



Auckland Women
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This issue's editors:
Maria Dew and Suzie Abdale

NEWSLETTER

SEPTEMBER 2004

From the President...

First, congratulations to Miriam Dean and Helen Winkelmann on their recent appointments as, respectively, Queen's Counsel and a Judge of the High Court. Notwithstanding that both are gross overachievers, Miriam and Helen are immensely likeable and personable, as well as being outstanding lawyers. We wish them very well in their new roles.

Many thanks also to Phillips Fox for so generously hosting our "congratulations" drinks for Helen and Miriam on 31 August 2004. The Association was very grateful for that as it is to all the law firms who support it.

Secondly, when the last newsletter was published, the Human Rights Commission had just published its *New Zealand Census on Women's Participation in Governance and Professional Life*. The rationale behind the census is "what gets counted gets done". The 2004 census will provide a benchmark against which to measure progress in the future. You can download a copy of the 31 page census from www.hrc.co.nz/leeo.

There are few surprises in the census. The essence of it is that women are poorly represented in many important sectors of the community, including on boards of directors of publicly listed companies, in academia and, a subject close to our own heart, in the larger law firms. Taking the latter, the census finds that women hold 14.12% of legal partnerships in New Zealand legal firms with 10 or more partners. At AWS Legal Invercargill, 27.3% (3 of the 11 partners) are women. Simpson Grierson is a close second with 26.8% (11 women in total).

The figures for boards of directors of publicly listed companies are nothing short of appalling. Women hold 5.04% of directorships in companies listed on the NZSX. These figures are derived from 89 companies with a total of 29 female and 546 male directors. 72% of the companies did not have any women on their board. The results for NZAX are better, but at the time of the census there were only 12 companies listed on that exchange.

Representation in Parliament is definitely trending in the right direction (presently around 30%) and 35% of directors of Crown companies are women.

From time to time AWLA has focused on the need for suitably qualified women to make themselves known to the nomination services and, in particular, the Ministry of Women's Affairs (Joan Isaac – email joan.isaac@mwa.govt.nz, phone (04) 916 5849) and the Director of Appointments and Governance at CCMAUPO (cv@ccmau.govt.nz).

There is not much point in us banging on about this poor state of affairs if we are not (when circumstances permit) willing to put our names forward.

The only other matter to mention in particular is the upcoming media and law evening. This is to be held at Simpson Grierson's offices and we are arranging a date in the second half of October. An invitation will come around shortly. We look forward to seeing as many of you there as possible. On those rare occasions when a reporter comes calling, it's as well to know how best to respond.

Regards, **Mary Peters**

**Law School
revives important
paper for women.**

“Women and the Law” returns to Law School

After a 6 year absence, AWLA are pleased to report that “Women and the Law” has returned as an elective paper to the Law School this semester.

According to their records, the paper was originally offered as an Honours Seminar in 1974 by David R Mummery and then as an elective paper in 1975 by Margaret Wilson. The elective was offered almost continuously thereafter with the main lecturers being Margaret Wilson until 1990 and Elizabeth Paton-Simpson until 1998. Other lecturers during that time have included Pauline Tapp and Jane Kelsey.

The elective was enthusiastically re-offered in 2001 by a group of lecturers including Treasa Dunworth, Jane Kelsey, Joanna Manning, Julie Maxton, Rosemary Tobin, Julia Tolmie and Khylee Quince. However, the paper had to be cancelled due to various circumstances, none of which involved a lack of student enrolments.

This year the elective is being taught by Treasa Dunworth, Julia Tolmie and Jane Kelsey with guest lecturers including former AWLA president and Chair of the Refugee Status Appeals Authority, Ema

Aitken. Hopefully AWLA will be able to benefit from the research undertaken by this year's students as they are required to complete either one 10,000 word essay or two 5,000 word essays on topics of their choice.

It is also pleasing to see the return of “Women and the Law” as universities around the world face a decline in areas of critical legal scholarship in favour of more marketable subjects. This trend has been instigated not only by universities adopting a more corporate approach but also by students themselves in deciding which subjects will be most useful to them post-graduation.

In light of this, it is important to ask ourselves – do we want to train students to master particular skills in order to service the economy of today, or, do we want to teach students to think laterally and reflect on the way things are? Personally I think a balance should be struck between the two and by focusing on economics and marketability, it is easy to lose sight of the value of independent thought and reflection.

Ronelle Barnes

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Justice Helen Winkelmann appointed to the High Court

Helen Winkelmann was appointed as a Judge of the High Court on 13 August 2004 and is now sitting at the Auckland High Court. This is obviously a great achievement but is only the latest in her successful legal career.

Justice Winkelmann studied law at Auckland University. She graduated in 1985 after being awarded the Auckland District Law Society centennial prize for best graduate. After graduating, she began her career as a law clerk at Nicholson Gribbin (later to become Phillips Nicholson and then Phillips Fox). She made equity partner in 1988 at the age of 25. She was the first woman to be appointed as a partner at the firm, and one of only two people in the firm's history to achieve equity partnership at that age. Justice Winkelmann attributes her appointment as a partner to working hard, being at the right place at the right time and to the other partners being forward thinking and supportive.

Helen developed expertise in commercial litigation, insolvency law, and medico legal law and remained at Phillips Fox until 2001. While at Phillips Fox, she worked on the high profile Equiticorp case, which was the biggest corporate insolvency in New Zealand, lasted many years and was New Zealand's longest running civil trial.

Justice Winkelmann also has four children, all born whilst she was a partner at Phillips Fox. She juggles the demands of work and family life by having developed an efficient working style enabling her to be home by about 6 in the evening, having a policy of spending that time with her family, doing any extra work after the children have gone to bed, running

an organised household and having a good nanny. She also keeps fit by running.

From 2001 to August 2004, Justice Winkelmann worked as a barrister sole at Shortland Chambers. She continued practising commercial litigation and medico legal law during this time.

Two key people have inspired Justice Winkelmann in her career. The first is Chief Justice Sian Elias, who has been inspirational because of her passion for the law, and belief that law is an important profession in society and one in which traditions and ethical principles are important. The second is her friend Kate Davenport, who went to law school with Justice Winkelmann, worked with her in her early days at Phillips Fox, and shared the experiences of working and having children at the same time as Justice Winkelmann.

Justice Winkelmann believes the key to young women lawyers succeeding in law but also having a family life is to be firm on what are non negotiable issues for them, be firm upon seeking flexibility from an employer, be reasonable with any expectations, and not try to be a clone of a male lawyer.

It is early days in her new role as Justice Winkelmann, however so far she is enjoying it, and finds the role varied and eye opening. Justice Winkelmann says that while it is too early to reach a firm view on the matter, she believes that the attributes of a good judge include common sense, humanity, good organisational skills and the ability to identify issues quickly.

We wish Justice Winkelmann every success for the latest phase of her exciting career!

Laraine Vickers

Two key people have inspired her career –

- ***Chief Justice
Sian Elias***
- and***
- ***Friend, Kate
Davenport***

Discussion Paper *Appointing Judges:* *A Judicial Appointments Commission for New Zealand?*

By Vicki McCall

“...submissions to the Select Committee of the Supreme Court Bill included suggestions to the effect that New Zealand should set up a Judicial Appointments Commission.”

In 2003 the Supreme Court Bill was passed, removing the possibility of New Zealand cases being appealed to the Judicial Committee of the Privy Council (JCPC) and setting up a Supreme Court for New Zealand. Many of the submissions to the Select Committee on the Supreme Court Bill included suggestions to the effect that New Zealand should set up a Judicial Appointments Commission for the selection of judges. Such a commission was thought to be particularly important for the selection of Supreme Court judges, but important also for the selection of judges to all other courts in New Zealand. Such commissions operate elsewhere in the world, and the British Government announced in 2003 that it would set up such a commission within its constitutional reform project for the selection of judges in England and Wales, Scotland, and Northern Ireland.

There are two areas in which a Judicial Appointments Commission is thought to assist in the process of selecting judges. The first is in the area of transparency and accountability in the selection process – the public can have faith in the judges ultimately selected, because they can see that the process by which they were chosen was open, impartial and thorough. The second is in the area of streamlining the process, which would become more efficient under a dedicated body.

For the purposes of this comment, therefore, it will be necessary to distinguish clearly two different aspects to the judicial selection process. The first is that of *selection method* – the means by which judges are chosen. Examples of these include judicial appointments commissions, elections systems, and recommendation to the head of state by non-partisan government officials. The second is *selection criteria* – the underlying reasons one particular person is chosen over another. Examples of these include legal ability, personal integrity, and connection with the community. The Government Discussion Paper deals only with selection method, as opposed to criteria-based issues.

From the perspective of the AWLA, this distinction should be kept in mind. The representation of women on the bench may be considered to be the result of a collection of factors, such as:

- The comparatively short period of time in which women have been training and practicing as lawyers in large numbers (in relation to men);
- Systemic bias, in which women are not promoted to higher positions within law firms, and the profession generally;
- The importance of the “connection with the community” requirement of the merit calculus, via which it may be expected that over time the gender balance on the bench will become more even.

While this list is by no means exclusive, a judicial appointments commission could not hope to address any of the above considerations, which result from the selection criteria (as opposed to the selection method).

CURRENT JUDICIAL APPOINTMENTS PROCESS

Statute in New Zealand sets out, in very broad terms, the requirements for appointment to the Bench. These requirements are:

- that judges be appointed by the Governor-General;
- that judges swear an Oath of Allegiance to Her Majesty, The Queen;
- that judges swear the Judicial Oath, promising to well and truly serve The Queen, according to law, and to do right to all manner of people after the laws and usages of New Zealand without fear or favour, affection or ill will;
- that judges must have held a practicing certificate for 7 years (as a barrister and solicitor);
- that judges must retire on reaching the age of 68.

These requirements say nothing of either the selection method or criteria to be used in so doing.

In New Zealand currently, the *selection criterion* for the appointment of all judges is merit.

The *selection method* for judges to the higher courts in New Zealand (the Supreme Court, Court of Appeal and High Court) follows the below pattern:

- The first step is for an extensive list of possible candidates to be generated. This is done in several ways:

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“Generally, there is a representation for the lay population ... to reflect the function that the judiciary carries out...”

Discussion Paper – *Continued from page 4*

- Expressions of interest are called for (this step does not apply to the Court of Appeal or Supreme Court justices)
- Suggestions are made to the Attorney-General’s office by groups with an interest in the process – for example the New Zealand Law Society, the AWLA, the Maori Law Society etc.
- The pool of candidates is then ‘sifted’ into a “long list” by the Chief Justice and the President of the Court of Appeal, consulting with the Solicitor-General if necessary.
- The “long list” is then shortened further when a vacancy occurs. Consultation is undertaken with the profession through the Solicitor-General (the process often referred to as “secret soundings”) and the Chief Justice continues to be involved. This shortening results in a list of a few names which is presented to the Attorney-General, who makes the final decision as to who to appoint.
- The Attorney-General advises the Governor-General of who should be appointed, mentions the name in Cabinet, and the formal appointment is made.

Several problems with this process have been identified. First, the consultation phases are carried out largely in secret (“secret soundings”), and little information is available as to the way in which they are conducted, and who is consulted. This opacity has been criticised as having the potential to result in a general lack of faith in any appointment that is made as a result. Secondly, the process operates with the Chief Justice heavily involved, potentially breaching the convention that judges do not sit in judgment on each other, and affecting collegiality.

On the other hand, the need to maintain the confidentiality of applicants, particularly the unsuccessful ones, is extremely important. In order to attract high-quality applications, it is necessary to be in a position to assure candidates that their record will not be open to public scrutiny if they are not successful. Partly, this consideration has driven the practice in Canada of refusing to utilise commissions of this type for promotions from one court to another, because this involves the scrutiny of a sitting judge.

PROPOSED CHANGES –

JUDICIAL APPOINTMENTS COMMISSION

The proposal for a Judicial Appointments Commission in the Discussion Paper can be found at paras 65–79 of the paper. Generally speaking, the proposed Commission would look like this:

- 3 lay people, who are not practicing lawyers and have never held judicial office, appointed by the Government
- the Chief Justice (or nominee, who is a judge)
- one other senior judge (e.g. the Chief Judge of the Court in which the vacancy occurs)
- the President of the New Zealand Law Society (or nominee)
- the President of the New Zealand Bar Association (or nominee) and
- one of the following:
 - High Court: Solicitor-General
 - District Court: Secretary for Justice
 - Appointments to Maori Land Court: the Chief Executive of Te Puni Kokiri

The Chairperson gives a list of names to the Minister, who must select from this list when recommending to the Governor-General whom to select.

COMPOSITION

Proposals for commissions of this kind generally assume that the size of a commission should be between 5 and 20 persons. The English proposal, contained in the Constitutional Reform Bill, calls for a panel of 15 members. The size of a commission of this type shouldn’t fall below 5 members, because it would cease to be effective for the purposes for which it was designed – to reduce the influence of individuals’ predilections, political views and to increase the diversity of factors which will be examined in making appointments.

Generally, there is a representation for the lay population i.e. those members of the community without legal training, to reflect the function that the judiciary carries out – to decide disputes between individuals, and between individuals and government. In previous proposals, the lay representation has ranged from around 20% of the Board, to up to 50% (as in Scotland). The selection of lay people to the commission should take account of the reason for their presence on the board in the first place – that they represent the views of the community over which the

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The Crimes Amendment Bill (No. 2)

The Bill is the first review of sexual crimes contained in the Crimes act 1961 and aims to update the law to reflect more recent changes in criminal behaviour and social attitudes towards sexual matters.

The main amendments aim to ensure:

1. All sexual offences (with the exception of rape, which is a male-against-female offence only and is retained in the new bill) are expressed and applied in a sex-neutral manner
2. The law's coverage for vulnerable groups is strengthened, including provisions relating to sexual offences against children, which are to be simplified into three groupings so they overlap and close a loophole that allows some offenders to escape conviction when the precise age of the child cannot be established.
3. Offences based on "sexual intercourse" are extended to cover "sexual connection" as currently defined for the crime of "sexual violation"
4. It will not be a defence to argue that the young person consented
5. The penalties for sexual offending are set at an appropriate level
6. A statutory basis for drug rape prosecutions is provided for
7. The bill facilitates New Zealand's compliance with the Optional Protocol to the United Nations Convention on the Rights of the Child, on the sale of children, child prostitution and child pornography.

The Law & Order Committee called for submissions in April 2004 and is currently reviewing those submissions.

Discussion Paper – *Continued from page 5*

judges preside. As a matter of logic, then, they themselves should reflect the community. Other considerations include good-standing within the community and experience with selection boards in other areas.

In addition to the influence of lay people, it is important that the judiciary be represented, as they can be expected to be in the best position to judge:

- a. whether lawyers who have appeared before them embody the necessary qualities of judges
- b. how candidates could be expected to function in the collegial environment of a court
- c. whether the candidates do, in fact, embody the qualities necessary to be judges.

Thus, the presence of the Chief Justice and Senior Judges on the panel is important to maintain.

Currently, there seems little viable alternative to governmental appointment for these members. While this may be thought to allow "packing" of the commission, alternatives (such as some kind of super-majority in Parliament) are unlikely to be feasible alternatives.

CONCLUDING COMMENT

On its own, the Discussion Paper on a Judicial Appointments Commission for New Zealand addresses very few of the concerns important to the AWLA. It fails to address the appointments process in the round, and merely deals with procedural concerns – a procedure which is thought generally to result in good appointments. However, a discussion of the process of appointments in New Zealand may be begun by this paper, allowing the criteria-oriented concerns to be discussed as well.

CORRECTION *from July's newsletter*

Professor Julie Maxton's PhD is from Auckland, not Canterbury as stated in the article about her.

BOOK REVIEW

AN UNSETTLED SPIRIT

The Life and Frontier Fiction of EDITH LYTTLETON (G.B. Lancaster)

Terry Sturm

"She wrote under the penname G.B. Lancaster and did not allow herself to be photographed or interviewed (so as not to cause her family shame)..."

"Edith Lyttelton ... was one of New Zealand's most widely read authors of popular fiction overseas between the early 20th Century and the end of the 2nd World War."

This contribution to AWLA Newsletter is not a book review but rather a sharing of a book about a remarkable New Zealand woman.

A couple of months ago, I attended a meeting of the Literature Association in Auckland, a small group which meets each month or so to listen to an invited speaker. The speaker on this occasion was Terry Sturm, author of "An Unsettled Spirit" a finalist in this year's Montana New Zealand Book Awards. The book is a biography of Edith Lyttleton a New Zealand author who wrote in the early-mid Twentieth century under the penname G.B. Lancaster. I found the lecture fascinating but it was my ignorance of the author, the first professional woman writer in New Zealand which sparked my interest and made me go out and buy the book. Terry Sturm's biography is comprehensive drawing on a great deal of documentary material including letters to and from the author. It chronicles a harsh but inspirational life and Sturm, being a professor of English at Auckland University considers and reviews throughout the biography many of Edith Lyttleton's written works which include novels, short stories and articles. Sturm introduces Edith Lyttleton thus;

"Edith Lyttleton, who wrote under the pen-name of G.B. Lancaster, was one of New Zealand's most widely read authors of popular fiction overseas between the early twentieth Century and the end of the Second World War. Her novels and short stories – most of them narratives of adventure and romance set in the remote back country or hinterland territories of colonial New Zealand, Australia and Canada were also familiar to many New Zealand readers during her lifetime.

Altogether she published 11 novels and an early collection of short stories, as well as two serial novels and some 250 other short stories in magazines. Most of the novels were reprinted on numerous occasions during her lifetime, and many were published by prestigious British and American publishing firms: by Hodder & Stoughton, Constable, Allen & Unwin, and John Lane Bodley, in England; and by Doubleday Page, George H. Doran, the Century Company and Reynal and Hitchcock

in the United States... Three of the novels and several short stories were made into Hollywood silent films in the early 1920's. At least one of these – The Eternal Struggle (1923) set in the north west of Canada and one of her best earlier novels, The Lawbringers (1913) – featured some of Hollywood's most famous actors at the time and achieved an impressive international success."

Why didn't I know anything about her? According to Sturm, one of the reasons that Edith Lyttleton and her writing is so little known in this country was due to her domestic situation at the time – a mother who vehemently opposed her writing and imposed severe restrictions on her and the life she led. She wrote under the penname G. B. Lancaster and did not allow herself to be photographed or interviewed (so as not to cause her family shame) as writing was regarded as sinful for a woman. Edith Lyttleton's mother imposed intolerable restrictions on Edith and her sister – their sole purpose in life seemed to be to look after their mother. Neither Edith nor her sister married because of this "duty" and Edith's writing was often put on the backburner while she tended to her mother who was intent on keeping her so busy that she would not have the time to write. Other reasons for her "disappearance" included the prevailing attitude to women writers at the time and the popular nature of Edith Lyttleton's writing.

Edith Lyttleton was born in 1873 in Tasmania and moved to New Zealand with her family in 1880 aged 6 years. From 1880 to 1909 Edith Lyttleton and her family lived at Rokeby, a station purchased by her father in New Zealand's Canterbury Plains. This is where Edith began writing and being published. Following the death of her father, Edith Lyttleton, her sister and one of her brothers moved to England with their mother. Edith returned to New Zealand in 1926 after the death of her mother and her sister and remained for a number of years where she had a younger brother and his family. She always saw herself as a New Zealander.

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“The biography portrays her life during the war years in London...”

An Unsettled Spirit – Continued from page 7

The biography gives real insights into New Zealand colonial society in the late 1800's and how a talented young girl coped. She did not in fact believe she had coped and in one of her final letters referred to by Sturm she says *“I went to see the doctor yesterday and got him to speak very plainly, and I think better for the children's sake that I tell you. Don't think I am whining, but I fear I find it hard not to be angry at the damned needlessness of it all and the fact that if I hadn't tried hard to do my duty I wouldn't be as I am now. My nervous system is destroyed, my arteries abnormally hardened, and my blood pressure is so high that nothing can help it.”* Edith had two brothers and a sister. Neither Edith nor her sister Bing received any formal education, the two brothers were educated at Christchurch Boys' High School. Sturm writes *“In this regime of enforced ignorance and deprivation it was “the uselessness of Bing's and my lives that makes me sorest”, accompanied as it was (even after the family shifted to London after 1909) by seemingly endless futile chores, such has been made to “sit for hours and sew sheets by hand when we had two machines and I was champing to get at my writing”.*

Despite the harshness of her life, Edith Lyttleton was one of New Zealand's most

successful writers of popular fiction of the time and is best known for her “Dominion-historical novels set in Tasmania, Canada and New Zealand”. The novels included “Pageant”, “Promenade” and “Grand Parade”. As mentioned above, one of her best early novels, “The Lawbringers” set in Canada was made into a Hollywood movie featuring some of the most famous actors at the time and achieving considerable international success. (Sturm page 1). Other Hollywood movies were made based on her novels also. The biography portrays her life during the war years in London and her efforts to help with the war effort. Her ongoing struggles with agents and publishers over contracts for the publishing rights to her works including her most popular novel reveals her determination to be treated fairly as a woman writer and to achieve a level of economic independence. In 1933 Edith Lyttleton was awarded the Australian gold medal for literature.

This article does not do justice to Edith Lyttleton nor her biography by Terry Sturm, my purpose was to share a bit about an extraordinary New Zealand woman who, until a couple of months ago I had never heard of!

Anna Fitzgibbon, LawWorks

LawWorks seeking Property Lawyer

LawWorks is a two women partner firm in Ponsonby. Allison Adams and Anna Fitzgibbon started up the firm in December 2000 employing one staff member. Since then, the practise has grown steadily and we now employ six staff. Anna and Allison practise in the specialist areas of employment and family law but the practice is a general one, providing an holistic service to its client base.

LawWorks has a flourishing property practice and requires a solicitor with a minimum of 5 plus years experience to join our team. The work is predominantly trusts, and related conveyancing work, asset planning, company compliance, commercial agreements and leasing. Our client base is small to medium

businesses and individuals who can afford to pay for quality legal advice. The role has a dedicated legal executive to provide secretarial support and to handle the conveyancing files.

We are a firm which is busy, and focused on quality attention to client's needs. However, we also focus on a balance between our professional and personal lives which is reflected in our ability to recognise that a job can still be done whilst being flexible about work arrangements.

If you are looking for a senior role, providing you with lots of client contact and you think you would be interested in working for us then we would love to hear from you.

In the first instance, please contact either Allison or Anna on email at lawyers@lawworks.nz or phone 360 7780.

United Kingdom Commission on Women and the Criminal Justice System 'Man-made' justice fails women

The Fawcett Society's Commission on Women and the Criminal Justice System launched its final report in March 2004 and finds that women victims, offenders and workers receive rough justice from a 'man-made' system.

The report is the result of a year-long Commission into United Kingdom women's experience of the criminal justice system.

Vera Baird QC MP, Chair of the Commission said:

"When we look across the criminal justice system, the figures really begin to stack up. As the Commission's report today shows, only 6% of reported rapes end in conviction, there has been a 194% increase in the female prison population over the past 10 years and there are just 11 women among 156 of the most senior judges. This suggests that women experience systematic disadvantage right across the criminal justice system."

The importance of the report was underlined by Solicitor General Harriet Harman QC MP, who commented that:

"The Commission's work has made an invaluable contribution to the question of women's involvement in the criminal justice system. It reminds us of longstanding concerns, makes new arguments and makes proposals which are worthy of serious consideration."

The launch of the final report, addressed by the Rt Hon Baroness Scotland QC, Home Office Minister, outlines the Commissioners' findings and recommendations based on 400 submissions. The report highlights that:

Women victims face a postcode lottery

There is much evidence to show conviction rates of rape and domestic violence – crimes experienced in the vast majority by women are extremely low. The Commission heard:

- One woman in four experiences domestic violence at some point in her life, and 30% of domestic violence cases start or escalate during pregnancy.
- Domestic violence accounts for a quarter of all crime, and yet only 5% of recorded cases of domestic violence end in conviction.
- Less than 20% of rapes and sexual assaults are reported to the police, and less than 6% of rates result in conviction.

The Commission highlighted the continuing lottery of services facing rape victims. It is now calling for a Sexual Assault Referral Centre to be established in every police area and for specialist police officers to be made available to all victims of rape.

Women offenders are shoe-horned into a made-made system

Sentences are getting harsher and the number of women in prison has risen dramatically – at a much faster rate than imprisonment of men – even though there has been no equivalent rise in female offending.

Overwhelming evidence presented to the Commission highlighted that prison is rarely the solution for the complex issues faced by women offenders. As a minority population, women are being shoe-horned into a system that is not designed for their needs. Recent government figures show:

- One woman out of 12 judges in the House of Lords
- Five women out of 43 police Chief Constables
- 18 women out of 42 Chief Officers of Probation
- Seven women out of 42 Chief Crown Prosecutors
- 31 women out of 138 Prison Governors

Commissioners also heard evidence of sexual harassment and discrimination experienced by women working in the system.

Commissioners find that the single most effective way of redressing the poor experiences of women in the system would be to introduce a law which obliges public bodies to promote sex equality.

Vera Baird QC MP says:

"The Commissioners were unanimous in recommending that the government changes its approach to sex discrimination legislation and adopts a positive approach, similar to that already in place for race. If all public bodies were obliged to promote sex equality, services would have to take into account the different needs of women and men. This would be the single most effective measure in transforming the experiences of women in the criminal justice system."

A copy of the full report is available from www.fawcettsociety.org.uk

"Commissioners find that the single most effective way of redressing the poor experiences of women in the system would be to introduce a law which obliges public bodies to promote sex equality."

Taonga and the Property (Relationships) Act 1976: Recent Case Law

Suzie Abdale¹

Introduction

Between 1977 and 2001, whilst the Matrimonial Property Act 1976 remained in force, family chattels were reasonably extensively defined within the Act.²

Section 11 of the MPA in providing that *"each spouse shall share equally in – ... the family chattels"* gave effect to the overarching purposes and principles of the Act which were to reform matrimonial property law; to recognise the equal contribution of both spouses to the marriage partnership; to provide for the just division of matrimonial property at the end of a marriage; and to reaffirm the legal capacity of married women.

With the repeal of the MPA 1976 following the enactment of the Property (Relationships) Amendment Act in 2001, the amending Act made fundamental changes to existing relationship property law. One of those changes was the removal of heirlooms and *taonga* from the definition of family chattels. Previously, heirlooms and *taonga* within the family chattels context would have come within the definition of household furniture³, and articles of household for family use or amenity or household ornament⁴, as the terms 'heirlooms' and '*taonga*' had not hitherto specifically featured within the family chattels definition.

Early on in the history of the MPA it had become apparent to the legislature that the catch-all definition of family chattels could lead to injustice in cases involving heirlooms and Maori *taonga*.

As early as October 1988, the Ministry of Justice provided a report on the Working Group on Matrimonial Property and Family Protection. The Working Group recommended⁵ that heirlooms and *taonga* be exempt from the definition of family chattels and would therefore be treated as separate property not available for equal division. Notably, the Working Group acknowledged that *"... The definition of the terms heirloom and taonga would require careful thought."*⁶

Thirteen years later, legislative effect was given to some of the recommendations made by the Working Group in its Report. Despite the Working Group's precautionary warning that the definitions of *taonga* and heirlooms '*would require careful thought*' the legislature did not assist those implementing the new Act with the provision of definitions for these terms.

Interestingly the Working Group Report referred to *taonga* within a limited context assuming its use by Maori only in regard to Maori chattels.

Taonga as a legal concept

The word *taonga* first appeared in the Maori version of the Treaty of Waitangi⁷. *Taonga* as a legal concept has since been considered by a number of Waitangi Tribunal reports⁸. The meaning of the word *taonga* seems always to have been dependant upon the context of its use, however, it is generally accepted that the word itself means treasure⁹. From the Treaty context it is clear that *taonga* as a legal concept is not confined to objects or possessions but includes cultural property, and Maori cultural and spiritual values.

But *taonga* within the PRA has not been defined. Consequently, there has been nothing to indicate that the word *taonga* was intended to have the same or similar meaning as has been developed to date. The only real assistance in the definition of the word *taonga* in the relationship property context is this it is within the definition of family chattels and therefore relates to moveable property and not land.

Even before the PRA was enacted the definition of *taonga* was considered in the obiter remarks of Durie J. in *Page v Page*¹⁰ where His Honour stated that:

"While I have not considered the meaning of "taonga" in the context of the Act, it seems to me that its ordinary and everyday use would encompass without difficulty the artworks of the mother in this case."

The importance of these remarks by the High Court prior to the commencement of the Act indicated that *taonga* could be claimed by any party to the proceedings, without the chattel being confined to a Maori context. In other words, the application of the Maori term *taonga* was not restrictive in application to the Maori source of the word.

The first substantive decision to consider the definition of the term *taonga* was *Perry v West*¹¹. In the Perry case the learned District Court Judge concurred with Durie J. in considering that the ability to claim a chattel a *taonga* is not restricted to Maori alone. Mather J states:

"Early on in the history of the MPA it had become apparent to the legislature that the catch-all definition of family chattels could lead to injustice in cases involving heirlooms and Maori taonga."

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“Taonga”

‘Although it is a Maori word, it describes a relationship between a person or persons and property, and I see no reason why it cannot apply to a person of any ethnic or cultural background.’

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“In the 2000 Act taonga is limited in scope by its inclusion in the definition of family chattels. Although it is a Maori word, it describes a relationship between a person or persons and property, and I see no reason why it cannot apply to a person of any ethnic or cultural background.”¹²

In addition, Mather J. concurred with Durie J. in determining that a chattel claimed as taonga could be a painting or a collection of paintings (as in the Page case).

What was not expressly stated by either Judges, but what is implied in both decisions is that a chattel claimed as a taonga did not have to be a Maori object. Mather J states:

“The Judge (Durie) made no mention of other art works which were part of the same collection but not painted by the husband’s mother. For my part I see no reason why they also could not be taonga. For the present purposes I consider that the painting in dispute is capable of being categorized as a taonga.”¹³

In the Perry case, Mr Perry claimed that a Colin McCahon painting was his taonga. Mr Perry had purchased the painting prior to marriage with money he had received from an Elam Fine Arts School prize for painting. In addition Mr Perry had been taught by Colin McCahon, and had exhibited his own paintings with McCahon in the 1960’s. Mr Perry looked upon Colin McCahon as a mentor and inspirator. These facts were undisputed. Mather J found that the painting in dispute was capable of being categorised as a taonga. On appeal Laurenson J agreed:

“On the evidence available I can accept, as did Mather FCJ, that the particular circumstances surrounding the acquisition of the painting could justify a finding that it was taonga to him at the time he was unmarried and despite his relationship with the respondent;...”¹⁴

In the Page case, Mr Page claimed that a collection of paintings inherited by him from his mother’s estate was his separate property. On an interlocutory appeal, an issue was raised regarding cases (such as this one) filed but unheard before the commencement of the PRA, wherein the provisions of the new Act would apply. In this case Durie J provided that in granting the appeal, his decision was dependant upon the matter being heard before the commencement of the PRA, otherwise it

would give the appellant an unfair advantage.

How else has the definition of taonga been shaped by judicial interpretation?

In the Perry case, one of the grounds of appeal of the Family Court decision was based upon the Lower Court’s finding that sale of a taonga is inconsistent with an item being a taonga. Mather J states:

“Finally I consider it inconsistent with an item being taonga that the person making that claim is willing to sell it simply to realise cash for other routine purposes, such as housing, except in the most pressing situation.”¹⁵

On this point, Justice Laurenson on appeal considered that possession of a taonga was not inconsistent with sale per se:

“With respect for the Judge’s view, I disagree, however, with his assessment of the significance to be attached to the possibility of the appellant later selling the painting. The references mention above indicate to me that the word “taonga” is used not only to describe objects of value, but to also convey a concept of value to be ascribed to anything, be it material or not, which has attached to it a special significance. This significance may attach for any number of reasons. These may range from simply being the bounty of nature to a site where an occasion of particular moment occurred, to a special, personal gift or ability repositied in a group or individual. I do not pretend to be able to supply an exhaustive list of such examples. However, by reason of the breadth of the meaning of the word as I perceive it, it seems to me that consequences of something being described as taonga will differ. At one extreme will be an acceptance that the taonga is sacred and inviolate and the other extreme may be an acceptance that the taonga is simply deserving of respect. In between will lie an acceptance of responsibilities to nurture and pass on to others;...”¹⁶

Laurenson J further states:

“Therefore I consider that whether or not the appellant may have been prepared to sell that painting is not determinative of the issue whether or not at some earlier point it could properly be regarded as the appellant’s taonga.”¹⁷

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“Sale is not inconsistent per se with the object being a taonga.”

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The Honourable Judge goes on to state:
“... the nature of the gift may be such that it would be quite inimical to the recipient’s receipt and possession of the object for it ever to be sold for a monetary return. ...however, if an individual, having acquired the object without reference to others, simply because it was of special significance to him or her, then decided to sell it, then that would not in my mind, necessarily indicate that the object had not, been regarded as an object of taonga to the owner;...”¹⁸

What makes a taonga?

In the **Perry** case, Laurenson J states that:
“A particular object may attain the status of taonga in two ways. The first is where the object is acquired by an individual because it has a special significance to that individual. The second is where the object assumes the special status of taonga because others also ascribe to it or bestow upon it a special significance for example, in the sense of gifts made to recognise a special relationship between the donor and the recipient. In either case the monetary value is irrelevant in determining whether the object is taonga;...”

Importantly, both the Lower Court Judge and the High Court Judge on appeal in the **Perry** case were of the view that the status of a chattel over the course of a relationship was capable of change and was not static. Laurenson J was of the view that the determining factor is the manner in which the painting was dealt with in the context of the relationship. Considering this determining factor, Laurenson J was able to come to the final

conclusion regarding the status of the painting:

“The net result is, in my view, that originally the painting could have been categorised as a taonga and hence separate property. However, by reason of the subsequent dealings with it within the context of the relationship it ceased to be the appellant’s taonga.”

Conclusion

From judicial consideration in the **Page** and **Perry** cases the following relevant points can be extracted:

1. It is clear that in determining whether a chattel is a *taonga* will depend upon the particular facts in any given case.
2. Any party to relationship property proceedings can claim that an object is a *taonga* irrespective of their ethnic or cultural heritage.
3. The object claimed as a *taonga* must either be:
 - (i) Acquired by an individual because it has a special significance to that individual; or
 - (ii) The object assumes the special status of *taonga* because others also ascribe to it or bestow upon it a special significance.
4. The value of the chattel is irrelevant.
5. Sale is not inconsistent per se with the object being a *taonga*.
6. Close scrutiny will be paid by the Court in determining how the object, claimed as a *taonga*, was acquired and how the *taonga* was treated within the context of the relationship.
7. Scrutiny will also be directed to any change of circumstances that may have an impact on the designation of an object as *taonga*.

1 Barrister, Crescent Chambers, ADLS Family Law Committee member, and counsel in the **Page** and **Perry** cases

2 S 2 MPA 1976

3 s2 “family chattels” (i)

4 s2 “family chattels” (ii)

5 Page 17

6 Page 18

7 6 February 1840, ‘ratou taonga katoa’, which has been translated as ‘all things valued or all things treasured’.

8 Orakei Report (1987), Muriwhenua Fishing Report (1988), Te Ika Whenua Rivers Report (1998).

9 Or ‘anything highly prized’ Oxford New Zealand Dictionary edited by H. W. Orsman, 1997

10 (2001) 21 FRNZ 275, Durie J; High Court Wellington

11 (2003) Mather J; Family Court Waitakere

12 Paragraph [89]

13 Paragraph [92]

14 **Perry v West** [2004] NZFLR 515, 525 paragraph [37] (a)

15 Paragraph [95]

16 **Perry v West** 525 paragraph [37] (c)

17 *ibid* 525 paragraph [37] (g)

18 **Perry v West** 526 paragraph [f]