, including Professor Janet McLean of the University of Auckland.

Older judicial decisions spoke in favour of a governmental private life. In *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd,* the Privy Council stated:[3]

> "It does not seem likely that a decision by a state-owned enterprise to enter into or determine a commercial contract to supply goods or services will ever be the subject of judicial review in the absence of fraud, corruption or bad faith."

In *Lab Tests Auckland Ltd v Auckland District Health Board,* Hammond J spoke of "twilight" areas where the appropriateness of judicial review was "still largely unresolved".[4] In that case, both parties had invited judicial review of a contracting decision by a District Health Board, and while the High Court and Court of Appeal proceeded to do so they grumbled about being asked to review commercial decisions.[5] The Court of Appeal continues to express reticence[6] and while the Supreme Court holds to the general proposition it has recognised exceptions for some commercial decisions with a peculiarly public flavour.[7]

Perspectives at the conference

These topics continue to be the subject of debate. The conference saw several strong presentations on aspects of this topic. The coincidence of three strong papers and speakers on this topic left the feeling that this was an idea that continues to be at the frontier of public law. This theme was specifically remarked upon by Ellen France J and the other speakers in the closing plenary.

Professor Anne Davies of the University of Oxford raised these issues in the context of "expert" government contractors. She questioned if contractors performing a public function, often through policies such as the private finance initiative (PFI) or public/private partnerships (PPPs), should be subject to judicial review. The original concept that government is the contractual party who holds a greater degree of bargain power and that the practice of contracting out will encourage the most efficient service provider to perform a previously public function needs to be re-assessed in light of the phenomenon of the expert government contractor. That is, instead of being a specialist in providing a particular service (e.g. transport), contractors specialise in the business of being a government contractor, who in turn holds multiple contracts over a wide range of core public services.

In England, the courts have made limited steps towards permitting review of contractors' actions. In line with the famous *Datafin* test,[8] something more than a contract with a public body is required to bring the contractor's activity within the scope of judicial review, and that connection is often expressed by way of a "statutory penetration".[9]

Professor McLean proposed the idea of a new law of public contract as a potential alternative to the public/private divide of remedies. She opined that conceiving of government contracts as purely private does not sit comfortably with liberal contract theory. Professor McLean discussed the Sky City Convention centre agreement as an extreme example of a contract which potentially curtails the autonomy of future governments. She questioned if the type of constitutional fettering which arises from government contract is justified. It is noted that this type of fettering threatens to weaken the unwritten constitution in New Zealand.[10]

Sir Kenneth Hayne (former Justice of the High Court of Australia, and presently chairing the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry) also spoke on matters relating to this topic. He highlighted the ways in which governments were looking to market economies as a guide to organising public services. That in turn had implications for the availability of judicial review. Sir Kenneth also touched on the phenomenon of contractual arrangements which extends beyond the term of the government (or indeed the length of the legislation). He questions if the Crown can be considered a polity in the contractual context, and if the source of power is a relevant question to the issue of amenability.

Reflections

Is the move towards the amenability of judicial for government contracts a retreat from the traditional Diceyan equality in common law? The Diceyan theory of equality holds that the same law should apply to private individuals and public entities or officials. The laws which govern the relationship between the state and the

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[3] *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385 (PC) at 391.
[4] *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776 at [351].
[5] See the heel-dragging in *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776 at [342]-[344].
[6] See *Attorney-General v Problem Gambling Foundation* [2016] NZCA 609, [2017] 2 NZLR 470 at [34].
[7] *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056 at [65] and [74].
[8] *R v Panel on Takeovers and Merges, ex parte Datafin* [1971] QB 815 (CA) at 824.
[9] See for example *R v Servite Houses, ex parte Goldsmith* (2001) 33 HLR 35 (QB) at [76]; *R (A) v Partnerships in Care Ltd* [2002] EWHC 529 (Admin), [2002] 1 WLR 2610.
[10] See a more detailed discussion at J McLean, "The Unwritten Constitution and its Enemies" (2016) 14(1) International Journal of Constitutional Law 119.

individual is not a separate category of law. This is to be contrasted with the public/private division in civil jurisdictions, where there is typically a distinct body of procedural and substantive rules which governs the actions of public authorities.

Is the move towards a formal public/private distinction on the cards? Certainly, if Professor McLean's idea of a public contract law is accepted by the courts, it may be a blow to those who consider the Diceyan equality as a foundational theory of common law. Is the UK Supreme Court judgment in *Braganza*[11] a mere prelude for a new era of convergence[12] or an example of the socialisation of private law?[13] From one perspective, at least, the absorption of public law norms in private law appears inevitable.

The constitutional fettering by contract described by Professor McLean is a familiar topic in the context of international investment treaty law.[14] Traditionally, constraints which are placed on the host state (who was the party with less bargaining power) by the terms of the investment treaty can be seen as constitutional in nature. On the other hand, modern multi-lateral trade treaties such as the TPPA do not fit within these neat constructs. Is there a parallel to be drawn between developments in investment treaty law (itself a hybrid species between public international law and commercial arbitration) and domestic government contracts?

Academics and the profession

The conference illustrated the degree to which this area of the law is still being written. But the writing is not just the role of academics. One of the audience questions to Professor McLean was whether innovation in this area was best left to the legislature.[15] Professor McLean's response addressed her intention to give the tools and theoretical basis to assist with strategic litigation on this point. Judicial development is more likely than legislative development.[16]

We agree. But the observation emphasises the role the profession must play in the development of common law legal concepts. The nature of the legal system is such that judicial engagement with these ideas leads to the swiftest development. One good judgment has the potential to change the law, and if it doesn't then a close-but-no-cigar decision can be just as useful to practitioners and academics. The profession is best-placed to advance these ideas before the courts. That in turn speaks to the importance of the profession remaining in touch with the work of the academia.

And if the goal of legal development is too noble, awareness of ideas like this one has more base advantages. Scrutiny of the government's "private life" has the potential to shape and reshape claims against the government. Although the frameworks are still in development, it offers new causes of action, new grounds to challenge, and new opportunities for persons or parties typically unable to bring claims.

Aside from that it invites a healthy revisionism of and reflection on of New Zealand case law. *Transit New Zealand v Pratt Contractors Ltd* [17] is a leading decision on tendering processes in contract law. As well as classic breach of contract causes of action, the plaintiffs had pleaded alternative claims that alleged failures in the tendering process amounting to bias in a public law sense. The courts politely side-lined them. This was a contract law claim. The fact that one of the contracting parties was a public body was not relevant.[18] There is a history to be mined, where the *Pratts* of this world can be recast not simply as contract law cases but also as missed opportunities.

And more generally, there is value to the profession in staying up to date with developments in the law. It guards against the Rip Van Winkle career in law, where after university the "realities of practice" puts one to sleep for the next 20 years, only to wake up to discover all the legal developments one missed.

The next Public Law Conference will be held at the University of Ottawa in 2020.

** Yvonne Wang is a senior solicitor at Meredith Connell. She graduated from a Master of Public and International Law from the University of Melbourne with First Class Honours in 2018 and has recently been awarded an Inner Temple Pegasus Scholarship in 2018 to work with barristers at a leading chambers in London. Matthew Mortimer is also a senior solicitor at Meredith Connell. Prior to joining the firm, he was research counsel to the Office of the Chief Coroner and a research assistant in the University of Otago Faculty of Law. Contact Yvonne at yvonne.wang@mc.co.nz and Matthew at matthew.mortimer@mc.co.nz*

[11] *Braganza v BP Shipping Ltd* [2015] 4 All ER 639. The Court explicitly read across administrative law principles to contractual review in the context of contractual discretion. See also *Bartlett v ANZ Banking Group Ltd* [2016] NSWCA 30.
[12] Janet McLean, *Convergence in Public and Private Law Doctrines – the Case of Public Contracts* [2016] NZ L Rev 5.
[13] This topic was presented at the conference by Associate Professor Jason Varuhas of the University of Melbourne (who was also the convener of the conference). His views were challenged by Professor Stephen Hedley of University College Cork.
[14] See for example, David Schneiderman, 'Investment Rules and the New Constitutionalism' (2000) *Law & Social Enquiry* 25, 757. Investment treaties may be seen as a set of inbuilt restraints which limits the democratic mandate of future governments to change laws or policies in areas where the interests of foreign investment may be affected
[15] This question has been asked of every academic in every area of law since the beginning of time and will continue to be until the heat death of the universe.
[16] We observe that this would seem especially so in a jurisdiction like New Zealand where the executive will always maintain a functional majority in the legislature.
[17] *Transit New Zealand v Pratt Contractors Ltd* [2002] 2 NZLR 313 (CA), confirmed by *Pratt Contractors Ltd v Transit New Zealand* [2003] UKPC 83, [2005] 2 NZLR 433.
[18] *Pratt* (CA) at [77].

Setting the Bar Allows Clients to Reach the Bar

By Jacqui Thompson*

An online dispute resolution platform may be the key to greater access to justice for many clients.

Concern about the increasing unaffordability of litigation (especially when dealing with disputes under the $100,000 mark) led Hamilton barristers, David and Melanie O'Neill, to set up a new system so that clients could get quality dispute resolution at a reasonable cost. This system is an online dispute resolution forum called "*Setting the Bar*".

David and Melanie are members of Victoria Legal Chambers. After initially working for a law firm in Napier for three years, David returned to the Waikato in 1984 to work for the family firm of O'Neill, Allen and Parker. He became a partner in that firm in 1985 and ran its litigation section until 1995, when he left to become a barrister sole. He works mostly in the civil commercial area of litigation and has extensive experience in land law, insolvency law and intellectual property litigation.

David notes that as a barrister in a "provincial" area you become a Jack of all trades. Over the years he has acted for clients in numerous arbitrations, and eventually became an arbitrator himself. He is an associate of AMINZ. David is also the NZBA Treasurer and Editor in Chief of *At the Bar*. He was a bit bemused to find himself the subject of an interview for that publication!

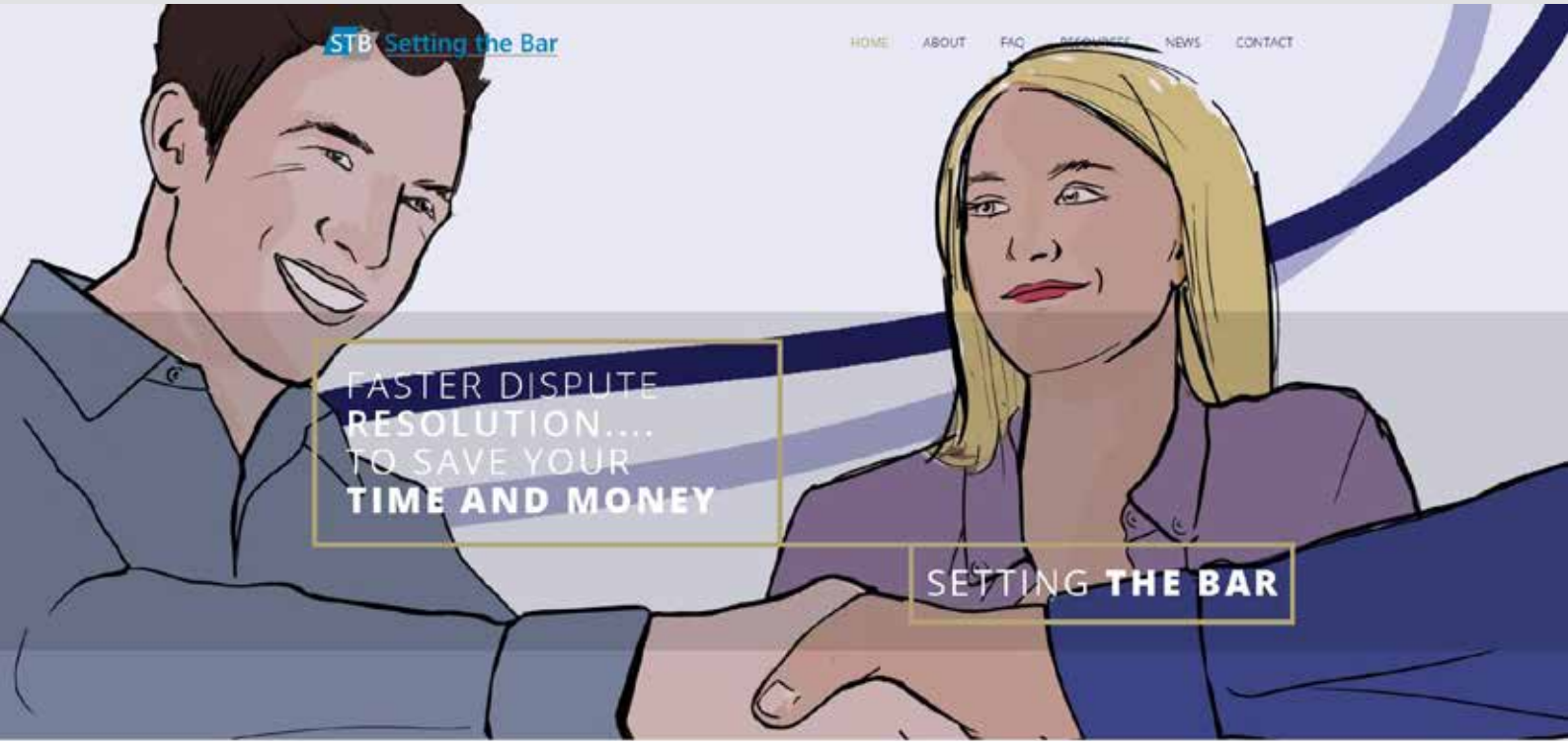
Melanie describes her skills as complementary to those of David. She was admitted to the bar some 27 years ago and worked at Rudd Watts and Stone (now Minter Ellison). In 1992 she joined Tompkins Wake where she became a partner, specialising in family and employment litigation. In 2000 she moved to the independent bar, developing her mediation practice from 2001 on.

Melanie is an accredited mediator with Resolution Institute (formerly LEADR). In addition to her private mediation practice she also contracts to the FDR Centre to mediate child disputes and with MBIE to mediate employment disputes. She holds a Masters degree in Commercial Law which has proved useful in enabling her to mediate all types of dispute. Melanie has retained a barristerial practice but says that mediation comprises about 60% of her practice now.

David has been involved in the discussions about the increasing problems with access to justice through his position on the NZBA Council. Combined with his own experience as a barrister, he notes that increasingly, it is costing more to chase debts: "You get these debts of $50,000 coming in to litigate. You can't change what you are doing to make it cheaper, as you still must do it properly. But the client could end up spending $30,000 to chase the $50,000 result. And then there are all the risks of litigation. So, Melanie and I tried to think of something that would improve the situation."

The result was an online dispute resolution platform called *Setting the Bar.* The aim was to offer a service for litigants who don't meet the Disputes Tribunal jurisdiction of $15,000 (about to be raised this year to $30,000) but don't want to spend a fortune on chasing a result or wait too long for that result. Melanie and David wanted a system that would channel clients into mediation, enabling them to solve their own problems, but if that failed, they would move straight to an arbitration on the same day with a final decision within two weeks.

The key to it all was that the dispute would be resolved promptly. "Timeliness is almost as important as the result for many people," David says. "These disputes can hang over people for years and they live with the ongoing stress. I can spend a couple of sessions with clients, who are in the middle of a dispute, and try to coach them into putting their emotion to one side, but it will rarely work. They live with it on their shoulders every day. They get up with it every day. We figured that this was a quick and reliable way to avoid that situation."



David stresses arbitration provides speedy and just resolution of disputes. He says, "The court is log jammed. Hamilton is a very busy centre and the growth is through the roof. I recently spoke to a Registrar who said that if you are looking for a hearing over three days long, you can basically write off 2019." Part of the problem, he says, is that self-represented litigants are taking up a lot of court time and that is on the rise because of the cost of litigation. People are having to represent themselves to get access to justice.

By contrast, he has a matter that is coming up for arbitration which started in March/April and will be heard in November. "You don't get that kind of speed in court proceedings. If you are looking at a one-week hearing, you are looking at a wait time of about 18 months. And that's from when you're ready to set it down not the date of filing proceedings. With an arbitration you have a conference and set the dates all the way through to the end of the process."

Melanie agrees with this view, saying that she thinks people see arbitration as a good way to get finality. They know that court proceedings are going to take a long time and just want it resolved.

David and Melanie set a monetary limit on the service of disputes up to $100,000 or those that dealt with non-monetary issues. David and Melanie also exclude anything where there is a legislative dispute resolution framework.

The fact that it is an online service means that it is accessible wherever people are located in NZ.

David and Melanie also wanted the service to be affordable so the cost for using the service is a fixed fee arrangement of $10,000 + GST, with each side paying $5000 + GST. This applies whether or not the dispute is resolved at mediation. Even if the dispute doesn't go ahead to arbitration, the fee still applies because a day has been put aside to determine the dispute.

Setting up the process required research and planning. Melanie and David spent 12 months developing forms, FAQs and figuring out the process. It was important that the website be interactive so that it was easy for an applicant to come to the site and easily start the process.

The applicant begins the process by listing the witnesses, uploading the relevant documents and completing the forms. This material is submitted and sent to the other party and to David who acts as the arbitrator. The other side then responds, and documents are exchanged online again. David and Melanie check there are no issues around conflict and whether the dispute is appropriate for the mediation/arbitration process.

Parties then begin the mediation with Melanie. This can be done either in person or online. Melanie has had experience with online mediation and says that she often has one party at a distance and attend by Skype or any other online meeting platform.

Melanie believes that mediation is one of the most satisfying activities that she undertakes in

her practice; “Clients get the chance to resolve the dispute themselves," she says. "That is more empowering for them and we give them that opportunity. But if they can’t reach agreement, they know that they are going to get a hearing on the same day with a decision shortly afterward that is final with no right of appeal.”

The mediation process is robust. Applicants get four hours and Melanie is quite directive during that time. Some private mediations will allow parties to go on as long as they want to. However, mediation is a facilitated meeting to see if the parties can reach agreement under guidance, and Melanie is confident about the timeframe they have chosen for this.

Melanie and David decided that they would prohibit lawyers from attending either the mediation or the arbitration. “Lawyers can be behind-the-scenes and help to prepare, but they can’t come on the day,” says Melanie. As barristers, they have both experienced situations where lawyers had become entrenched in positions while representing their clients.

David tells of one situation where a judge had, in effect, mediated a settlement in court, only for the lawyers to leap in with complaints and nearly derail the deal. Equally, they don’t allow anyone who is representing someone else. “These so-called advocates can really create disasters,” says David.

The arbitration is inquisitorial with David asking all the questions. Another important factor is that Melanie will not discuss what is said in mediation with David, which is, of course, critical.

Melanie points out that the system could work well in several situations. For example, it could work for insurance disputes involving insurance company to insurance company. “It would dramatically save on their legal costs,” she says.

Melanie and David are keen to keep improving their service. They recently applied for a scholarship and were notified that they had been shortlisted as finalists. “We are really interested in looking at the online functionality of the product,” says Melanie. “The Singapore State Court, through its Community Justice and Tribunals system has e-mediation – it has an online capability that we are hoping to study.”

For more information on the service go to https://www.settingthebar.co.nz/ or contact David at David.ONeill@nzbarrister.com and Melanie at Melanie.ONeill@nzbarrister.com.

** Jacqui Thompson is the sub-editor of At the Bar.*

Briefing the Bar and Diversity in the Legal Sector

Diversity and its importance to successful businesses was a key topic at the New Zealand Bar Association’s networking event, *Briefing the Bar and Diversity in the Legal Sector*. Keynote speaker, Sir John Key, discussed ways that business can introduce structural and cultural changes to encourage inclusion and diversity.

We were also fortunate to hear a range of views from the panel which included the Hon. Justice Helen Winklemann, NZBA President Kate Davenport QC, Dr James Farmer QC, Jenny Cooper QC, David Bricklebank (General Counsel ANZ Bank) and Kathryn Beck (New Zealand Law Society President). The attendees included members of the legal profession (including in-house counsel, members of the bar and solicitors from law firms) as well as representatives from business.

Sir John Key said that the merits of diversity and inclusion in business were not debatable - they had long been identified and acknowledged. However, he questioned whose responsibility it was to effect change? While government had a role to play, he did not believe that change happened as a result of legislating business. He suggested that the best way to effect change was a mixture of policy and leadership within business.

When asked about quotas, Sir John’s view was that these did not necessarily work. What was needed was structural change, flexible work practices and transparency within the organisation. During the panel discussion that followed, Dr Famer also expressed doubts about whether quotas were helpful.

This view was challenged by Jenny Cooper, who explained the rationale for the joint NZBA/NZLS Gender Equitable Engagement and Instruction Policy, which sets a target of 30% of lead roles in litigation being taken by women. Ms Cooper said that the current rate of progress for women in senior litigation roles was not glacial so much as imperceptible. This was shown by the recent research by NZBA, funded by the Law Foundation, on the proportion of male and female counsel appearing in the senior courts, which showed no material change over the last six years. Therefore, it was clear that change would not happen without active measures being taken.

Ms Cooper also stressed that the 30% is a target, not a quota; and no one is suggesting that work be given to someone simply because of their gender. Rather, it is a way of encouraging instructing solicitors and clients to think about the pool of talent they are drawing on and whether they are including all suitable candidates, irrespective of gender. Assuming that the female half of the profession is equally capable as the male half, there was no reason to think that meeting the target would require anyone to instruct a lawyer who wasn't qualified for the role. However, if policy adopters did find it difficult to meet the target, it would be useful to have feedback on why, so that the relevant issues could be addressed.

Ms Cooper noted that a real concern for women and "minorities" was the lack of visibility at the time of briefing. People tended to focus on those who had been recommended to them or who they had worked with before. It was therefore critical to draw the attention of those who briefed out work to the full range of barristers that were available to them and not just the usual (known) pool. Kate Davenport agreed that visibility was a key issue and noted the difficulty for referrers of legal work in locating appropriate barristers. She suggested that an option is the NZBA's website "Find a Barrister" search tool (see below at the end of this article for more information).

Court of Appeal/Te Kōti Pīra Judge, the Hon. Justice Winkelmann, talked about the importance to the Court of having the right person address it and that this is not always lead counsel. Often juniors know more about aspects of the case than their senior and there is nothing more frustrating for a judge than having lead counsel constantly turning to the junior for clarification. The Court would much prefer that the junior be given the opportunity to argue this aspect of the case. It was for this reason that the Court of Appeal issued a practice note encouraging the greater participation of junior counsel before it. Dr Farmer echoed this, saying that there were many cases where it was more appropriate to have a junior present a point, and frequently that junior was a woman.

Kathryn Beck, President of the New Zealand Law Society, outlined the measures that the regulator was taking to increase diversity in the profession and make opportunity to advance available to all. She stressed the importance of the initiatives that have been undertaken, including the Gender Equitable Engagement and Instruction Policy and the Gender Equality Charter which is a set of commitments aimed at improving the retention and advancement of women lawyers. Ms Beck said that it was equally important to consider diversity as a whole, including ethnicity and cultural aspects.

David Bricklebank described the work that has been undertaken by the ANZ Bank (who also hosted this event) to ensure diversity and inclusion in the workplace. The Bank is committed to processes and policies ensuring equal employment opportunity, flexible working, reasonable accommodation for staff with a disability and for those with responsibilities of care for a family member. In terms of legal representation, Mr Bricklebank agreed that there was a visibility problem for members of the bar and suggested that barristers needed to do more to make themselves known to potential clients.

From the floor, Polly Pope (Commercial Litigation Partner at Russell McVeagh) said that she was delighted at the call to arms that this event had inspired and noted that real change was going to take ferocious action from all in the room. Ms Davenport commented on Russell McVeagh's support for the Gender Equitable Engagement and Instruction Policy and thanked Ms Pope for Russell McVeagh's hard work in this regard.

The NZBA would like to thank all of the speakers and attendees for a highly informative and positive evening. In particular, we would like to thank the ANZ Bank for hosting this event.

Increasing your visibility as a barrister

Unlike those in law firms, barristers do not have access to a marketing department. But there are several relatively easy ways in which you can begin to increase your visibility, so that key people become aware of you and your work.

1. ***Find A Barrister*** **Listing** – if you are a member of the NZBA, you can create a directory listing on our *Find A Barrister* search tool. This is one of the most heavily used areas of our website. Make sure that you take the time to make this listing as full as possible. A skeleton/incomplete record is going to look unprofessional.
Ensure you include at a minimum:
   - Your title and qualifications
   - Your practice areas
   - A brief statement about you and your background
   - Links to your website and/or *LinkedIn* profile
   - Contact details

   You should also consider including:
   - A head and shoulders photo
   - A background banner for this photo (for example, if you practice in Dunedin, you may want this to be a picture of the city, or if you practice constitutional law, it could be a picture of the Beehive)
   - A copy of your CV

   Even if you cannot afford the time or money to maintain a full website, your *Find A Barrister* listing will give people enough information about you to ensure that you are visible on the Internet. For instructions on how to create or improve your listing, go to the Help section on our website - https://www.nzbar.org.nz/find-barristerdirectory-listing.

2. **Get Social** – whatever your views about the intrusion of social media into your life, there is no doubt that this is a highly effective way to market. For example, if you don't already have one, create a *LinkedIn* profile. Again, make sure that this is reasonably complete. If you have a profile, look for companies that you can follow. You can then make comments on their posts. When choosing companies, think about the kind of people who are likely to follow their posts. You should have a focused network of those who you have or would like to have business contacts with – in this case, social does not mean non-discriminating! The NZBA has a *LinkedIn* company page at https://www.linkedin.com/company/2174959. We are also on *Twitter* (@NZBarAssoc) and *Instagram* (nz_bar_assoc).

3. **Network** – whenever possible, attend professional social events and remember that the people there are the ones who will be recommending you to others if they themselves cannot help. Recognition goes to those who turn up.

4. **Get involved** – join professional associations and networking groups. Remember that diversity is essential, so get involved with important organisations such as NZBA, NZLS, Te Hunga Rōia Māori o Aotearoa / New Zealand Māori Law Society, the Pacific Lawyers Association, Criminal Bar Association and the various women lawyers associations. Think about community groups and charities that you can join. Social connections are important for increasing visibility.

5. **Say hello** – sometimes a direct approach can be an excellent way of increasing your visibility. If you practise in a specific industry or region, you may want to try mailing a letter directly to local firms who brief barristers so that they know you are around and what your services are. Introduce yourself to business leaders as well.

ANZ/NZBA Diversity Event 1 November 2018

Kate Davenport QC, Hon. Justice Winkelmann, Dr James Farmer QC, Jenny Cooper QC, Kathryn Beck, David Bricklebank

David Bricklebank, ANZ

Bhakti Meta, Evelyn Jones

Carmel Walsh, David Bigio QC, Suzanne Robertson QC, and Rachel Reed QC

Sir John Key, Maria Dew, Jenny Cooper QC

Tiho Mijatov, Garry Williams, Simon Foote, Kevin Clay

Helen Chung and Lorraine Smith

(Unknown), Carmel Walsh, Sir John Key, Michael Heron QC, Maria Cole, Melissa Perkin, Dr Anna Kirk

Stephen Laing, Jason Zwi

Kathryn Beck, Amelia Schaaf

Michael Heron QC, Kathryn Beck, Stephen Hunter, Jenny Cooper QC, Victoria Heine

Hon. John Priestly CNZM QC, Anita Killeen, Helen Chung, Gurbrinder Aulakh

Greg Bonnet, Carol Patton, Vivien Vesty, Frances Joychild QC, Maria Cole

Pip White, Sam Wimsett

Robert Foitzik, Helen Wild, Mike Heron QC

Announcing

FortyEight Shortland Barristers

At FortyEight Shortland, we believe that the whole is greater than the sum of its parts.

Whilst all practising as barristers sole, between us we have a wealth of expertise and experience across civil, commercial, regulatory and equitable law. In addition to traditional advocacy services, we offer arbitration, mediation, negotiation, and technical specialist advice, using our strategic judgement. In other words, we focus on what our clients need.

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BARRISTERS:

Kellie Arthur
Mark Colthart
Bret Gustafson
Greg Jones
Steve Keall
Rob Latton
Tim Rainey
Carole Smith

The New Kid in Town – FortyEight Shortland Barristers

Interview with Mark Colthart

In August this year a new set of chambers was formed and took up residence in the Vero Building on Shortland Street. One of its founding members, Mark Colthart, discusses the reasons behind its formation and the challenges that they faced.

Where were you before forming FortyEight Shortland?
I was actually on Level 31 of the Vero building in a shared office arrangement with Bret Gustafson, Rob Latton and Steve Keall. We all had separate offices on that floor.

How did you find the other members of the chambers - was it word-of-mouth or something more formal?
Brett, Rob, Steve and I knew each other pretty well. We knew Tim Rainey because when he was a partner at Rainey Law, his office was on the same floor. We also knew Greg Jones because he was up on level 34 (which is where we have now set up our new chambers). The six of us started talking about creating a shared chambers.

Once we made a decision about the premises and realised how many rooms we had available, we went out and actively sought expressions of interest from people that we knew who were either contemplating joining the bar or who had recently joined it. That is how we came into contact with Kellie Arthur and Carole Smith.

Compared with the informal arrangement you had on Level 31, what are the advantages of shared chambers?
The first advantage is the collegiality of being in chambers. I'm lucky enough to share chambers with a great bunch of people, and actually look forward to coming into work every day (seriously, I do).

The second advantage is closely related to that and is the exchange of ideas and information

about cases (while still respecting client confidentiality). That is easier to do in chambers.

The third is the ability to refer work among chambers members which means that we can offer clients a real depth and breadth of experience, and you have people readily available who can help when required. That is a great advantage.

There are also marketing advantages. We can market the chambers as a single brand and we made the decision early on that we wanted to do that. That makes the individual marketing of our practices much easier. We are part of an identified set of chambers.

Another advantage is a shared sense of identity among us, and it is an identity that we are creating ourselves. We designed that identity exactly as we wanted it to be.

There are also of course cost saving advantages around sharing of expenses, including premises, fit-out, marketing, client functions etc.

Do you also share a technology infrastructure and software costs?
We have taken a practical view of hardware and we are all doing our own separate thing in our offices, but we share a lot of the software licensing costs and our website costs.

We also share a joint library, but more in conventional sense. We each separately run our own online databases/E-libraries. The NZBA LexisNexis e-library scheme is excellent value.

On your website you describe the chambers as "... a progressive and modern chambers focused on civil, commercial and regulatory law." Do you plan to keep the chambers commercially oriented?
Yes. We have differing practices within the commercial field, but they are all broadly around commercial dispute resolution. When we seek expressions of interest from new members of chambers, we will be looking for people within the broad field of commercial dispute resolution.

We will always hold ourselves out as a commercial set of chambers. That is our niche. But within that we try to cover a broad range of practice areas, which is why we have specialists in insolvency, insurance, trusts and construction etc.

After your initial chat around the possibility of setting up chambers, what was your next step?
Well, the biggest challenge for us was trying to bring together a group of people coming from different situations. Bret, Rob, Steve, and I were already at the bar and were therefore quite flexible. Two members, Greg and Tim, were coming from firms. It was a matter of lining everybody up so that we were ready to go at the same time and then finding people who were ready to form a new chambers. Once we had the core group of people together, it was a matter of finding suitable premises, and the chambers started taking shape from there.

Projecting ahead, do you have a view on what size you would like the chambers to be?
Currently we have eight members but we are being joined by former Associate Judge Jeremy Doogue shortly. We have another three rooms that we are seeking expressions of interest for. Two of these are for full chambers members and one is more suitable for a junior. So, a total of 12 will be the immediate number, although we do have an option for expansion at a later date. This will make us one of the largest chambers in Auckland, along with Bankside, Richmond and Shortland Chambers.

How did you choose the name for the chambers?
Through intensive brainstorming! We came up with several different options and narrowed it down to a very short shortlist of about three contenders. Of all the options we liked FortyEight Shortland best. And of course, it is pretty obvious because it is our address!

What was your approach to design and branding?
Very early on we decided we wanted a strong and well thought out brand. We worked with a company called Brand Counsel in developing this over a number of months. Again, we were presented with a short list of brand designs, and chose the one that we felt best expressed the vision we had for the chambers. We then carried that through to our business cards, letterhead, signage and the chambers itself. And of course, it's in all our advertising and marketing.

Do you think that business cards are still necessary?
I think it's a matter of personal preference. But I do think they are good as an aide memoir. You give them to someone you have met who may then go back to their office and look you up on LinkedIn, or your website or email you. So, yes, I do use them but how many you hand out is up to you.

From start to finish how long did it take you to set up the chambers?
We started talking in the third quarter of 2017 and were in the chambers by August 2018. So, it was around nine months – about the same time it takes to have a child!

That included agreeing on the premises, as when we first talked, we didn't know exactly where we would go. Although we preferred the Vero Centre, we did have a look at other offerings around Shortland Street.

Then of course we had to get the premises fitted out but that took much less time than I thought. The fact that we were able to essentially just add on to the existing space that Jones & Co had occupied made it easier – almost seamless. We just had to push through to the next-door space.

We were also lucky with our landlord, which has been exceptionally good. The fit-out people were also very good and did a brilliant job.

It really happened much faster than I thought it would. I had visions of the August deadline passing, and not being in by Christmas and finally getting in the following year. But they were excellent at delivering the premises on time.

You run paperless offices. Why did you choose to do this and how did you implement it?
I personally made a decision more than two years ago when I moved from Lorne Street Chambers into the Vero Centre. I wanted to move to a paperless office for two reasons. First, from a practical point of view, it would cut down on the amount of space I needed for file storage. Secondly and more importantly, going paperless provided a far greater degree of flexibility as to when I did work, where I did that work, and how I did that work. Moving all of my files to the cloud enabled me to be more flexible.

I make it very clear in my terms and conditions that I operate a paperless practice and that I would appreciate it if clients would send documents to me in an electronic format. I also tell them that I can make a copy of their file available to them electronically throughout the matter that I am working on and clients tend to appreciate that. Not all of them take this up, but it is something I like to provide for them.

Generally, clients are good at sending documents electronically, although occasionally paper does turn up. I try to stop the paper coming through the door to make this process easier. It is faster for them and cheaper as we don't have to use photocopying, couriers and tons of Eastlight files. It also makes the process of pulling together documents for discovery and document bundles much easier.

Most of our chambers' members use systems such as Dropbox or One Drive for file storage, together with cloud-based time recording and billing software like Harvest. Most of us also use DragonDictate to speed up the process of writing documents.

Do you miss having a fully featured document management system?
I took quite a simple approach to setting up my paperless office. I have created a fairly simple file folder system in One Drive. I had a look at a few document management systems, but they seemed to be designed, in the most part, for larger enterprises rather than a sole person in an office. The simplicity of a straight forward folder system in the cloud has served me well so far. I create a folder for each client, and within that a folder for each matter. In each matter folder I set up subfolders for pleadings, documents, research, correspondence and drafts. Every file has that same structure and I can navigate through that easily.

On the whole, have clients responded positively to the paperless office concept?
Of the clients that I deal with, there is an expectation that we do things in a modern way and that extends to document management in an electronic format. I have had no real issues with that at all. However, I have had one case where one of the parties did not even have an email address. All communications with that party had to be by letter and posted or couriered to him. That was a multi-party case and it underlined for me how cumbersome that old way of doing things really is.

How important do you think it is for the bar to support junior members?
I have employed a number of juniors over the years. Whenever I have done that I have thought back to when I first graduated and was looking for a job and a very kind practitioner took me on and really gave me a leg up. I have always been keen to repay that with the next group of people coming through.

I believe there is an obligation to support the junior members of the bar. But as a chambers, there is a limited amount that we can do because of the limited space we have here. However, wherever possible we brief juniors on aspects of the work we are doing and make sure we create opportunities for them to attend hearings with us and wherever possible take an active role in those hearings.

I am very much in favour of giving juniors the opportunity to examine witnesses and present parts of the submissions. This allows them to learn through doing as opposed to simply sitting there and observing.

In a perfect world, we would make more space available in chambers for junior members. But that's not practical for us. The better approach is to embrace the flexibility that modern technology gives us to allow us to feed work to junior members of the bar who are not in chambers with us, but are in a number of different situations such as another chambers, or working on their own or a combination thereof.

How do you find the juniors that you brief and did you know that the NZBA Find our Barrister directory on its website allows you to search barrister by experience level (0-3 years and 4-7 years post admission experience)?
Predominantly it is by word-of-mouth such as recommendations from other barristers who may have engaged juniors in the area in which we are working. Occasionally we are approached directly by recent graduates or recently admitted barristers. If the timing is right that might work out.

I had forgotten about the NZBA directory! But this is a good list for people to be on and to use.

Your chambers has made a commitment to equitable briefing by signing the Gender Equitable Engagement and Instruction Policy. Is it hard to find commercial women barristers to come into chambers? What can chambers do to encourage women in this area?
As a chambers we all agreed that this was an important policy for us to adopt. We all feel that we should be supporting equitable briefing as far as we are able to. As individual members of chambers, whenever we are asked for recommendations for counsel or mediators or arbitrators, we need to be alive to the desirability of ensuring that there is a balance of gender when making this sort of recommendation.

This is something that I personally do already and everybody else in our chambers is equally supportive of this.

We also will actively look for diversity when we have the opportunity to office space and chambers. I think that working at the bar offers a great deal of flexibility if you embrace modern technology. This makes it very attractive to those who need a more flexible arrangement. Women in firms in particular might be attracted to this. The common concern for those coming to the bar is security of income. That concern usually doesn't play out in practice and the benefits of flexibility generally outweigh the security of income issue.

Diversity in general is a key concern for the bar. As a chambers, how will you deal with diversity issues?
As a small organisation of nine members with potential for growth to 12, we don't have too many detailed policies around things like diversity. But we all acknowledge that there is strength in diversity, and we do what we can. We are very impressed with what firms like Fletcher Kayes Walker has done, and have huge respect for that.

What advice do you have for people who would like to set up their own shared chambers?
Don't do it! Instead, come and express an interest in joining us!

More seriously, the key for us has been identifying a group of like-minded individuals who can all get on well together and who bring a sense of collegiality to a shared working environment. Once you have identified that group of people with shared values and approaches, everything else will fall into place fairly easily.

We have had about a million decisions to make in setting up these chambers, but we navigated our way through that with a huge degree of consensus because we all get on well and we have a shared vision about what we are trying to create. So that has made this decision-making process easy for us virtually in all respects.

** Mark Colthart can be contacted at Markcolthart@fortyeightshortland.co.nz .*

Hon. John Wild QC, Stephen Mills QC, Clive Elliott QC, Rt. Hon. Sir Ted Thomas KNZM QC, Hon. Justice Raynor Asher, Stuart Grieve QC and Kate Davenport QC, current President of NZBA

30 Years On

By Jacqui Thompson and Melissa Perkin*

In July this year the NZBA turned 30. The Annual Conference in September allowed everyone involved in the Association to reflect on the past and consider the future. At the Bar interviewed each of the former NZBA presidents and asked them to help us chart the organisation's progress. This article considers the journey for the NZBA to this point. In our next issue, we will look at views on where the organisation and the profession are heading.

In some jurisdictions it is common to mark the end of the presidency with the building of a library. The NZBA has marked the end of presidencies with a vote of thanks and the compilation of a new file box to go into storage. Rummaging through these boxes has been a fascinating journey back over the last 30 years and they contain some surprises too. The correspondence pieces together not just the beginning of the organisation, but the development of the independent bar within New Zealand.

Conception

In 1988, the bar in New Zealand was very small, with estimates of around 200 members. But there were those who could see even at that stage that it would grow quickly. However, towards the end of the 1980's the profession was facing calls for deregulation. Some saw this as a threat to the principles that guaranteed clients fair, impartial and independent representation.

C. P. Hutchinson QC was an English barrister who had brought with him to the New Zealand bar the traditions of the English separate bar. Mr Hutchinson was concerned about a proposal to allow law firms and accounting firms to amalgamate. He feared it would mean the end of the independence of lawyers as they would become totally commercial by being lumped in with accountants.

Sir Robin Cooke, who was President of the Court of Appeal at that time confided in Dr James Farmer QC that he also had concerns about the direction of the profession. He shared the view that there was a danger that barristerial standards would not be maintained as independent and objective advisors.[1] Sir Edmund (Ted) Thomas KNZM QC joined the independent bar after having been at Russell McVeagh for 22 years. He became concerned that the independent bar did not have a strong

[1]Sir Robin became one of the NZBA's strongest supporters and was the guest speaker at the very first Association dinner. He predicted that in time the Association would become a powerful voice for barristers and would be a leader in upholding the standards to which the legal system should adhere.

voice to look after its interests and most importantly, protect the quality of independence which distinguish those at the bar from those firms.

Sir Ted remembers that during his time with the firm he took the big firm view "...that we were barristers and equal status to barristers sole." He recalls that a there was a phrase that was used within the firm – QC equivalent. When partners met with a request from a client to have a QC, they would say that the firm had a QC equivalent so that they could keep the work within the firm.

When he joined the independent bar, Sir Ted's views changed. "If you feel yourself to be a member of the independent bar, when the need arises you are more likely to act in an independent manner. Because that is your function," he says. This was echoed by another barrister who was involved at the inception of the NZBA, Colin Carruthers QC, who describes the quality of independence as the essential keynote to being at the bar.

The drive to bring the NZBA into being was initiated by Ted Thomas QC (as he was then), Dr Farmer, Raynor Asher (now Justice Asher), Noel Ingram QC, Sonja Clapham and Peter Williams QC who, following the passing of a resolution proposing its establishment at a meeting on 2 November 1987, set about forming the Bar Association.

A common theme among those involved in the Bar Association's formation was the view that the Law Society could not represent the needs of the independent bar in a way that an organisation dedicated to those needs could. The Law Society had to represent a very wide group with different requirements and often not much in common. It was understandable that the relatively small bar would not receive as much attention as other areas.

Sir Ted himself sat on the Law Society as a delegate for three years and as President for one year. He stresses that there was no intention to ignore the independent bar, but simply that the focus was elsewhere.

The Law Society was strongly against the formation of the NZBA. Mr Carruthers worked alongside Sir Ted in the negotiations with the Law Society in respect of the issue of the entitlement of the Bar Association to have any role in the legal profession at all. Many within the Society took the view that the Law Society controlled the legal profession and it wasn't appropriate for there to be a professional organisation that was independent of its control.

Stuart Grieve QC says that at the time he had the feeling that he and his fellow barristers were regarded as renegades for wanting to set up their own Association. In retrospect, he acknowledges that on one level they were indeed renegades. He comments: "The personality of barristers is such that once you feel you are up against it, you are pretty determined to push back, and that is what happened."

It would however be wrong to say that there was 100% support among those at the bar for forming an independent organisation. There was opposition from a few members. Reading through the historical documents, support was strongest in Auckland and weakest in Wellington. Some agreed with the Law Society that there should instead be a branch set up for barristers that would be under the ambit of the Society. The minutes of the meetings show that all options were well debated and discussed thoroughly among those who were involved. A real battle was waged, not just against the Law Society but also internally. Serious consideration was given to the branch proposal.

Sir Ted remained opposed to it and argued that as a section, the organisation would continue to be accountable to the Law Society. While some counselled conciliation, the minutes reveal that there were questions of the benefits of conciliation following past experiences. Indeed, the language was that of a battle, with one very well-known QC expressing the view that if they did not stand firm, they would be seen as surrendering.

In the end, perhaps Justice Asher summed it up best. "Perhaps this is the nature of barristers – we had already got out from the umbrella of a law firm and now we wanted to get out from the umbrella of the Law Society! Much as we respected those bodies, we wanted to do something for barristers," he says.

Birth of the organisation

Sir Ted could rightfully (if colourfully) be described as the midwife for the birth of the Association. Following the 2 November 1987 resolution, he threw himself into ensuring that the organisation got off the ground. This was a very tense time. One of the most significant battles related to the name, "The New Zealand

Bar Association", which had seemed to be the natural choice.

The Registrar of Incorporated Societies advised that there was already an incorporated society with that name. It appeared (according to the minutes of a meeting held at the time) that in 1984, the New Zealand Law Society had registered this name as a defensive measure when the Criminal Bar Association was being incorporated.

Sir Ted wrote to the Law Society requesting that it relinquish the name, but the Society refused to do so. Accordingly, the name "New Zealand Association of Independent Counsel" was adopted. On the night of signing of the application for incorporation, it was resolved that the Association would however call itself the New Zealand Bar Association. Sir Ted remembers that his view was that the Law Society "... could take us to court and I would have every QC in the country representing us. It was clear they would never do this."

There had been some suggestions that the Bar Association should take on the disciplinary role. This was vehemently opposed by the Law Society and on reflection the Association did not pursue it. As Mr Carruthers noted, in hindsight, many of those involved at the inception felt that this was a blessing, as it would have distracted the Association from its real work. "The fundamental reason for establishing the Association was to promote the bar as the relevant body to conduct litigation", he says.

The issue of who should be entitled to membership was also carefully considered and debated. A meeting was held on 10 December 1987 to identify the Association's aims and objectives.[2] One of the five key issues that were discussed was whether the membership should be restricted to barristers sole.

Justice Asher recalled that it was not easy to say no to membership for highly respected litigators from law firms who wished to join but it was felt that the correct decision was to refuse membership to anyone who was not a barrister sole. "The matters that ... led us to join the bar and to form the Association were all about the independence of barristers, the fact that they were not affiliated in any way to firms and ... [could give] undivided loyalty to a client in a particular case. We would have lost our uniqueness and we would have defeated our very reason for being if we had let that happen," says Justice Asher.

Growing pains

If Sir Ted Thomas was the midwife, it was Dr James Farmer QC who nurtured the Association in its early years. He became President following Sir Ted's appointment to the Bench in 1989. Dr Farmer served two consecutive terms as President and is credited by many for the successful growth of the Association during that time.

Dr Farmer had worked in Sydney for 10 years and been a member of the NSW Bar Council from 1983 to 1984 when Murray Gleeson (who later became Chief Justice of Australia) was the President. Dr Farmer was able to adopt some of the NSW bar's initiatives for the fledgling NZBA. A very important initiative was negotiating a preferential rate for indemnity insurance for barristers who were members of the Association. This was one of the strongest benefits offered by the Association and led directly to an increase in membership.

Growth was steady and incremental as expected. The organisation concentrated on developing its profile through the work that it did in its committees, through the people that represented it and through its education programme. This would demonstrate the attractions of the bar more generally to those who are still in firms.

However, there was an expectation that becoming a barrister would be more popular and the number at the bar would increase. This proved to be the case. Another former President of the Association, the Hon. Justice Dobson, says that "Escaping to the bar was like going from a well regimented school to anarchy, because there was no administration to take care of. I went into a no-frills chambers and there was nothing to take care of at all! I was in a small group that was lucky enough to be getting good work, working collegially but paddling our own canoes. The level of satisfaction rose because I was able to focus on doing the work."

Julian Miles QC followed Dr Farmer as the next President. His description of how he came to take on the presidency is not too dissimilar to that of others who innocently agreed to step

[2] The role and functions of the NZBA are spelt out in its constitution and these can be viewed on our website.

up. Mr Miles said that Justice Asher was on the Council at that time and had asked Mr Miles to stand. When he asked Justice Asher what was involved, in what Mr Miles says was a "rather disingenuous suggestion", Justice Asher replied that there might be one or two meetings a year and that he might have to deal with the odd issue, but really there was nothing to it.

Mr Miles says that: "I have never forgotten it and I have never let him forget how utterly misleading that was. I think that I probably lost more friends in those two years than ever before. I took the job on because I was seduced by the proposition that I could be useful, and that really there was very little I had to do."

Mr Miles concluded that after those two years as President, he could probably survive anything. "It is a very hard role and a very important one" he says. "Although it was way more challenging than Raynor Asher told me, it was irresistible, and I enjoyed it. I have continued to be a major supporter of the Association."

At the time he took over in March 1994 the biggest need was consolidation. The primary concern was to establish the NZBA as the authoritative voice of the independent bar in the face of an ongoing (minority) view that the Association was unnecessary, and in the face of continuing scepticism by the Law Society. The judiciary however gave its support to the Association.

One of the major controversies that Mr Miles faced was a proposal by a former High Court Judge who had resigned from the Bench that he be entitled to a practising certificate and resume his career at the bar. This was very much opposed by the judiciary, but it wasn't clear cut. There had been a move in the UK and in Australia for developments along these lines. The Association formed a clear view that the traditional approach was correct. It decided that there would be issues around perceived bias and that it would cause problems for the judiciary itself.

Mr Miles believes that a very important role for the NZBA is to speak out where members of the judiciary had been unfairly criticised. Judges themselves cannot speak out and explain themselves, and it therefore falls to the profession to do so. The importance of this was brought home to Mr Miles at the final sitting for a High Court Judge. The judge summarised the highlights of his judicial career. "One of these was a letter that I had written on behalf of the Bar Council to the Herald explaining one of his judgements for which he had been criticised," says Mr Miles. "He said that was literally one of the most important occurrences and how important it was to know that he had a support structure."

Mr Miles notes that on the other hand, the role of the Bar Association is not to support the unsupportable. He says that if judges make comments that are unsupportable, then the Bar Association has an obligation to say so. It is important to adopt a principled approach in these matters. Nor should lawyers who speak out in a reasonable way be disciplined.

Raynor Asher QC took over the presidency from March 1996 for a two-year term. At that time, he had been very heavily involved in Law Society work and continued to be so. After his role as President of the NZBA, he became Vice-President of the New Zealand Law Society and President of the Auckland District Law Society. But he still held entirely to his initial feelings on the need for the Association. Justice Asher describes the relationship between the two organisations as symbiotic. It is only infrequently that there is a difference, but it is a difference between friends and can be worked through. "The well-being of the profession as a whole is dear to both organisations – no doubt about that," he says.

Mr Carruthers agrees with this view. He says he was fortunate to work with Law Society presidents who are sympathetic to the Bar Association and he made a point of raising issues with them. There was a degree of reciprocity in the relationship.

Following Justice Asher's term, John Wild QC (later Justice Wild) took on the role as President in March 1998. He was the first President from the Wellington area. His tenure was short as he himself was appointed to the Bench in August of that same year.

Mr Wild notes that at that time the Association was not dealing with the large range of activities that it does today, but one thing he remembers being involved in was providing comments to the then Solicitor-General, John McGrath, on the candidates for Silk. This process was very time-consuming because the Bar Association had been requested to comment on all of

Hon. John Wild QC, Stephen Mills QC, Rt. Hon. Sir Ted Thomas KNZM QC, Hon. Justice Raynor Asher and Stuart Grieve QC

the potential appointees and not just on the candidates that it supported for appointment.

Mr Wild says that if the appointment process operates properly, and the appointees meet the criteria set out in the Queen's Counsel rules, it is an excellent office because the public will know that the QCs are leaders of the bar. The office indicates absolute integrity and reliability – two different but important concepts. He is a strong supporter of the rank of Queen's Counsel.

Clive Elliott QC, whose presidency finished in October 2018, agrees that the rank is a mark of excellence and "...any mark of excellence is to be encouraged and not denigrated. It tells you something about a person who has achieved that status, that their own peers have chosen to anoint them," he says. "Every profession has its sign of seniority. It is also something to aspire to."

Stuart Grieve QC assumed the presidency after Mr Wild. He served two terms from September 1998 to September 2002. He agrees with Mr Wild that in many respects, times were not as testing as they now are. This does not mean that it was plain sailing during Mr Grieve's presidential term. There were ongoing issues related to the intervention rule, which was always problematic.

Mr Grieve is also a firm believer that the bar has a role in speaking up for the judiciary in the face of unfair criticism or attack. Mr Grieve still advocates for this and has at times drawn inappropriate comment to the attention of the Association, allowing it to respond publicly to these comments. "Experienced people at the bar know when the line has been crossed," he says, "and when that happens, we need to urgently bring it to the attention of the Association which can then decide whether something should be done."

This is a sentiment shared by former President, Judge Paul Mabey QC, who during his term had to speak out strongly in support of a High Court Judge after the Judge's refusal to impose a preventive detention sentence. At the time the Judge noted that the media criticism in that case was neither balanced or fair and served no purpose "... other than to falsely and wrongly undermine public confidence in our system of justice."

A measure of deregulation was in the wind by the time Robert Dobson QC (now Justice Dobson) became President in October 2002. The Association was involved in discussions over the shape of the proposed new Law Practitioners Bill. The Law Society wanted the three years practical experience placed on solicitors to be extended to barristers and that they pass the Stepping Up Programme before practising on their own account. "The NZBA Council accepted that this was in order but there were regional differences," says Justice Dobson. "In some centres, established members of the bar recognised their responsibility to take on juniors and effectively have them as pupils. But in other areas and with other practitioners, they thought that this was unnecessary."

Justice Dobson notes that there were also discussions around pupillage and tutelage. Everyone recognised that there was a need for those at the bar to have discrete training for advocates. Litigation skills was seen as a partial answer but beyond that it was left to the senior practitioners to stand up and take on juniors.

For some barristers who had escaped from firms where they had been expected to manage junior staff, there was a reluctance to commit themselves on an ongoing basis where the commitment might be for three years. "Having said that, several of the large chambers committed to taking on juniors to allow them to gather experience and do well," Justice Dobson comments.

Another issue which loomed large during this period was concern over increases in court fees. The Association combined with the Law Society to produce what Justice Dobson calls a "... thorough and stinging critique of the bases on which officials had recommended an increase in court

fees." There were adjustments to some of the increases, but not nearly what was hoped for. The increase trend has continued since then, notwithstanding that it is a core function of government to provide competent, objective and unbiased adjudication.

In October 2004, Dr Farmer again took over the presidency. By this time, it was apparent that the work of the organisation had grown so much that a full time Executive Director was required. Monique Pearson was appointed to this post in 2006 and the immediate effect was the development of a robust administrative framework. Her appointment allowed the President and Council to concentrate on growing the standing of the Association while she focussed on growing the membership and the benefits offered to the members.

The Association had developed a suite of strategic priorities, and in Ms Pearson's view, the top two priorities she faced were being able to provide value to Bar members and secondly, revisiting the constitution. The constitutional change was important for creating a pathway for juniors at the bar. "Looking at the demographics back then, the bar was not viewed as an opportunity for young barristers," says Mrs Pearson. The constitution was therefore modified to introduce the role of junior barrister and the junior bar.[3]

Colin Carruthers QC describes himself as having been "shepherded" into the role of President by Dr Farmer in 2008. He was one of the Wellington practitioners who was very much involved at the inception of the organisation. He had served on the Council for several years before becoming President. A key objective for him was the promotion of the bar through its advocacy training. He believed strongly that senior litigators should pass on their skills and knowledge to their more junior colleagues in the same way as they had acquired them from those who came before them.

Mr Carruthers was also keen to expand the focus of the NZBA into participating in the international community of bar councils and associations. "I had the sense that we weren't making the most of ourselves as an Association by focusing on local interests," he says. "We could develop a much broader base by looking to overseas connections. In particular, I had been advocating for some time and taken a number of initiatives to get contact with the Australian Bar Association and the Australian state bars." He believed that promoting the trans-Tasman relationship would result in better access to developments and resources. "I got to the stage with the Australian Bar Association where we were given a place at their meetings," he notes.

The first woman president of the Association was Miriam Dean CNZM QC who took over in October 2010. Ms Dean identified an agenda of key areas for action during her time as president which included training, member benefits, fostering collegiality, and advancing the equitable briefing policy. Her presidency had a focus on training, particularly for the junior and middle bar. But Ms Dean also launched specialised training for women barristers to encourage them to step up to lead roles such as the "Walk the Talk" events, which had very high numbers attending. Another event for women was an opportunity to meet the judges which also proved to be very successful.

Ms Dean is also very proud of the work that went into expanding the membership of the Association at this time. Associate membership was offered to those in Crown Law, the Crown Solicitors Network, the Public Defence Service and Parliamentary Counsel.

In October 2012 Stephen Mills QC became President of the Association. He knew how demanding the role would be, but there were two things that proved to be particularly demanding. The first was the very serious push in some quarters to have the intervention rule abolished or heavily modified.

This rule was believed to be vital for the long-term health of the NZBA as well as for consumers, who needed the protection of barristerial independence. The Association worked hard to get support for the retention of the rule from the Minister of Justice, the Law Society and the judiciary. Although the outcome was not perfect, Mr Mills says that it was a much better outcome than what was threatened at various stages.

The second matter that proved demanding was the World Bar Conference in Queenstown in 2014. In an exciting development, Mr Carruthers

[3]Other constitutional changes related to succession for the President and regional representation. The result was the creation of the President-Elect position, and four Vice-Presidents, each representing a region.

had persuaded the governing body of the World Bar Conference, ICAB, to agree to New Zealand hosting this event. As it turned out, it was not possible to deliver on the original date and location and format selected and Mr Mills then flew to Boston persuade ICAB to agree to a later date. The conference proved to be a great success and was responsible for raising the NZBA's profile but involved considerable work.

Paul Mabey QC was another of the NZBA presidents who was appointed to the Bench part way through his term. He was the NZBA's first provincial President, having practised mainly in Tauranga. As a specialist criminal barrister, he wanted to expand the work of the NZBA criminal committee. Having another President from the criminal bar was advantageous as it made it clear to all that the NZBA was the voice for all barristers and not solely the commercial and civil bar. During his time as President, Judge Mabey was able to increase the awareness externally of the criminal bar as an essential part of the NZBA.

Judge Mabey was also committed to promoting training and education and, in particular, to supporting advocacy training. Judge Mabey believes that the NZBA is the obvious body to promote advocacy training and it was under his presidency that the Association branched out into online training and advocacy skills workshop.

The workshops proved very popular with members. These had begun with the inaugural NZBA Appellate Advocacy Workshop, organised by Kate Davenport QC and Christopher Gudsell QC following the World Bar Conference in 2014. Many of the international senior counsel and judges who had attended the Conference stayed on to teach at this very successful workshop. Subsequently Judge Mabey attended the International Advocacy Training Council's Conference in Belfast in 2016 on behalf of the NZBA and was able to see just how the 2014 event had enhanced NZBA's standing in international advocacy training.

Clive Elliott QC took on the presidency for an extended term from April 2016 – September 2018. His first task was to improve the systems and processes of the Association so that it would run on a more professional basis. From the outset he was also concerned that it developed a strong sense of strategic direction. This led to the development of the NZBA strategic plan. A council member (Greg Hollister Jones, just prior to becoming a District Court Judge and with a bit of help from a close personal friend who is a professional facilitator) ably facilitated the process. This allowed key objectives to be identified, after some robust debate. "It was very much a bottom up process," says Mr Elliott. "Everyone who contributed (and that was everyone) was very engaged and positive." It also proved to be a good bonding exercise for the council to work together in the future and the input from the junior members of council was extremely valuable.

The Present

On 1 October 2018, Kate Davenport QC took over the presidency. In her column in this issue she outlines some of what she has been working on. Like all the presidents before her, she faces a hectic schedule. But each of the presidents that we interviewed for this article described their time at the helm as worthwhile. We thank all of them for their work and commitment to the independent bar.

** Jacqui Thompson is the NZBA's Training Director and Sub-editor for at the Bar. Melissa Perkin is the NZBA's Executive Director and a member of the editorial committee for At the Bar.*

Presidential Role Call

Jun 1989 – 1990	Ted Thomas QC
1990 – Feb 1992	Jim Farmer QC
Mar 1992 – Feb 1994	Jim Farmer QC
Mar 1994 – Feb 1996	Julian Miles QC
Mar 1996 – Feb 1998	Raynor Asher QC
Mar 1998 – Aug 1988	John Wild QC
Sep 1998 – Feb 2000	Stuart Grieve QC
Mar 2000 – Sep 2002	Stuart Grieve QC
Oct 2002 – Sep 2004	Robert Dobson QC
Oct 2004 – Sep 2008	Jim Farmer QC
Oct 2008 – Sep 2010	Colin Carruthers QC
Oct 2010 – Sep 2012	Miriam Dean QC
Oct 2012 – Sep 2014	Stephen Mills QC
Oct 2014 – Mar 2016	Paul Mabey QC
Apr 2016 – Sep 2018	Clive Elliott QC
Oct 2018 –	Kate Davenport QC

Rt. Hon. Sir Johann Thomas Eichelbaum GBE PC QC
17 May 1931 – 31 October 2018

Obituary

The New Zealand Bar Association offers its condolences to the family of Former Chief Justice Sir Thomas Eichelbaum, who died on 1 November 2018, aged 87. Sir Thomas was Chief Justice of New Zealand from February 1989 to May 1999.

At an event in Auckland on 1 November which was attended by Sir John Key, NZBA President Kate Davenport QC asked attendees to observe a moment of silence, in recognition of Sir Thomas's life and career.

Born Johann Thomas Eichelbaum in 1931 in Koeningsberg, Germany, Sir Thomas came with his family to New Zealand in 1938 to escape Nazism. He became a naturalised New Zealand in 1946 and proceeded to serve his country with distinction.

The NZBA notes Sir Thomas's significant contribution to the legal profession and subsequently to the judiciary: "Aside from his legal acumen, Sir Thomas was known for his excellence in administration," Ms Davenport comments. "He introduced several reforms and changes to our court system, particularly the establishment of the Criminal Appeal Division of the Court of Appeal."

"Sir Thomas was also a champion of diversity. During his term, the first Māori High Court judge was appointed. Sir Thomas also called for the removal of informal barriers to women in the law and the judiciary. As Chief Justice he saw the appointment of the first women to the High Court and was succeeded by the first woman Chief Justice, Dame Sian Elias," said Ms Davenport.

Ms Davenport recalls that in the mid-1990s, when she sat on a committee that Sir Thomas set up to tackle unconscious bias, he had shown that he was willing to "walk the talk" in terms of involving women in the profession. He arranged for Ms Davenport to feed her new born child in his Chambers to enable her ongoing involvement in the committee.

In a move welcomed by many barristers, Sir Thomas also updated the legal profession and courts with the abolition of the wearing of wigs in the High Court, and the introduction of computers into court proceedings.

After graduating from Victoria University, Sir Thomas was admitted as a barrister and solicitor in 1953. He became a partner in Chapman Tripp in 1958. He left that firm in 1978 and was appointed Queen's Counsel that same year. He also served a two-year term as President of the New Zealand Law Society.

In 1982 Sir Thomas was appointed to the High Court Bench. In a move that broke with tradition, he was appointed as the 11th Chief Justice of New Zealand in 1989. This was the first time that a Chief Justice had been appointed from within the serving judiciary. That same year, in recognition of this appointment, Sir Thomas was made a Knight Grand Cross of the Order of the British Empire (GBE) and a Privy Councillor. He was also made an Honorary Bencher of Lincoln's Inn.

Following his retirement from the Bench in 1999, Sir Thomas continued to be heavily involved in the law by leading several investigations. He chaired the Royal Commission on Genetic Modification from 2000 to 2001 and conducted an independent inquiry into New Zealand's loss of co-hosting rights for the 2003 Rugby World Cup. In 2001 he led a ministerial inquiry which reviewed the evidence that children had given in the controversial Peter Ellis case. His report supported the guilty verdicts but was widely criticised.

The Chief Justice, Rt. Hon. Dame Sian Elias, said that as Chief Justice, Sir Thomas was "... a reforming leader of the judiciary who modernised courts administration during his time in office. He was held in the highest affection by the judges who served under him both for his leadership and for his personal warmth and kindness." Her Honour said that Sir Thomas was greatly admired as a very fine judge.

Former Court of Appeal Judge and former NZBA President, Rt. Hon. Sir Edmund Thomas, also paid tribute to Sir Thomas Eichelbaum, saying that he liked him immensely. He added that the former Chief Justice was extremely approachable, and diligent in supporting his fellow judges. In court he was firm but courteous. Sir Edmund said that Sir Thomas was a fine Judge, who had done much to advance criminal justice at the appellate level.

Sir John Joseph McGrath KNZM QC
10 March 1945 – 19 October 2018

Obituary

Former Supreme Court judge, Sir John McGrath, died on 19 October 2018, aged 73.

Sir John graduated with an LLM from Victoria University of Wellington in 1970. While at the University, he served as President of the Student Association and later sat on the University Council for 20 years before going on to be Pro-Chancellor and Chancellor.

Sir John became a litigation partner at Buddle Findlay before moving to the independent bar in 1984. He was appointed Queen's Counsel in 1987. He was described as unfailingly courteous and personally encouraging and fair in his dealings with others. His generosity with his time and advice was also noted by those who had worked with him.

Sir John was noted for the contribution he made towards advancing women in the legal profession. He was described in 2015 by the then President of the Law Society, Chris Moore, as being a real pioneer in this area and that he appeared to have almost single-handedly been responsible for the career progression of many senior women practitioners, by offering talented women staff members opportunities for leadership and career progression. Mr Moore said that Sir John was more than a mentor – he empowered his employees and gave them support, backing their skills and abilities and opening doors for them.

Karen Clarke QC (as she was then, and later, the Hon. Justice Clark) said that she herself had benefited from His Honour's guidance. However, she noted that it was not just women who were the sole beneficiaries. There were many lawyers in government, private practice and academia who had had that privilege.

Sir John remarked that he had been fortunate to work in both the private and public sector. He learnt the importance of public service and service to the profession from his father, Denis McGrath. He served as Solicitor-General from 1989 to 2000, a role that he greatly enjoyed and described as "the most interesting and exciting legal job in the country". At his valedictory sitting on his retirement from the Supreme Court, Sir John said that it was the defining moment in his career and practice when the then Attorney-General, the Hon. Geoffrey Palmer (now the Rt. Hon. Sir Geoffrey Palmer), offered him the position as Solicitor-General.

The Chief Justice said that he had been "quite simply, a star" during the time that he held the office Solicitor-General. Former Attorney-General Margaret Wilson noted that Sir John had worked with five Attorneys and that she knew she spoke for them all when she said that his "understanding of constitutional principles, legal expertise and analytical skills were greatly appreciated."

He was made a judge of the Court of Appeal in July 2000. In 2005 he became a judge in the recently established Supreme Court. The Chief Justice said that the expectations of Sir John were high when he was appointed to the bench and that he did not disappoint. She considered his judgments to be "thoughtful, brave and careful." Sir John was also a representative on the group that piloted the construction of the Supreme Court building which was, she said, a testament to his perseverance and care.

The former judge was also described as having a distinctive approach to statutory interpretation, interpreting statutes in a contextual and not technical way and "thus enlivening their purpose" by Karen Clark QC, when she spoke on behalf of the New Zealand Bar Association at His Honour's retirement sitting in 2015.

When he retired from the Supreme Court bench, His Honour stood firm on the need to for a commitment to the rule of law and parliamentary sovereignty, which had previously been found in the Supreme Court Act 2003 but had been dropped from the new Judicature Modernisation Bill. He remarked:

> "The inclusion of this statement in the Act did, however, make a very appropriate legislative recognition that under our constitutional arrangements there is some system. Parliament legislates and the Courts administer the law."

Sir John pointed out that while the Constitution Act 1986 provided for Parliament to be the supreme law-making power of the nation, there was no equivalent provision stating the role of the judicial branch "or indeed the underlying concept of the judicial function which is to uphold the rule of law."

Sir John became a Knight Commander of the New Zealand Order of Merit in 2009. Outside of his remarkable career in the law, Sir John had a love of music and fishing.

The Council of the New Zealand Bar Association and extends its condolences to Sir John's family.

Sir Thomas Murray Thorp KNZM
1925 – 17 October 2018

Obituary

Former High Court Judge, Sir Thomas Thorp died in Auckland on 17 October 2018 at the age of 92.

After graduating from the University of Auckland, Sir Thomas spent much of his early career in Gisborne having joined local firm Nolan and Skeet in 1949. He was appointed Crown Solicitor in 1963 and continued to serve in that capacity for the next sixteen years. In 1977 and 1978, Sir Thomas was the President of the Gisborne District Law Society.

In 1979 Sir Thomas was appointed to the High Court bench. Stuart Grieve QC, who appeared before him several times, describes Sir Thomas as a very fair and courteous judge. Sir Ted Thomas QC described him as a first-rate judge and of great value to younger judges, as he was at that time. "He was supportive and always courteous, come what may in court. He never let it rattle him."

Sir Thomas remained on the bench until 1996. The following year he was appointed a Knight Companion of the New Zealand Order of Merit in recognition of his service as a judge. He also served as chairman of the National Parole Board.

After his retirement the judge conducted several inquiries. He was best known for his inquiries into firearms control in New Zealand and, perhaps more controversially, into the convictions of Peter Ellis and David Bain. While Sir Thomas was satisfied with the safety of the verdict in the Bain case, he had misgivings about aspects of the Ellis case. He found that the children's claims of sexual abuse could not be corroborated and recommended the repeal of section 23G of the Evidence Act.

His work on the Ellis case led Sir Thomas to conduct a two-year study of the nature

and incidences of miscarriages of justice in comparable jurisdictions, particularly the UK and Scotland. The research considered 53 applications to the Ministry of Justice alleging miscarriages of justice from 1995 to 2002. He classified 26% of these as requiring careful investigation.

In 2006, following this research (which was published by the Legal Research Foundation), the former judge made headlines when he said that as many as 20 people could wrongly be incarcerated in New Zealand. Sir Thomas called for the establishment of an independent authority to identify miscarriages of justice.[1]

A briefing paper to the Minister of Justice in 2006 stated that "Sir Thomas' paper is a valuable study that raises a number of operational and policy issues for further investigation." Notwithstanding this, the brief concluded that "... there is not in our view a satisfactory factual basis for the conclusion that an independent body is needed to generate and investigate a much greater volume of claims."[2] Sir Thomas was later to describe the Ministry of Justice as "regrettably turf-conscious".[3]

The Thorp Paper, as it came to be known, formed the basis of many calls for the establishment of a criminal cases review body. Some 11 years later, after much campaigning by the defence bar, the government announced the proposed establishment of the Criminal Cases Review Commission. In 2017, Sir Thomas said that he was pleased when the government indicated support for the body, but also anxious, commenting that "I think I have probably had about three ideas in my life and none of them has come off! It would be nice to get one." He expressed the hope that top-level criminal barristers would become involved to lend leadership and credibility to the commission.[4]

The NZBA offers its condolences to the family of Sir Thomas.

[1] "Up to 20 wrongly in jail says judge" https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10364743 (accessed 13/11/18)
[2] Ministry of Justice "Thorpe paper: miscarriages of justice" https://fyi.org.nz/request/1203/response/4989/attach/4/3.Thorp%20Paper%20Miscarriages%20of%20Justice.pdf (accessed 13/11/18)
[3] Call for inquiry into justice system ignored: ex-judge https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10486458 (accessed 13/11/18)
[4] "Top lawyers needed to help with criminal cases review", says judge https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11937159 (accessed 13/11/18). The legislation to establish this body was introduced in September 2018.

Facebook's Growth Spurt Just Sputtered. Rough Waters Ahead?

Laetitia Petersen

This time last year, investing in a company like Facebook might have seemed like a sure thing. You have probably seen numerous articles about the company's exponential growth over the last few years. On the other hand, there have also been plenty of stories regarding issues with privacy and big data and, as a result, the company's CEO, Mark Zuckerberg, losing billions of dollars from his personal fortune.

This is the issue with companies like Facebook, Apple, Microsoft, Google and Amazon. They are what we call "growth" companies. People expect that some of them will garner great returns in time, but it is also assumed that many of them simply won't perform as reliably. In fact, as I write this article, after a surprisingly weak growth forecast, Facebook's share price dropped 19 per cent in 24 hours. The decline, which erased about US$120 billion (NZ$178 billion) in market value, was the largest one-day drop in the history of the American share market. This raises the interesting question of how we, as financial advisers, can sensibly protect our clients from such big falls. After all, these companies have become some of the largest and most successful in the world. Surely, we can't afford to ignore them. But, if we accept them for what they are at face value, we risk exposing clients to significant negative returns. When you are Mark Zuckerberg, this is not a

serious problem as he made significant gains early on, bu for investors coming to the party late this is not an ideal outcome.

The answer is intuitive. We prefer value companies over growth ones when constructing investment portfolios for our clients. In practice, this means underweighting growth companies such as Facebool Apple, Microsoft, Google and Amazon. Together, these companies represent around 9% of the MSCI World Index (excluding Australia) but in our international equities strategy we underweight these shares to only make up 2% of the international equities allocation. So, we don't ignore them but rather we take some risk off the table.

On the other hand, we tend to overweight cheaper value companies such as JP Morgan Chase & Co, AT&T Inc, Intel Corp, Wells Fargo & Co and Exxon Mobil Corp. These shares make up 5.4% of our international equities strategy but only 3.6% of the MSCI World Index (excluding Australia). Overweighting value and underweighting growth shares is just one component of being studious evidence-based investors who focus on maximising returns for clients while lowering risk.

Growth companies, like Facebook and Apple, are those with a big prediction built into the price. In simple terms, you are paying prices today based on what investors speculate is going to happen in the future. And that prediction is big growth. Hence the name. But this categorisation also implies they are susceptible to a big problem. What happens when the predicted growth was too optimistic? The answer: a big drop in prices.

As you may have read in one of my previous articles, at The Private Office we are evidence-based investors. And there is ample academic evidence to support our intuition that value shares should have a higher expected return than growth shares over time. It starts with High Minus Low...

Breaking down 'High Minus Low - HML'

HML is the technical term used to evaluate profit margins for a share over the short and long term. HML provides an indication of the anticipated performance of a share in the future. HML takes into consideration the relationship between the 'book' and 'market' value of a share and analyses it accordingly. The book value of a share is estimated, or calculated, by looking at the historical costs and accounting values of the company. On the other hand, the market value of a share is its market capitalisation and represents the capital sizing of the company. HML says that a share with a high book-to-market ratio tends to outperform the low one. High book-to-market value shares are referred to as 'value stocks' and the low ones as 'growth stocks'. So, value shares tend to give higher returns than growth shares according to this strategy. HML is one of three factors in the original Fama and French Three-Factor Model, which is often used to evaluate a portfolio manager's returns.

What is the Fama and French Three-Factor Model?

Founded in 1992 by Gene Fama and Ken French, the Fama and French Three-Factor Model builds on the One-Factor Model associated with the Capital Asset Pricing Model (CAPM), by adding two more factors of size, also referred to as Small Minus Big (SMB), and value, as defined by HML.

They wrote a series of papers that cast doubt on the validity of the CAPM, which posits that a stock's beta alone should explain its expected return. These papers describe two factors above and beyond a stock's market beta which can explain differences in stock returns: market capitalisation (size) and value. They also offer evidence that a variety of patterns in average returns, often labeled as 'anomalies' in past work, can be explained with their Fama–French Three-Factor Model.

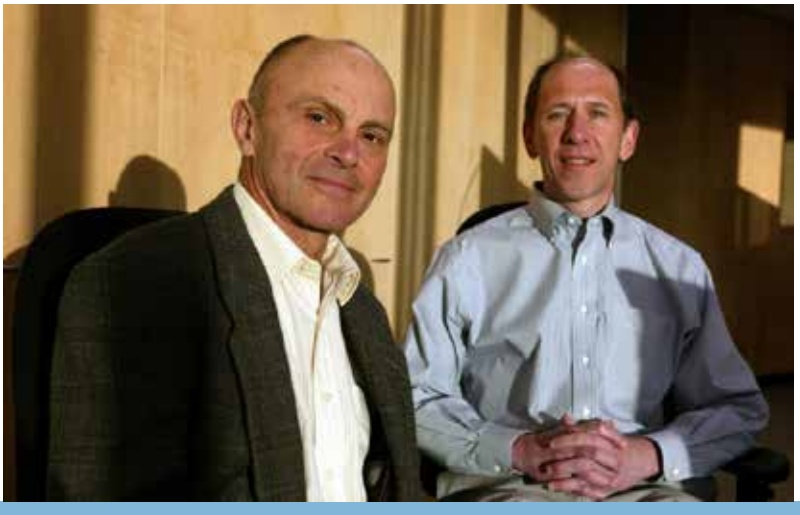
Fama and French found that small company stocks often gain higher returns than those of larger companies, while value stocks gain higher returns than those associated with growth stocks. The model is based on the assumption

that higher compensation is necessary for riskier investments (i.e. there is no 'free lunch'), which results in higher earnings potential. By examining a portfolio's return based on the three factors, it is possible to separate the skill of the fund manager from higher returns based solely on the composition of the portfolio.

Specifically, HML shows whether a manager is relying on the value premium by investing in shares with a high book-to-market value to earn an abnormal return. If the manager is buying only value shares, the model shows a positive relation to the HML factor, which explains that the portfolio's returns are accredited only to the value premium. Since the model can explain more of the portfolio's return, the original excess return (also called 'alpha') of the manager decreases.

Who are Fama and French?

Gene Fama is an American economist, best known for his empirical work on portfolio theory, asset pricing and the 'Efficient Market hypothesis'. He teaches Finance at the University of Chicago Booth School of Business. In 2013, he shared the Nobel Memorial Prize in Economic Sciences jointly with Robert Shiller and Lars Peter Hansen. He is ranked as the seventh-most influential economist of all-time based on his academic contributions.
Ken French teaches Finance at the Tuck School of Business, Dartmouth College. He also taught at MIT, the Yale School of Management, and the University of Chicago Booth School of Business. He is most famous for his work on asset pricing with Gene Fama. Both Gene and Ken are board members of Dimensional Fund Advisors in the US, who are one of the managers appointed by The Private Office to invest some of the international asset allocation for our client portfolios based on their alignment with our evidence-based investment philosophy.



In practice, how do we use this academic and empirical evidence to help clients navigate investment markets and give them comfort that they will be 'okay' despite volatile financial markets? Let's use sailing as a metaphor.

Embarking on a financial plan is like sailing around the world. The voyage won't always go to plan and there'll be rough seas, but those who are prepared, flexible, patient and well-advised greatly increase the odds of reaching their destinations.

A mistake many inexperienced sailors make is not having a plan at all. They embark without a clear sense of their destination. And once they do decide, they often find themselves lost at sea in the wrong boat with inadequate provisions.

Likewise, in planning an investment journey, you need to decide on your goal. A first step might be to consider whether the goal is realistic and achievable. For instance, while you may long to retire in the south of France, you may not be prepared to sacrifice your needs today to satisfy that distant desire.

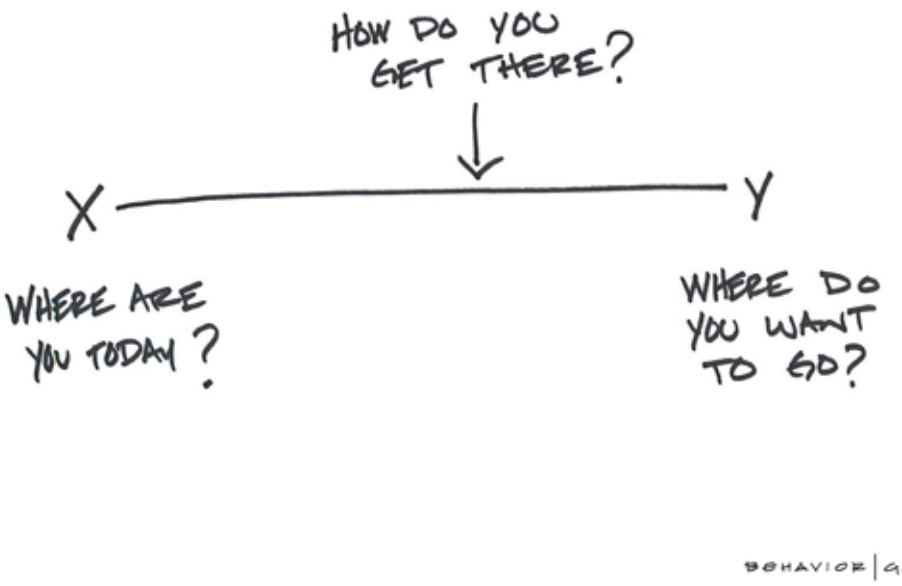
Once you are set on a realistic destination, you need to ensure you have the right portfolio to get you there. Have you planned for multiple contingencies? What degree of 'bad weather' can your plan withstand along the way? Key to a successful voyage is a good navigator. A trusted advisor is like that, regularly taking coordinates and making adjustments, if necessary. If your circumstances change, the advisor may suggest you replot your course.

As with the weather at sea, markets can be unpredictable. A sudden squall can whip up waves of volatility, tides can shift and strong currents can threaten to blow you off course. Like a seasoned sailor, an experienced advisor will work with the conditions.

Once the storm passes, you can pick up speed again. Just as a sturdy vessel will help you withstand most conditions at sea, a well-diversified and evidence-based portfolio can act as a bulwark against the sometimes tempestuous conditions in markets.

Circumventing the globe is not exciting every day. Patience is required with local customs and paperwork as you pull into different ports. Likewise, a lack of attention to costs and taxes are the enemy of many a long-term financial plan.

Distractions can also send investors, like sailors, off course. In the face of 'hot' investment trends, it takes discipline not to veer from your chosen plan. Like the sirens of Greek mythology, media pundits can also be diverting, tempting you to change tack and act on news that is already priced in to markets.



A lack of flexibility is another impediment to a successful investment journey. If it doesn't look like you'll make your destination in time, you may have to extend your voyage, or take a different route to get there or even moderate your goal.

The important point is that you become comfortable with the idea that uncertainty is inherent to the investment journey, just as it is with any sea voyage. That is why preparation and planning are so critical. While you can't control every outcome, you can be prepared for the range of possibilities and understand that you have clear choices if things don't go according to plan. If you can't live with the volatility, you can change your plan. If the goal looks unachievable, you can lower your sights. If it doesn't look like you'll arrive on time, you can extend your journey.

Of course, not everyone's journey is the same. Neither is everyone's destination. We take different routes to different places and we meet a range of challenges and opportunities along the way.

But for all of us, it's critical that we are prepared for our journeys in the right vessel, that we keep our destinations in mind, that we stick with the plans, and that we have a trusted navigator to chart our courses and keep us on target. A navigator who has collected the evidence pertaining to all the other ships at sea, their current positions, weather forecasts, likelihood of them reaching port, and uses that intel to plot a course that the numbers suggest is more likely to manifest as plain sailing.

** Laetitia Peterson is a personal wealth adviser. She has worked with companies such as Goldman Sachs and boutique funds management firm Liontamer, which she co-founded with Janine Starks. She is now the CEO and founder of The Private Office, helping successful lawyers achieve the financial goals important to them and their families. Laetitia is also the author of a book called " Legal Tender" which explores attitudes towards money, and lawyers' views on wealth creation.*

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Rule of Law and Social Justice

By Jacqui Thompson*

It is easy to be cynical about corporate social responsibility projects and brand them as opportunistic marketing, but the reality is that we are seeing corporates that are highly committed to rolling up their sleeves and driving successful social projects because they believe in them. Company employees are often passionately committed to making a difference, and utilising the resources of their employer allows them to act quickly and effectively.

When interviewing people for positions at her company, Head of Local Online Solutions for LexisNexis, Lindsay O'Connor, is often asked about the work that the company does within its Rule of Law Project. This is particularly so for the younger members who join the team. O'Connor thinks that they are investigating whether the company is serious about this or whether it is a marketing gimmick to make themselves look good in the age of corporate sustainability.

But it is no gimmick and has proved an attraction for employees. Many staff members arrive with a history of volunteerism, perhaps with charities or volunteer work, and welcome the opportunity to contribute to the project. When O'Connor joined LexisNexis in the UK in 2011, she was aware of it and was keen to be involved.

Until relatively recently, the company had been doing some work with the United Nations around the principles for the rule of law. A call went out across the organisation for volunteers to work on that project. People from across the globe put their hand up to become involved in researching and writing for this. No matter how senior or junior an employee was, they were given an opportunity to get involved, and to be as much or as little involved as they wished to. The company also works with outside organisations and welcomes their assistance. For example, the UN project involved several large law firms in the US lending their assistance and expertise.

As a more senior member of staff, O'Connor is more involved in the rule of law work than most. She says that LexisNexis takes this work very seriously and has made it clear to managers that the project is fundamental to the company. But she is adamant that people understand that this is not about marketing the company. It is about upholding the Rule of Law, something she and many of her colleagues feel strongly about.

In New Zealand, in 2013 LexisNexis worked with Slave Free Seas, a charitable trust that focuses on using the law to end human trafficking at sea. The company developed a human trafficking online practical guidance module, which provides free access to information for existing customers around issues within the slave trade and what they should do if they become aware of such issues.

As this module developed, it became clear that there were many other issues within society that were adversely affecting the general public and there was not as much support for access to justice as there could be. The trafficking project was therefore expanded into different guidance modules grouped under the title Social Justice Practical Guidance.

LexisNexis felt that there were areas in which the company could offer support and guidance to litigants in person to support their right to access to justice and thereby, more generally, to support the court system. The company has made the content within the social justice modules free to all – not just customers.

O'Connor points out that it is important to remember that the aim of the project is not to encourage individuals to attempt to handle complex claims in the court process, because that is often not in their best interests. For this reason, at certain points in the content there are clear signals for the reader that a lawyer should now be engaged. The reader is then given help in finding a lawyer, what information they might need to take to a lawyer and an indication of what free legal advice is available in that area.

The existing modules are centred around employment, care of children and human trafficking. These areas often involve strong imbalances of power. The concept is to gradually expand the units or modules. Housing has been recently covered. This is a topic which the

Social Justice Team sees as being a big issue in New Zealand now.

Prisoners' rights are another area which the team is interested in looking at, and on the immediate horizon, is immigration. O'Connor points out there have been several recent cases where people have entered New Zealand on what they believed to be genuine student visas and have later discovered that the institution that they were supposed to study at did not meet quality standards. This resulted in their visas being withdrawn and they had to leave the country.

Putting together the modules for the Social Justice Project is going to be a mammoth task. Although LexisNexis has several engaged and interested authors, more help will be required. A lot of authors are used to writing for a professional audience and therefore there is some training to be done around writing for a "consumer" market. O'Connor says that there is also a lot of work to be done on the structure of the modules.

Initially the focus in the units was litigation centred rather than dispute resolution. "It is a matter of having needed to start somewhere," O'Connor comments, "and we haven't necessarily started at the beginning of the process. We have started from where authors have been willing and able to provide content. But what a lot of people need is guidance on resolving disputes rather than legal guidance, and how to come to an agreement to avoid going to court."

O'Connor says that one thing that they would like to do is create connections between people who need help and lawyers. She says that there are a lot of law firms that have good pro bono programmes, as do some of the universities, such as Victoria University which runs the Community Justice Programme. The aim is to direct these people to those who can help them, including barristers.

At the moment, the company only links to other resources listing those lawyers who are available to undertake pro bono work (such as the NZ Law Society website). Eventually the team would like a database of those who do pro bono, which can be accessed by those looking for help. O'Connor thinks that social justice could eventually provide almost a "marketplace" so that lawyers can record that they are willing to help, what their areas of expertise are and how they can be contacted.

O'Connor says that many lawyers volunteer because they are trying to reconnect with the desire that they had at the start of their careers to make a difference. For younger members of the profession, many feel quite passionately about doing something worthwhile. For all this is an opportunity to stand behind the rule of law.

The project needs a mix of people and skills to move to the next stage. It is very far from finished and potentially will never end. If someone does want to become involved, O'Connor is clear that the level of commitment is up to the individual. "If they someone only wants to write one piece of information for us based on (for example) mediating employment disputes, that's great and we will absolutely take that," she says. "If people want to become more involved in owning a section of content and restructuring it to how they think it should go forward, but not actually do any writing, that also is fine because it is useful guidance on what we should focus."

But a critical need is letting people know about the Social Justice Project. LexisNexis is looking for ideas about how this new venture could be spotlighted for the general public. O'Connor says that it is seen more as a resource for lawyers and other professionals. LexisNexis is trying to change that and has done mail-outs to libraries and citizens advice bureau's, providing flyers about the resource for them to hand out to people who come to them. But the project needs people who have connections with relevant organisations or charities to help spread the word.

What can you do to get involved?

If you would like to help with the Social Justice Project by providing content, please contact Katerina Zamyatina, who is managing the content, at katerina.zamyatina@lexisnexis.co.nz. The type of help required can range from writing a simple checklist or workflow document through to structuring some Q & As on a topic. If you would like to discuss the project more generally, please contact Lindsay at lindsay.oconnor@lexisnexis.co.nz.

** Jacqui Thompson is a member of the At the Bar Editorial Committee.*

Flexible Work Hours are a Win-Win for All

Dr Frances Pitsilis

MB BS (Mon) Dip Obst, Dip Occup Med, FAARM, ABAARM,MACNEM, FRNZCGP *

Shortly after launching her career in general medicine more than 25 years ago, Dr Frances Pitsilis developed an interest in stress as she realised that many illnesses are related to it. Dr Pitsillis's medical practice now involves second opinion and consulting work on stress, pain, fatigue, and complex conditions including hormonal and shift work-related problems. She takes an holistic approach and uses evidence-based natural and complementary therapies and lifestyle interventions where appropriate.

Flexible Work Hours (FWA) are now something that has become global – that is the increasing accommodation of employees in terms of the where, when and how they work. This is a win-win for all concerned.

These changes, which started to emerge in the 70's, are in response to the changing needs of both the workforce and the marketplace allowing both employees and employers to adjust to new work conditions while allowing the employee to be able to accommodate personal and family needs, as well as work/life balance in a better way.

Flexible work hours are mutually beneficial agreements between employers and employees that provide alternative options to when, where and how much the employee works. These arrangements vary in the type of solution, level of formality and degree of flexibility offered.

FWAs consist of working patterns involving modifications to the regular working week, working at night and on weekends, in addition to work schedules where the starting and finishing times can vary. A wide range of FWAs include all sorts of work, including shift work, overtime, weekend work, annual hours contract, part time work, job sharing, flexitime, temporary/casual work, fixed time contracts, home based work, teleworking and even compressed working weeks.

The benefits to employee and employer are numerous. Researchers have found that FWAs are related to reduced turnover, improved retention of quality employees, improved loyalty and performance, and increased work satisfaction and general happiness, with a reduction in stress. In turn, these reduce labour costs, improve employee retention and will attract a desirable and improved human resource pool. Employees are also able to work in a more sustained fashion without feeling stressed.

A summary of the business case for flexible work hours is below. Performance has been found to improve across the full spectrum of indicators, with:

- Improved productivity. FWAs reduced absenteeism and improved supervisor and self-performance ratings across numerous studies and industries.
- Improved quality of life. FWAs are linked to a reduction in customer complaints and errors made. Deloitte's reports that 84% of clients are satisfied or very satisfied with service provided by FWA employees and only 1% of clients were dissatisfied.
- Enhanced job satisfaction. Employees widely report higher levels of satisfaction. JP Morgan Chase's annual employee survey found that employees with FWAs were much more likely to report overall satisfaction than those without it.
- Increased organisational commitment. A study of five organisations that implemented flexibility reported that overall commitment was 55% higher for employees with flexibility. Additionally stress and burnout was 57% lower.

- Favourable applicant perceptions. Nearly a third of 1500 US workers surveyed considered FWAs to be the most important aspect of an employment offer. Additionally 80% of a cross-section of managers surveyed indicated that the flexibility offerings impacted recruitment of top talent.

At the organisational employer level, flexible work hours have been linked to:

- Higher financial performance. A study on the impact of Fortune 500 company profits in the Wall St Journal found that firms' stock prices rose 0.63% on average following announcement of flexibility initiatives. Research has found that when looking at workplaces with FWAs, there was a positive association with long term financial performance of the company with both remote working and flexible schedule offerings.

- Reduced labour turnover. The flexibility policies are a significant predictor of talent retention with both schedule flexibility and remote working, and reduced labour turnover. Deloitte quantified their turnover related cost savings due to the availability of flexible work hours at $41.5m in one year alone.

When there is a persistent pattern of conflict between work and life, this may run the risk of stifling worker productivity and economic competitiveness. Studies show that a good balance between work and life have boosted morale and enhanced productivity.

Technical developments such as laptops, mobile devices and new ways of communicating using webinars, the internet, etc. allow more workers to be able to engage with their workplace from home, either completely or for part of the week.

Working away from the office was found to improve performance and reduced absenteeism. The social exchange theory states that the employee, by receiving flexibility, seeks to reciprocate to the employer in terms of reward.

Increase in competition in the marketplace, the presence of millennials who are less loyal and more selective, as well as general business pressures, have placed more stress on employers and organisations to have to adjust to changes in their environment. This has led to the need for greater organisational flexibility in the workplace that has included the way the work is done, employee and financial resources and the design and organisation of work, and worker labour flexibility.

Not being able to be home for dinner with the family and poor participation in family life is a significant disruptor to work/life balance. Time flexibility has also been a common innovation that is very strong in the European Union. Thus, the employee has time to be able to take the children to or from school, and even be home for dinner depending on the arrangement.

Employees will tend to work during their most productive hours, which then allows them to deal with non-work demands during a work day. When someone is working from home, sometimes the best ideas could be at 5am or 11pm. A parent can work from home while still caring for a sick member of the family rather than taking time off work which can be costly and stressful for the work environment.

The spinoff is a reduction of commuting which often tends to be during peak hour traffic that can be dangerous, stress and time consuming, especially when the weather is bad. The employee can be working and being productive instead of commuting.

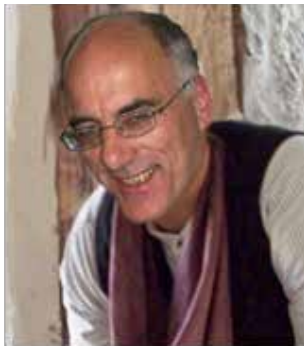
The Millennial group will become the largest group in our workplace after the baby boomers. In addition, high quality women with children, will be able to bring their skills to the workplace if FWAs are available.

A willing employer offering flexibility to their employee, is showing them that they care about their mental and physical health, as well as their personal and family life. In return, the employee will work longer hours easily, feel more committed and remain more loyal. The feeling of obligation towards the employer generates a reciprocity that goes beyond a normal standard working week. Any small or large employer contemplating flexible work hours for their workplace will be abundantly rewarded, as will their employees.

** Details of Dr Pitsillis's practice and her contact details can be found on her website at http://www.drfrances.co.nz/index.html*

Don't Take the Bait

CommArc Consulting*



Steve Brorens, CommArc

A warning recently from the NZ Law Society to its members to be vigilant against "phishing" scams and the shutdown of Hawera High School's computer system a couple of weeks ago brings home the importance of vigilance and awareness around email scams.

Phishing is when a criminal sends you an email that entices you to open a file or click a link designed to give them some access. More sophisticated scams may even involve a whole bogus email conversation before enticing you into dangerous behaviour.

The first phishing scams a decade ago often looked like they were alerts from your bank and led to what looked like your bank's login screen. Of course, if you entered your account number and password, you'd have given the 'phisher' access to all your funds.

Such scams are still common, but now there are a wide variety of tricks in use. All involve you following instruction in what almost always seems an unusual or odd email.

"Whenever you receive something odd through email, your 'spidey sense' will normally warn you," CommArc security analyst Steve Brorens said.

"You just need to heed that warning, and take measures to confirm that the email is genuine before clicking any links, opening attachments or responding."

For example, a recent spate of emails targeting large law and construction firms appeared to come from genuine staff members using *WeTransfer* as a file sharing site. A click on the link, however, opened the recipient and the company up to the whims of hackers.

Brorens said that while the emails looked convincing, the recipients hadn't asked the sender for the files, so should have immediately been on guard.

"If an email is from someone you don't know, or someone you do know but it's out of character – you haven't been having discussions about a new project but you've been sent plans for one – be very wary about clicking on it or opening any attachments."

"If you have doubts, don't reply to the original email but pick up the phone, walk down the corridor, or start a new email to whoever the original email was from. That puts you in control and should ensure your safety. Alternatively, forward the message to your IT support people for checking".

Brorens said there are generally two goals for the hacker – to get your money or get control of your system so you have to pay them money.

"If the target runs an application, typically something bad will happen. It's likely it will be ransomware which will look at all the documents they have access to - which in many businesses will be all of them - and it will encrypt them. You won't be able to get them back unless you pay the ransom."

While well-maintained systems will have good backups, Brorens said, restoring from these typically takes a minimum of half a day.

"Although it may cost less to simply pay the ransom, you just wouldn't go down that track. It's a pain and expensive to do, and no-one wants to be rewarding criminals".

Getting tricked by a 'phishing' email can be an expensive mistake in other ways too. If a senior staff member has their password stolen, in the absence of two-factor authentication (2FA) the hacker can log in from anywhere in the world and have complete access to every document they have access to.

If accounting staff get their credentials captured, the criminal hacker can impersonate them and change payment instructions to send funds to the fraudster's account instead of the legitimate recipient.

Brorens said even the best email firewall, antispam, and antivirus products will still let a small proportion of email scams through.

"Really the only water-tight solution is to restrict most staff so that they can't receive email from the Internet - something which is unrealistic for most companies.

"So, the only other alternative is to train people to be a more careful."

"To help with this, CommArc offers 'simulated phishing' training campaigns to clients. This teaches people how to spot dodgy emails – and gives a measure of how cautious people currently are.

"Clearly if 50% are fooled by our test emails then the business is at grave risk, and urgent training is needed. Our experience is that running such tests every six months or so soon pushes such rates down drastically."

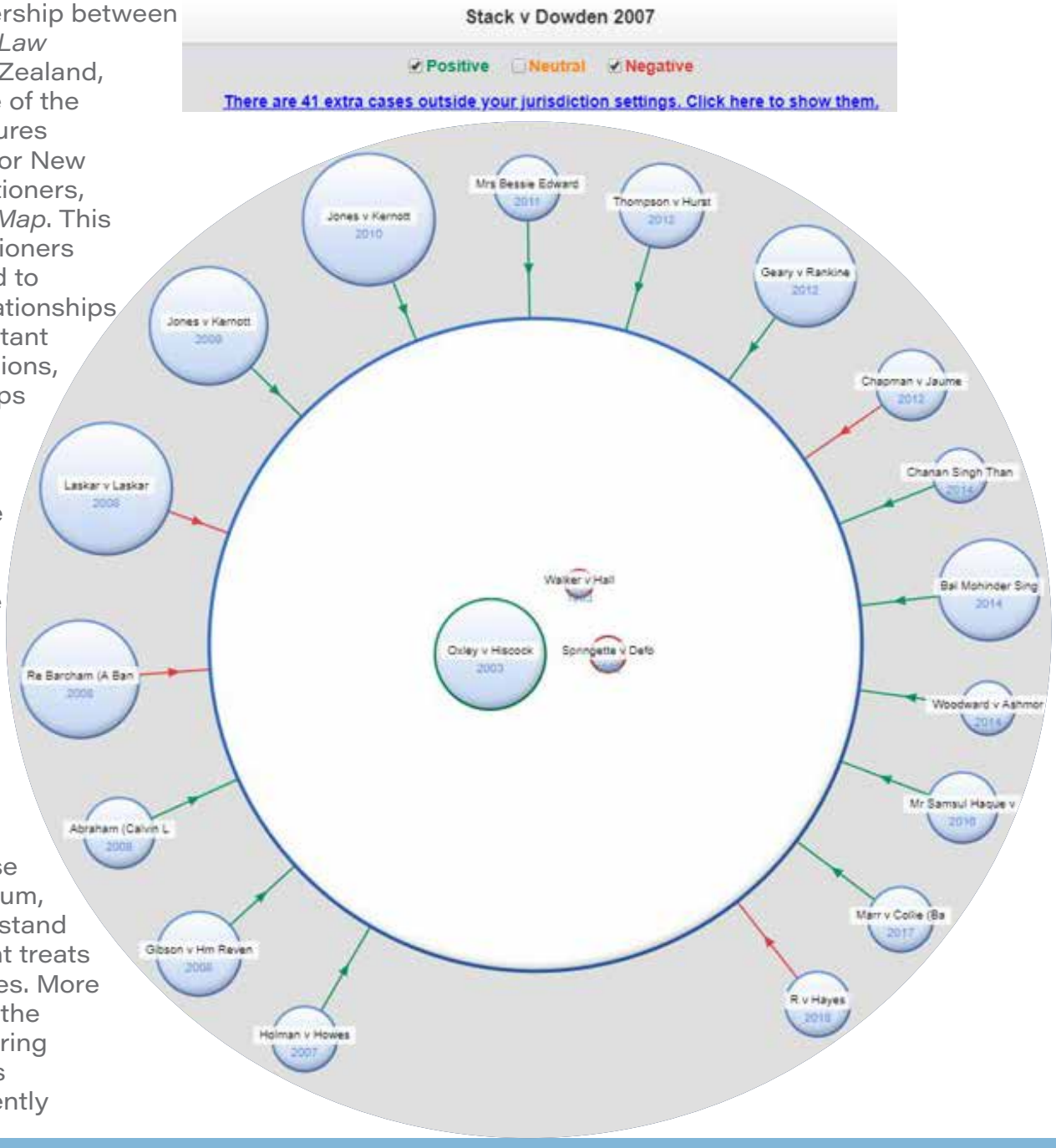
So be wary when opening your emails. If your "spidey senses" go off and you suspect there's something wrong, or the email is completely unexpected or out of character, hit the delete button.

** If you'd like to know more about CommArc's phishing campaigns or how to tighten up your business security so you're less susceptible to email scams, talk to a CommArc account manager today. 0800 338 0414 or email info@commarc.co.nz.*

A New Way to Explore New Zealand Case Law

Matt Terrell, Justis (Member Benefit)*

Following the first anniversary of the forward-thinking partnership between Justis and *The Law Report* of New Zealand, we explore one of the innovative features now available for New Zealand practitioners, the *Precedent Map*. This enables practitioners in New Zealand to explore the relationships between important domestic decisions, and relationships across jurisdictions with the most comprehensive collection of common law cases available online.



Traditionally, understanding how cases are related to each other requires reading vast amounts of case law. At a minimum, this is to understand how a judgment treats the cases it cites. More complicated is the task of discovering how a case has been subsequently

treated since being handed down by the judge. This latter step is a vital one, however, as it is important to determine if a case is still considered good law before using it.

Using *JustisOne's Precedent Map*, it is now possible to instantly see the relationships between cases, the treatments applied, and even identify cases that are relevant to the point of law being researched. *JustisOne* also indexes content from over 120 other providers, and the *Precedent Map* will display case relationships even if we do not house the case ourselves, to ensure that you are seeing the complete picture. The *JustisOne Precedent Map* is a visualisation, rich with information about the relationships between cases, and it is a feature which has taken years of development.

The History of the Precedent Map

Justis' original legal research platform was launched in 1999 and was widely viewed as one of the most intuitive online case law libraries at the time. In 2005, Justis launched *JustCite*, an index of invaluable legal material, case relationships and citations. It was within *JustCite* that the *Precedent Map* first appeared. In 2016, Justis combined these two innovative products to create *JustisOne*. At this time the features from *JustCite* that were incorporated into *JustisOne* were re-developed to provide a better experience for the users.

Many years of work have been invested into developing the systems and infrastructure that supports this feature, and this goes beyond the software which can process millions of pages of case law. From digitising old cases that were archived in library basements across the UK, through to developing international partnerships which ensure that you can see all relevant cases from over 120 other services in our visualisations, there has been a lot of thought and effort gone into a feature which enables you to click a button and have complex inter-relationships between cases visualised so clearly.

The case treatments, colour-coded arrows, are determined and checked by our team of legally trained editors to ensure that they are accurate. Additionally, the size of the circles represents the number of relationships that cases have in common with each other, which would be impossible to visualise without powerful legal technology systems running in the background.

The *Precedent Map* also remains updated, displaying information when new cases are added to JustisOne as there are over 1,000 new cases added each month.

The *Precedent Map* is such a popular feature amongst our users not simply because it is visually pleasing, but because it provides important information in a fraction of the time that conducting the equivalent research manually would take.

"The Precedent Map allows a student to visualize the citing cases and the cases mentioned in the case at hand. Seeing a case in this way leads to a deeper understanding of its connections to other cases and how those cases might affect its continuing validity. Being able to switch from a list view to a graphical view serves different types of learners. It also allows a researcher to switch from a global to a granular view to see the problem from a different perspective."

Legal Information Librarian, Boston University School of Law, Massachusetts

New Zealand Bar Association

From Spring 2018, Justis subscriptions – that include access to *JustisOne*, and the *Precedent Map* – were listed on the NZBA Member Benefits page. Members can benefit from access to many of the innovative features included with *JustisOne* in addition to over 4,600 important cases from New Zealand across all major practice areas provided by *The Law Report*, exclusively available from Justis.

** Matt Terrell is a an author at Justis, which is a NZBA member benefit provider. For more information about this benefit, check our website at https://www.nzbar.org.nz/legal-practice-support*

Island Magic

Martin Cahnbley*

PlanetWine founder Martin Cahnbley takes a trip that many of us dreamed of taking when reggae was at its height and the top rock bands would congregate in Jamaica to record their latest albums.

Jamaica has held an allure for me since my first musical encounters with the reggae music of Bob Marley, Peter Tosh and Jimmy Cliff during my student days. Songs of rebellion resonate with young students. The spectre of illegal substances, long hair and a generally free life left trace elements in my DNA and I finally had the opportunity to visit said Island in June this year. An African friend from those student days lives in Kingston and has married into the local populace. Hence it was a matter of 'when', rather than 'if.'

My flights took me via LAX to Kingston. I bear a striking resemblance to one Bill Murray (especially when tired) and, once more, I was accosted by patrons at an LAX bar to much laughter over a few morning beverages.

Paul and Olivia and their daughter Victoria were my generous hosts for my week on the hilly island nation. Olivia ensured that we undertook the "have to" tours of the Bob Marley museum and the studios he recorded in: Studio One and Tuff Gong. For me, the highlight in Kingston was the walking tour of Trenchtown. The lyric "... sitting in a Government Yard in Trenchtown ..." is tattooed into my soul. (Bob Marley, No Woman No Cry).

An international grant had drawn international and local artists to this notorious street. Most of the walls along the main streets of Trenchtown are now adorned with murals. Our guide took us to the small community vegetable garden and offered weed. I played football with a bunch of kids, boys and girls of all ages, on the concrete floor of the derelict Culture Yard which had been Bob Marley's residence, also prettied with murals.

Our journey then took us to Silver Sands beach in Trelawney, Northern Jamaica. From here we discovered Leroy's Beach Bar and experienced the famous Jerk chicken at Scotchies (grilled over green sapling branches) and patties on the outskirts of Montego bay, all washed down with the ubiquitous Red Stripe beer.

In spite of many attempts to connect with various Rum Distilleries in Jamaica, it had been difficult to receive responses, let alone arrange any tours or meetings. I finally scored a hit and Paul and I visited Hampden Estate distillery in the North-West of Jamaica. This is the land of Usain Bolt and a framed pair of his spikes adorned the wall in the reception area. The Estate was established in 1753 by a Scot, Mr. Archibald Sterling as a

sugar plantation. The Hussey family purchased the Estate in 2009 and have been investing heavily in elevating the property to its prior glory.

Hampden Estate is renowned for the quality of its pot still rums. I have been importing rum from Cuba and Indonesia for some time, but was I in for some lessons! Especially in terms of esters in alcohol. The flavours of the Rum Fire overproof rum (63% alc) in its basic packaging blew me away. This is not a forum for education on esters but it is worth noting that the Rum Fire has around 1250 ester parts per million compared to Bacardi which would have 0. The esters occur during the fermentation process and are impacted by the micro-climate and flora of the building the sugar cane juice is fermented in. The old stone building at Hampden Estate (no photos allowed inside) is mouldy and decrepit and it is exactly this, the unfettered bacteria and organisms that live in this environment, that impart these incredible flavours. A good reference for this is: https://cocktailwonk.com/.

Sadly the new owners had decided to sell off all of their aged rums to an Italian entrepreneur. They have now realised the error of their ways and have started the long process of building up stocks again. The tour included a tasting of various rums and a lunch which again included the national dish: jerk.

I met with Christelle Harris, the family member responsible for Hampden Estate, at a Kingston hotel that the family also owns. We discussed the various facets of the liquor business, branding and the potential for export to New Zealand.
I have now managed to obtain those rights.

Next steps are to explore whether to import rum in bulk and/or the branded products. Rum Fire has an excellent reputation in avant garde bars around the USA and I am sure that New Zealand is ready for an ester high also.

When I left from Montego Bay airport early in the morning, Jamaican coffee in hand, I had time to pause and consider my impressions of Jamaica – as a tourist and as a spirits importer.

Jamaica delivers on its lore: the music, rasta, dreadlocks, 'yeah mon' greetings, rum, tropical weather and vegetation, jerk and patties. Given all of that, Jamaica still gave me the sense of being back in rural Africa or Brazil. A beautiful country with many people living a subsistence existence. There is wealth, which is centered in the hands of a few families. Most of the beautiful beaches are occupied by walled resorts with restricted access - fly in and fly out tourism with occasional excursions to places of cultural interest. Wealthier Jamaicans live in gated communities. I found the Jamaicans I met friendly and yet cautious. Jamaica's crime statistics are some of the highest in the world. I did not feel threatened but believe that this place, as history has shown, can be a powderkeg.

I think back to my visit with fondness and a sense of what could be and how much more I have to explore and learn.

** Martin Cahnbley travels the world looking for experiences and adventures and unique alcoholic beverages that New Zealanders may love. Remember the discount for NZBA members at www.planetwine.co.nz*

Petrol Heads' Corner

by David O'Neill*

Audi RS4

I was given the latest iteration of the RS4 Avant (station wagon) for the weekend, just in time to take it to the beach and back. I have found this is the best road on which to test a car as it has a bit of everything, corners, hills, straights and some really twisty bits.

Specs

Power	331kw (read "stonking")
Torque	600nm (read – "pulls like a truck")
Engine	2.9L twin turbo V6 petrol
Economy (trip)	10.1 l/100km – pretty good considering *[Global warming David, Global Warming... Sub-Ed]*

What is it like to drive

The trip over and back saw the economy rate sitting at around 10.1 litres of petrol/100kms. That's not bad considering I had it in sport mode for pretty much the whole way.

This car is a change of direction for Audi RS4s. Up until now the modern RS4 has always been a V8. In the early 2000's they were turbo charged V6s and were blindingly quick at the time. This is a new (old) move towards a lighter engine, presumably more economical. It does make it a much nimbler car. Apparently, the change in engine size has shaved approximately 80kgs off the old V8 version (that's one whole person less in the car). The amount of power that it puts out is about the same, and as a consequence the car is very quick, way quicker than the old version.

It cornered well, tucked into the corner and went around very easily without any sort of drama given the quattro drive. I thought handling was superb.

Predictably it was also a lot quicker than its predecessor.

Audi claim, and justifiably, that it is quicker by a significant margin than the old RS4, primarily because it's lighter and produces power in the same range as the old V8.

It's 0-100kmh time is reputed to be 4.1 seconds. That is very quick and is in the same realm as the RS6 – but – not quite there yet..... (I should wash my mouth out with soap.....)

It doesn't feel as fast as the RS6 when accelerating. There is a pleasant mild roar from the back end which is the sort of noise most RS drivers want to hear, but it's nothing like the earth-shattering blast that the V8 used to give out. In sport mode, it has a nice automatic blip on the throttle when it's changing down through the gearbox (8 speed), so that it continually stays in the power band ready for quick acceleration. These cars do everything for you these days. In the old days it was "double declutching" with a blip on the throttle to allow the engine to engage with the clutch easily.

Interior and Goodies

Interior wise it's got everything that you would possibly want. This car had added carbon fibre inserts, a glass roof with a see-through shade which stopped you from cooking, the usual quilted leather seats, flat bottomed steering wheel and surround sound stereo (B & O).

You can keep the stereo on if you don't want to listen to that lovely V6 blip and roar as you drive it through the hills. If you're by yourself, then by all means keep the radio/media player off and listen to your own orchestrated noise, but if you're with the family they might get sick of listening to the car farting and burping its way through the corners. I know mine did. *[Try electric – they are silent... Sub-Ed]*

I didn't know at the time but I was told later that the car I was driving had a sports differential and dynamic steering. These are all marketing words but the sports differential feeds more power to the outside wheels so that they will go quicker around the corner than the inside wheels. That gives a more even balance to the corner speed (very clever I think).

The dynamic steering is similar. Apparently, it means that the inside wheel turns in more than the outside wheel, which makes it more of a "point and shoot vehicle" than before. These extras are things that you probably don't realise are there until you are told. Now that you know all about them, you will probably feel the difference (really?).

There has been criticism of the Audi RS steering having little feel. I quite liked the steering. I thought it was light, nimble and its turn-in was very good. It certainly doesn't feel like a 1.7 tonne car.

Looks

Audi has been using the old Audi S2 bulge in the rear end over the wheel arches for some time now and it's a classic look. The car looks good, but not in a gaudy way. The tyres on the rear end are 275 (that's almost a foot wide-to use the old parlance) low profile tyres and are certainly enough to keep the car firmly planted on the road.

Another little touch which I quite liked was when you opened the door, the light in the bottom of the door shone down onto the surface of the road or garage and said "Audi Sport". It's amazing what LED's have done for car manufacturers!

The car that I had was "Nardo Grey". You're either going to love it or hate it. I don't think there's any middle ground on this one. Personally, I thought it was the colour of concrete and if you parked it next to an unpainted concrete block wall, you may lose it. You make your own mind up from the photograph.

The other thing I suspect that Audi generally won't understand is that New Zealand drivers probably won't want to have mag wheels which look like a set of waratah standards bolted to a rim.

Price

At $168,000 (with all the usual bits and pieces plus a few extras) it's not a cheap car but it is a price that is lower than what the earlier Audi RS4s were.

All in all, I can see that the RS4 will appeal to a lot of people. I imagine that Audi will move gradually towards (quelle horreur) an electric Audi RS. We'll see. *[Excellent idea. Sub-Ed]*

In the meantime, this car uses less gas, goes faster than the old RS4 but it doesn't have the old rumble of the V8 which I suspect a lot of RS drivers particularly like. By the same token you won't be disappointed with it. It goes like stink, corners well and looks and sounds the part (well sort of).

** David O'Neill is a Hamilton barrister, the NZBA Treasurer and a rally driver. He shudders when you say "electric" or "hybrid".*

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