

*Miscellaneous Paper 11*

*Women's Access to Justice : He Putanga Mo Nga Wahine ki te Tika*

THE EDUCATION AND TRAINING OF LAW STUDENTS AND LAWYERS

*A consultation paper*

## **The Law Commission**

The Law Commission is an independent advisory body, established by statute and funded by the taxpayer. Its main function is to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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Any personal information supplied in submissions made in connection with the Women's Access to Justice project will be used only for the purposes of the project and nothing the Commission publishes in respect of the project will identify any individual in any way.

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## WOMEN'S ACCESS TO JUSTICE: HE PUTANGA MO NGA WAHINE KI TE TIKA

The scope of this project was determined after extensive consultation with New Zealand women. At meetings and hui all around the country and in written and telephoned submissions, thousands of women described to the Commission their experiences with the law and identified the ways in which their expectations or needs have and have not been met. It was made clear that for a great many New Zealand women "access to justice" means, or at least requires, the ready availability of quality legal services. That quality is measured to a significant extent by the responsiveness of services and their providers to clients' social and economic situations and cultural backgrounds.

Amongst the women who questioned whether "justice" would be accessible if quality legal services were readily available, Maori women were strongly united in the view that the Treaty of Waitangi provides the measure against which justice should be assessed. As a result, Maori women's fundamental concerns about their access to justice are directed at the policies and activities of government agencies, particularly those in the state's justice sector.

The consultation papers which have already been published in the project are: *Information About Lawyers' Fees* (NZLC MP3), *Women's Access to Legal Information* (NZLC MP4), *Women's Access to Civil Legal Aid* (NZLC MP8), *Women's Access to Legal Advice and Representation* (NZLC MP9) and *Lawyers' Costs in Family Law Disputes* (NZLC MP10). The final consultation paper, on Maori women's access to justice, will present, in a cultural and historical context, the range of concerns voiced at 48 hui held around the country with Maori women.

This paper has been prepared by the project team for the purposes of raising issues and securing debate. It does not contain Law Commission policy nor does it necessarily reflect the views of the Law Commission. The Commissioners responsible for this project are Joanne Morris and Denese Henare.

Please contact Michelle Vaughan if you would like further information about the project – Freephone 0800 88 3453, email [mvaughan@lawcom.govt.nz](mailto:mvaughan@lawcom.govt.nz) or write to Freepost 56452, Law Commission, PO Box 2590, Wellington. We would like responses to this paper by **Friday 17 October 1997**, please. If you have problems meeting this deadline, please let us know.

The responses to this paper, together with the responses to the project's other consultation papers and information gathered through further meetings and research, will inform the Commission's report to the Minister of Justice, which is due in April 1998. The project's terms of reference state that the Commission will report concerning:

- principles and processes to be followed by policy makers and lawmakers;
- specific law reforms; and
- educational and other strategies;

which will promote the just treatment of women by the legal system.



## SOME COMMENTS ON LAWYERS' EDUCATION

“Some lawyers have no understanding of the nature and effects of domestic violence.” – *Submission 333*

“[A lawyer] needs to be someone who can understand our needs and is sensitive to us.” – *Transcript of hui held with Maori women in Rohe 3*

“There is a feeling of being cut off and removed from the system while two lawyers make their own solution and their clients, who are the people most affected, are left out of the process.” – *Submission 146*

“We want a good lawyer, one that is going to help us, not one that just looks at us, not a lawyer who speaks big words or high words we can't really understand.” – *Transcript of hui held with Maori women in Rohe 6*

“There is not enough training on communication skills [and] Treaty issues.” – *Submission 187 (lawyer)*

“There needs to be a focus on the differing needs of clients by reason of gender, age and cultural background.” – *Submission 298 (lawyer)*

“Awareness of gender issues, gender stereotypes etc [is] necessary for all practitioners.” – *Submission 286 (lawyer)*

“For me it was a shock leaving university to start a job where I had to learn everything over again. I wasn't applying very much of what I had learnt at university.” – *Submission 359 (lawyer)*

“I do not think a law degree prepares you for real people with real problems.” – *Submission 282 (lawyer)*

“We emerge from law school completely ignorant about how to *do* anything.” – *Submission 312 (lawyer)*

“There is a need to promote skills with people handling, making clients feel at ease, advising in clear logical and where possible non-legal language. More training in these areas would be helpful.” – *Submission 335 (lawyer)*

“Continuing legal education (seminars etc) [are] very useful but often seminars are poorly attended and those who should attend don't.” – *Submission 364 (lawyer)*

“Education in communication skills and gender and culture issues cannot be restricted to law students. Judges and senior lawyers and partners should also be required to undertake refresher courses in these areas.” – *Submission on Women's Access to Legal Advice and Representation (NZLC MP9, 1997) lawyer*

## INTRODUCTION

Lawyers are at the front-line of the legal services industry. Generally, a lawyer is a person's main contact with the legal system . . . . Client satisfaction in legal matters depends to a great extent on the integrity and responsiveness of the legal profession.<sup>1</sup>

### **The reason for this paper**

1 Access to justice is essential if citizens' legal rights are to be upheld. The Law Commission's project Women's Access to Justice : He Putanga mo nga Wahine ki te Tika was initiated by the Commission, with the approval of the Minister of Justice, to investigate women's experiences of barriers to their access to justice and to recommend ways in which the legal system can promote the just treatment of women. At more than 100 hui and meetings throughout the country and in 300 written and telephoned submissions, thousands of New Zealand women have voiced wide-ranging complaints to the Commission about the difficulty of securing legal services which are responsive to their social, economic and cultural situations.<sup>2</sup>

2 This is the sixth in a series of seven consultation papers in the project. Each presents, for information and discussion, the criticisms made by many New Zealand women about aspects of our legal system which they regard as being in need of urgent attention. This paper focuses on the academic and professional training of lawyers and places the issues raised by women in a context which it is hoped will promote their debate by legal practitioners, academics and others concerned with the aims, content and effectiveness of lawyers' training.

3 The Commission will report to the Minister of Justice in April 1998. As with the other consultation papers in the Women's Access to Justice project, the purpose of this paper is to secure debate of the issues it raises so that our report may be properly informed, constructive and balanced.

### **The context for the discussion**

4 During the past three decades there have been major changes in New Zealand society, in the composition of the legal profession and in legal education. While differences between the life prospects of men and women have altered in that time, increased understanding of the ideals of equity and equality has heightened public awareness of the "gender gap" and its effects upon diverse New Zealanders' lives. Judicial descriptions of battered women's syndrome, and recognition of the "feminisation of poverty"; seminars on the protection of women by international conventions, on gender bias, and on EEO in the legal profession; reform of the law

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<sup>1</sup> Attorney-General's Department, *The Justice Statement* (Canberra, May 1995), 38.

<sup>2</sup> In addition to the meetings with women consumers of legal services, the Law Commission has held numerous meetings with lawyers in Auckland, Hamilton, Rotorua, Christchurch, Invercargill, Nelson, Wellington and Hastings, at District and New Zealand Law Society level, and with members of the judiciary and government officials. At the time this paper was published the Commission had received over 500 written and telephoned submissions in response to its original call for submissions: some 300 from individual women and community groups and 200 from individual lawyers. Further input to the project has been received from 60 Pacific Islands women in a *Report on Consultation with Pacific Island Women* prepared for the Commission by Auckland lawyers Ida Malosi and Sandra Alofivae, and from approximately 100 lesbians in a *Report on Consultation with Lesbians* prepared for the Commission by Joy Liddicoat. The Commission has also received many submissions on the consultation papers *Information About Lawyers' Fees* (NZLC MP3), *Women's Access to Legal Information* (NZLC MP4), *Women's Access to Civil Legal Aid* (NZLC MP8) *Women's Access to Legal Advice and Representation* (NZLC MP9) and *Lawyers' Costs in Family Law Disputes* (NZLC MP10).



governing the evidence of complainants in sexual cases; and recent proposals to overcome inequities in the law governing the division of matrimonial and de facto property - all are modern entries in the database of New Zealand legal knowledge.

5 Concurrently, there has been an upsurge in public awareness of the socio-economic gap between Maori and non-Maori and, through the growing tide of claims and cases which invoke the Treaty of Waitangi, increased understanding of the reasons for that gap. The resulting Treaty jurisprudence is a phenomenon of which every New Zealand lawyer is aware.

6 As a result of such developments, and of the now widespread recognition that there must be ingrained effects of the fact that the making, practice and teaching of law in New Zealand have traditionally been the preserve of Pakeha men, today's judges, lawyers and legal academics are well aware that, in some spheres at least, the legal system should be more responsive to the needs of women and Maori. Undoubtedly, however, the experiences and perceptions of those presently working in or near our legal system range across a wide spectrum. Some will be keenly aware of the critiques of law and its processes and agents which have been made by individuals and groups, including women and Maori, whose relationship with the legal system has been largely that of an outsider. Others will have less awareness of the issues, and some may not regard them as significant. Traditionally, the system of legal education did not feel called upon to equip lawyers to meet the needs of "minority" groups. The question now is whether it should enhance its focus on these matters and, if so, how.

### **What women told the Commission**

7 Many of the women who spoke or wrote to the Commission said that the quality of the service they received from their lawyers presented a number of barriers to their access to justice. It was repeatedly suggested that the education and training of law students and lawyers could better prepare members of our legal profession to assist their diverse clientele.

8 The paper's focus on these matters does not deny that many New Zealand lawyers provide high quality service to their clients. Nor is it meant to suggest that only by changing the content of law students' and lawyers' education and training will the range of concerns voiced to the Commission be met. The purpose of each of the consultation papers in the Women's Access to Justice project is to relay, for information, discussion and response, the views of the thousands of New Zealand women who have identified barriers to their access to justice. Together, the six consultation papers now published, and the seventh which is in preparation, describe the most urgent of the interrelated concerns that women have voiced. It is within that broader context that this paper seeks to stimulate debate about the role which law students' and lawyers' education does and might play in responding to those concerns.

9 The Commission was told by most of the women who spoke to it that resort to the legal system was a luxury which they would only contemplate in a crisis. As a result, the matters for which most had sought legal assistance arose from a family breakdown, when protection from family violence, the resolution of a custody and access dispute and/or a division of matrimonial or de facto property was required. Less commonly, women who spoke to the Commission had been involved with the legal system as a witness or defendant in criminal matters or as a relative of a witness or defendant.

10 Many of the women who had obtained legal advice said that their lawyers did not appear to understand the effects on women's lives that are caused by the situations for which they most commonly seek legal assistance. They said lawyers can be ignorant of or indifferent to women's fear of the cost of legal services, the violence that may be dominating their lives, and the urgency with which they need matters resolved so they can ensure their own security and that of

their children. Throughout the consultation process women identified a need for more women legal practitioners so as to enhance lawyers' understanding of women's lives.

11 For Maori women the problems were particularly acute. At 48 hui with Maori women the Commission was told of the barriers that a predominantly Pakeha legal profession and legal system present to Maori women's and indeed Maori men's access to justice.<sup>3</sup> Maori women throughout New Zealand told the Commission that lawyers' lack of awareness of Treaty of Waitangi and Maori cultural issues posed significant barriers to accessing legal services. Consistently it was said that there is a need for more Maori and, in particular, Maori women lawyers.

12 Greater diversity in the legal profession may ameliorate women's concerns but the criticisms of lawyers' competence suggest that the achievement of equal employment opportunities in the profession will not provide the whole solution. Women made it plain that a lawyer's sex or race does not guarantee her or his ability to deliver appropriate legal services.

13 There are now over 7400 lawyers with practising certificates spread throughout New Zealand, 28% of whom are women and 3% of whom are Maori.<sup>4</sup> Approximately 90% of lawyers are in private practice offering services to clients. The Commission has spoken to or received written submissions from several hundred lawyers in private practice, and many have said that their training did not prepare them adequately for legal practice. It is their view that the law degree currently prepares practitioners for legal analysis and research but fails to provide the everyday skills that legal practice requires. A particular concern of lawyers is the lack of training in the interpersonal skills of communication necessary for dealing with clients. Another concern, although less commonly voiced, is that the education and training which lawyers receive provides an insufficient basis for understanding the social context within which law is practised and its impact upon clients' lives and needs.

### **Ideas for change**

14 The issues raised are aspects of the wider questions: what academic and professional training should law students and lawyers receive, and how should they receive it? In a changing society it is inevitable that the answers given to those questions will also change over time. Certainly, there have been many changes made to the style and content of New Zealand law students' and lawyers' education and training since the days when our more senior lawyers were admitted to legal practice. But attention has not yet been closely focused here, as it has in Australia and Canada - countries with similar legal traditions and societies - on the desirability and practicality, or otherwise, of educational initiatives, especially at university level, to enhance lawyers' understanding of gender and cultural issues.

15 It is plain that a lawyer's understanding of those matters derives from the sum of her or his life experiences, of which formal education at school, university and beyond is but a part. However, from the Commission's consultations with women clients, and with lawyers, it is clear that many regard law students' and lawyers' university and subsequent education as having a particularly important role to play in the development of knowledge of gender, Treaty and Maori cultural issues. The demographic profile of our legal profession, predominantly male and non-Maori, was said to make it especially important that lawyers be educated in these matters.

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<sup>3</sup> These issues will be discussed in more detail in the forthcoming consultation paper on Maori women's access to justice.

<sup>4</sup> Figures provided by the New Zealand Law Society.

16 Many of those with whom the Commission has consulted, including lawyers, have acknowledged a particular challenge that is posed when focusing attention on whether and how law students' and lawyers' education and training should enhance understanding of gender, Treaty and Maori cultural issues. The challenge arises from the very fact that many of the issues are not yet widely understood or regarded as being important elements in a lawyer's stock of knowledge and skills. As a result, any suggestion that the issues warrant greater attention by law schools and in lawyers' continuing education may be greeted without enthusiasm.

17 Overseas initiatives designed to increase law students' understanding of gender and cultural issues suggest that the challenge needs to be met by a concerted plan of action spearheaded by those who are best placed to ensure its implementation. The plans of action recommended in Australia and Canada, by the Australian Law Reform Commission and a Task Force of the Canadian Bar Association, incorporate a variety of strategies which, in combination, create a strong base from which to encourage academics to integrate "alternative" information and perspectives in courses across the law curriculum.

18 When considering whether and how the education and training of New Zealand law students and lawyers might have an enhanced focus on gender, the Treaty and Maori cultural issues, one relevant matter is the future of the 1997 report for the New Zealand Law Society and the Council of Legal Education on *Education and Training in Legal Ethics and Professional Responsibility* (the Cotter Report).<sup>5</sup> This is because poor service by lawyers occasioned by inadequate awareness of clients' needs can result in breaches of the Rules of Professional Conduct for Barristers and Solicitors. An enhanced focus on professional responsibility in law students' and lawyers' training is likely to have beneficial effects on the quality of service provided to diverse clients.

19 The Cotter Report proposes that material on professional responsibility should be integrated throughout each of the three stages of law students' and lawyers' education and training (university, professional training, and continuing legal education) so that specified objectives will be attained during each stage. The precise manner by which the Report recommends this be achieved may be contentious but the framework of a goal-orientated approach, and the Report's identification of obstacles to the teaching of professional responsibility to law students and lawyers, are relevant in the present context.

20 Although the issues raised in this paper overlap with the subject of the Cotter Report, the primary concern here is to raise for debate the questions whether and if so how law students' and lawyers' education and training should ensure that members of our legal profession:

- achieve an understanding of the social context within which law operates, especially the effects of gender, the meaning of the Treaty of Waitangi and Maori cultural issues;
- achieve an understanding of how the law impacts upon people who have historically been excluded from making and applying it; and
- develop the interpersonal communication skills with which to practise law, taking into account the diverse needs of the client base to be served.<sup>6</sup>

21 Lawyers and their clients have a common interest in the efficient and effective delivery of legal services. In the climate of increasing knowledge of the significance of gender and cultural differences, the Law Commission invites those involved in the education and training of

<sup>5</sup> W Brent Cotter QC and Christopher Roper, *Report on a Project on Education and Training in Legal Ethics and Professional Responsibility for the Council of Legal Education and the New Zealand Law Society* (1997).

<sup>6</sup> There are many matters which could be additional subjects of law students' and lawyers' education and training. This paper only focuses on the matters that have been raised with the Commission in the course of the project's consultation process.

law students and lawyers to consider afresh the questions which many women clients have posed. We seek advice on how the way ahead might be planned so as to improve the quality of legal services and the ability of all New Zealanders to secure justice

This paper is intended to stimulate the debate about the aims, content and effectiveness of New Zealand law students' and lawyers' university education and subsequent training. It is based upon the comments made to the Commission by thousands of New Zealand women users and potential users of legal services. The Commission would be very grateful for responses to those comments and/or answers to all or any of the questions asked in the paper about which you have particular knowledge or views. Alternatively, we would be very grateful for a more general submission based on some of the ideas in this paper.

Please return these responses to the **Women's Access to Justice: He Putanga mo nga Wahine ki te Tika Project, Freepost 56452, Law Commission, PO Box 2590, Wellington**. Alternatively, if you would like to make a submission by telephone, please call **Michelle Vaughan** toll-free on **0800 88 3453**. If you would like to make a submission by e-mail, please send it to **[mvaughan@lawcom.govt.nz](mailto:mvaughan@lawcom.govt.nz)**.

We would like responses by **Friday 17 October 1997**, please. If you have problems meeting this deadline, please let us know.

## PART 1 – LAWYERS’ EDUCATION – AN OVERVIEW

22 This part of the paper contains a brief description of each stage of law students’ and lawyers’ education: university education, preparation for admission, and continuing legal education.

### **The university education of lawyers**

23 There are currently five universities in New Zealand offering a Bachelor of Laws degree. This section of the paper provides a brief description of:

- the core curriculum,
- the entry criteria, and
- the demographic profile of law students.

#### *The core curriculum*

24 Since 1987, all students intending to complete a law degree must pass six core subjects which are prescribed by the Council of Legal Education<sup>7</sup> and a specific number of credits from a list of optional subjects.

25 The six core subjects and their content, as prescribed by the Council of Legal Education, are:

*Legal System* – An introduction to the New Zealand legal system. Legal reasoning and the judicial process, including selected problems in statutory interpretation. Selected legal institutions in England and New Zealand. Selected legal concepts. This subject may include studies in the history of law and legal institutions in England and New Zealand.

Or: An historical introduction to, and descriptive outline of, the legal systems in England and New Zealand, including the structure of government, civil and criminal proceedings, the sources of law and the main divisions of substantive law. Legal reasoning and the judicial process, including an introduction of statutory interpretation. An elementary treatment of legal concepts.

*The Law of Contract* – The general principles of the law of contract and agency.

*The Law of Torts* – General principles of civil liability. The law as to the various kinds of torts. The law relating to compensation for personal injury by accident in New Zealand.

*Criminal Law* – The general principles of criminal liability. The law relating to indictable and other selected offences chargeable under New Zealand law. Procedure on indictment and summary procedure (excluding Evidence).

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<sup>7</sup> The Council of Legal Education defines and prescribes the courses of study, practical training and experience that potential legal practitioners must complete for admission to practise as a barrister and solicitor in New Zealand. Members of the Council are two judges of the High Court, one District Court Judge, five persons nominated by the New Zealand Law Society, the deans of the five law schools, two persons nominated by the Council of the New Zealand Law Students’ Association Incorporated, one person (not a lawyer or law student) nominated by the Minister of Justice, and one member nominated by the Council.

*Public Law* – The principles and working of the constitution, the institutions of government, the exercise of public power and relations between citizen and the state. Controls on the exercise of public power, including an introduction to judicial review.

*Property Law* – An introduction to the law relating to property, both legal and equitable. (Or: *Land Law* – The history and principles of land law; and *Equity and the Law of Succession* – The principles of equity with particular reference to the law of trusts. The principles of the law of succession and of the administration of estates. Choses in action and the assignment thereof.)<sup>8</sup>

26 In addition to the six core subjects, other compulsory subjects are prescribed by four of the universities:

- *Auckland Faculty of Law* – Legal Research and Writing (non-credit course)<sup>9</sup>; Jurisprudence; Law of Personal Property.
- *Waikato School of Law* – Legal Method; Law and Societies; Jurisprudence; Corporate Entities; Dispute Resolution.<sup>10</sup>
- *Victoria Faculty of Law* – Mooting (non-credit course); Legal Writing Programme (non-credit course).
- *Otago Faculty of Law* – Jurisprudence; Research and Writing Programme (non-credit course); and Advocacy Skills Programme (non-credit course).

27 All the law schools offer to third and fourth year students a range of optional subjects which form part of the law degree. The prescription for these courses is approved within each university. In 1997 there are 15 subjects offered by all five law schools in addition to the compulsory subjects. These common subjects form a second tier of subjects that are taken by a large number of students. For example, in 1996 at Otago Faculty of Law the most popular full-year elective subjects for third year students were Company Law, Family Law and the Law of Evidence.<sup>11</sup>

28 The 15 optional subjects offered at all New Zealand law faculties and schools in 1997 are:

- Administrative Law
- International Law
- Family Law
- Conflict of Laws
- Negotiation and Mediation<sup>12</sup>
- Natural Resource Law
- Evidence
- Civil Procedure
- Company Law<sup>13</sup>
- Commercial Law
- Employment Law
- Intellectual Property Law
- Tax Law

<sup>8</sup> Prescription of Subjects, Council of Legal Education.

<sup>9</sup> A non-credit course does not have a credit point value which can be counted in the credits required for a degree.

<sup>10</sup> At Waikato Law School Public Law is taught as two compulsory courses.

<sup>11</sup> *Course Advice for Law Students* (University of Otago Law Faculty, 1997), 13.

<sup>12</sup> This subject is compulsory at Waikato Law School as Dispute Resolution.

<sup>13</sup> This subject is analogous to the compulsory subject Corporate Entities at Waikato Law School.

- Jurisprudence<sup>14</sup>
- Trusts.<sup>15</sup>

### *Entry criteria*

29 All of the New Zealand law schools have entry requirements either at stage 1 or stage 2 or at both stages.

*Auckland Faculty of Law* – In 1997, 425 places were made available to the stage 1 subject Legal System on the basis of students' academic record – either bursary or university – with some students admitted under the Provisional Entrance Regulations which allow their sixth-form certificate grades to be considered. The Faculty of Law has set quotas for Maori, Indigenous Pacific Islanders, disabled, international and mature students at both stage 1 and 2. In 1997, for example, the Maori quota was set at a maximum of 49 places for Legal System. Admission to stage 2 papers is based mainly on the grade average obtained in Legal System and non-law subjects. In 1997, 270 places were offered to stage 2 students.

*Waikato School of Law* – Waikato also has academic criteria – bursary or sixth-form certificate, or university record – for entry to the law school as well as equity considerations in accordance with the university's regional and social commitment. There are no quotas for particular groups of students. In 1997, 199 students were admitted to the law school.<sup>16</sup>

*Victoria Faculty of Law* – Entry to the stage 1 subject Legal System was capped in 1997 at 450 places and students were selected on merit (bursary marks, sixth-form certificate or university record). There is a quota of 45 places at stage 1 for Maori students. Entry to stage 2 is limited to 1200 places over the four second-year subjects. A maximum of 120 places across the four subjects is set aside for students selected under the Maori quota. To qualify for entry to stage 2, students must pass the subject Legal System (or an equivalent subject at another university) and at least 30 non-law credits.

*Canterbury School of Law* – Anyone qualifying for entrance to university may enrol for the stage 1 subject Legal System at Canterbury. Enrolment for each stage 2 subject is limited to 180 "general admissions" students and is grade-based. There are 10 additional places each for Maori and international students.

*Otago Faculty of Law* – Anyone qualifying for entrance to university may enrol for the stage 1 subject Legal System. Enrolment at stage 2 is limited to 200 and is based mainly on the mark achieved in the stage 1 subject Legal System. Applicants must also show a reasonable level of competence in their non-law subjects.

### *A demographic profile of law students*

30 The number of law graduates has been steadily increasing each year and is predicted to continue to increase. In 1995, 837 students graduated from New Zealand law schools. By the

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<sup>14</sup> This subject is compulsory at the Auckland Law Faculty, Waikato Law School and Otago Law Faculty.

<sup>15</sup> Auckland, Waikato and Canterbury are teaching as part of the core curriculum a compulsory Equity course which includes trusts.

<sup>16</sup> Waikato School of Law does not have an intermediate year. Students who have successfully completed all stage 1 (law and non-law) subjects are granted automatic re-entry to Law School at stage 2.

year 2000 that number is expected to have grown to 944.<sup>17</sup> The statistical material available about law students at each university varies.

- *Auckland Faculty of Law* – In 1996, women comprised 54% of Auckland law students. Asian students are the largest minority ethnic group amongst entrants to law school (15% in 1996).<sup>18</sup> In 1996, 70% of graduating students were Pakeha, 11% Maori,<sup>19</sup> 6% Pacific Islanders and 8% Asian. 58% were women.
- *Waikato School of Law* – Women comprised 63% of law students in 1995, 66% in 1996 and 57% in 1997. In 1997, 23% of students were Maori.<sup>20</sup>
- *Victoria Faculty of Law* – In 1997, 11% of the 712 law students at Victoria were Maori and 2.8% were Pacific Islanders.
- *Canterbury School of Law* – In 1996, 56% of students admitted into the first year of law school were women (57% in 1995) and 10% were Maori (9% in 1995). In 1997, of the 1140 students, 9.2% were Maori and 1.5% were Pacific Islanders.<sup>21</sup>
- *Otago Faculty of Law* – In 1997, 59.6% of the 601 students enrolled in the first-year course are women. Women comprise 62.8% of second stage students in 1997. Maori comprise 5.5% of the 1295 students enrolled for a law degree (undergraduate or post graduate)<sup>22</sup> and 2.6% are Pacific Islanders.

### **Institute of Professional Legal Studies Course**

31 After completing a law degree, law graduates who wish to be admitted as a barrister and solicitor must complete the Institute of Professional Legal Studies' (IPLS) course. The current IPLS course was established in 1988 as a result of a report on the reform of professional legal training in New Zealand.<sup>23</sup> The course is a 13-week full-time course which focuses on skills training. It is run up to three times a year in each of the five centres which have law schools.

#### *Course content*

32 Since its inception the IPLS course has focused on three groups of general skills:

- oral and written communication;
- analytical, problem identification and problem solving; and

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<sup>17</sup> Working Party of the Council of Legal Education, *Report on the Review of Practical Legal Training in New Zealand* (October 1996), 57.

<sup>18</sup> At the time of the 1991 Census 52 602 people (53% of the total New Zealand Asian population) lived in the Auckland region: *New Zealand Now – Asian New Zealanders* (Statistics NZ, 1995) 26.

<sup>19</sup> Maori constitute approximately 13% of the New Zealand population: *New Zealand Now – Maori* (Statistics NZ, 1994) 1. Maori make up 11% of the population serviced by the Auckland Regional Council, 10.

<sup>20</sup> Almost 20% of the population serviced by the Waikato Regional Council is Maori: *New Zealand Now – Maori*, 10.

<sup>21</sup> Approximately 6% of the population serviced by the Canterbury Regional Council is Maori: *New Zealand Now – Maori*, 10.

<sup>22</sup> Approximately 5% of the population serviced by the Otago Regional Council is Maori: *New Zealand Now – Maori*, 10.

<sup>23</sup> Neil Gold, *Report on the Reform of Professional Legal Training in New Zealand for the New Zealand Law Society and the Council of Legal Education* (1987). Prior to the establishment of the IPLS course the law degree developed as a 4 year course with an additional year known as professionals. In that fifth year, students attended university part-time to undertake practically-oriented legal subjects.



- planning, organisation and management.

These skills are taught in the context of typical transactions which a new lawyer is expected to undertake.

33 The course consists of a Litigation Module and a Commercial/Property Law Module. In the Litigation Module the skills, prescribed by the Council of Legal Education and taught in the context of criminal and civil litigation, are:

- advocacy,
- fact analysis, and
- writing and drafting of court documents.

34 In the Commercial/Property Law Module the prescribed skills taught in the context of residential sale and purchase, sale and purchase of a business, commercial agreements and wills, are:

- analysis of legal documents,
- interviewing and advising,
- law office management,
- negotiation, and
- writing and drafting.

#### *Profile of students completing the IPLS course*

35 The number of students completing the IPLS course is increasing. In 1988, 404 students completed practical legal training. In 1996, 736 students completed the course.<sup>24</sup> During 1996, women made up 49% of the 728 students enrolled in the course. Of those students who provided information about their ethnic origin 71% were European/Pakeha, 6% were Maori, 1.4% were Pacific Islanders, and 1.4% were Asian.<sup>25</sup>

#### *Student employment trends*

36 Employment surveys are completed by students at the end of each IPLS course. The figures for the years 1992 to 1995 indicate that the number of students assured of employment as barristers and solicitors fluctuates from year to year, the number of students assured of other employment is increasing, and the number of students who are unemployed but seeking full-time work is decreasing.<sup>26</sup>

<b>Immediate career prospects of IPLS students<sup>27</sup></b>					
	<b>1992</b>	<b>1993</b>	<b>1994</b>	<b>1995</b>	<b>1996</b>
Employment arranged as a barrister and solicitor or as a barrister sole	46%	42%	38%	45%	39.5%

<sup>24</sup> *Review of Practical Legal Training in New Zealand*, 57.

<sup>25</sup> Sixth Report of the Council of Legal Education, 10.

<sup>26</sup> *Review of Practical Legal Training in New Zealand*, 58.

<sup>27</sup> The percentages in the table relate to the proportion of survey respondents in each year. Figures provided by the IPLS.

Employment arranged other than as a barrister and solicitor or as a barrister sole	10%	12%	16%	19%	23.9%
Unemployed seeking full-time employment	41%	39%	38%	31%	)
Unemployed not seeking full-time employment	3%	7%	8%	5%	)

37 The 1996 report on *Graduate Employment in New Zealand*<sup>28</sup> provides further information about 834 of the 852 women and men who graduated from a New Zealand law school in the year ending 31 May 1996. At the time these graduates applied to have their degrees conferred, 455 were in full-time work, 159 were still looking for employment, 132 were engaged in full-time study, 77 were going overseas, and 11 were not available for employment in New Zealand.<sup>29</sup> Of the 455 in full-time employment, 67.05% were working in “Business and Financial Services” and 18.95% in “Community, Social and Personal Services”.<sup>30</sup>

### Continuing legal education

38 Once a lawyer is admitted to practice, compulsory legal training ceases. This section provides a brief overview of the New Zealand Law Society’s continuing legal education programmes, the district law societies’ initiatives, and other training that is available to lawyers.

#### *The New Zealand Law Society continuing legal education programme*

39 Continuing legal education is not compulsory in New Zealand.<sup>31</sup> However, each year the New Zealand Law Society runs a national continuing legal education programme for lawyers. The programme has been in operation since the late 1970s and is administered by the New Zealand Law Society Director of Education under the direction of the Society’s Continuing Legal Education Committee.

40 The 1997 national programme is divided into four main types of courses:

- *Standard seminars* – Standard seminars are practical programmes generally organised around the need for education about new legislation or topics for which a national demand has been identified (eg “Securities Act Update”). The seminars are provided in as many centres as possible – either by direct presentation or through audio conference link to areas outside the main centres.
- *Conferences and intensives* – In response to an increasing demand for specialist education, conferences and “intensives” (intensive 1-day programmes involving a range of speakers) are offered. During 1997 a company law conference and a property law conference are planned. The intensives planned are “Compensation at the Margin of ACC” and “Further Developments in Tendering in the Public Sector”.

<sup>28</sup> New Zealand Vice-Chancellors’ Committee, *Graduate Employment in New Zealand 1996: A Summary of Destinations*, Report No 23, 1996.

<sup>29</sup> *Graduate Employment in New Zealand 1996*, 58.

<sup>30</sup> The remaining graduates in full-time employment were working in the “Wholesale and Retail Trade” (7.05%), “Manufacturing” (2.4%), “Transport and Communication” (0.9%), and “Other” (2.4%), 59.

<sup>31</sup> The Institute of Chartered Accountants requires its members to participate in mandatory continuing legal education. Section 62 of the Medical Practitioners Act 1995 provides that the Medical Council may set or recognise competence programmes for the purpose of examining or improving the competence of medical practitioners.

- *Training programmes* – Skills-based training programmes are held so that practitioners can improve their skills in a number of areas including writing, drafting, negotiation, reading accounts and balance sheets, and time and stress management. These courses include: “Drafting Better Pleadings”; Litigation Skills Programme”; “The Lawyer as Negotiator”; and “Plain English Drafting”.
- *Planned curriculum* – The planned curriculum is a series of workshops intended for practitioners within their first 3 years of practice. These courses are designed to complement the skills-based IPLS course. It is hoped that the following courses will be offered during 1997: Duty Solicitor Training Programme; Sentencing Pleas in Mitigation and Summary Defended Hearings; Domestic Conveyancing Programme; Family Law Advocacy; and Civil Litigation.

41 A variety of methods is used to try to determine lawyers’ learning needs, including needs analysis workshops, questionnaires, consultations with a variety of special consultative groups set up for this purpose, and consultations with a wide variety of other groups.<sup>32</sup>

42 The standard seminar fee is \$130 (inclusive of GST). Other course costs vary. For example, the workshop “Counsel for the Child – Techniques and Issues” costs \$715 (plus GST) for a 3-day workshop.

43 On average, lawyers enrol for 1.5 New Zealand Law Society courses annually. The analysis of enrolments in terms of sex, length of time in practice since admission, size of firm, occupation and geographic distribution has found that:

- women practitioners are more likely than men to attend [continuing legal education] courses regardless of experience, occupation, size of firm, or location; and
- male barristers and male members of firms with more than 15 partners are least likely to attend [continuing legal education] courses with enrolment rates also declining somewhat among male practitioners who have been admitted for more than 20 years.<sup>33</sup>

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<sup>32</sup> Letter from New Zealand Law Society Director of Education dated 13 November 1996.

<sup>33</sup> New Zealand Law Society Annual Report for the Year Ended 30 November 1996, 18.

*District Law Societies' continuing legal education*

44 Before beginning to practise on her or his own account a solicitor must have received, during the preceding 3 years, adequate instruction and examination in the duties of a solicitor relating to the audit of solicitors' trust accounts or to the receipt of money. The instruction and examinations are specified by the Council of the relevant District Law Society.<sup>34</sup> Apart from this instruction, the offering of continuing legal education programmes by district law societies depends on the size and resources of each society. The Auckland District Law Society, which has the most extensive district programme, offers a wide range of seminars from basic courses for general practice, including communication skills, to specialist sessions. The seminars are generally short (usually 2 hours), use the skills and knowledge of experienced practitioners in the region, and are geared to provide information that is of maximum immediate practical use. Some of the smaller district law societies run programmes which are designed to complement the New Zealand Law Society programme. However, a number of districts do not have the resources to provide continuing legal education and rely on the New Zealand Law Society programme.

*Other training opportunities*

45 There are a number of other training opportunities available to lawyers in practice. Some law firms run education and training programmes for staff development on a regular basis. At a more informal level, some senior members of the profession also provide training and/or mentoring to younger lawyers in the skills of lawyering.

46 There is also a range of societies which run seminars for their members on matters of common interest, for example the Law and Economics Association of New Zealand. In university centres, the law schools may also offer regular seminars on law-related matters. In addition, private organisations provide seminars and conferences which lawyers can attend.

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<sup>34</sup> Alternatively, the solicitor can apply to the Court for leave to practise on her or his own account: Law Practitioners Act 1982 s 55(3). There are currently no requirements placed on barristers wishing to practise on their own account.

## PART 2 – GENDER AND LAWYERS’ COMPETENCE

47 This part of the paper begins by providing a definition of gender. It then illustrates the effects of gender on New Zealand women using material from recent studies and the 1991 Census.<sup>35</sup> Finally, by using the experiences of women as provided to the Commission in its consultation process, this part illustrates the relevance of the effects of gender to lawyers’ interactions with clients.

48 Gender has been described as the social construction of male and female identity which develops over time and is so influential as to be part of a society’s culture:

Gender describes more than biological differences between men and women. It includes the ways in which those differences, whether real or perceived, have been valued, used and relied upon to classify women and men and to assign roles and expectations to them.

The significance of this is that the lives and experiences of women and men, including their experiences of the legal system, occur within complex sets of differing social and cultural expectations.<sup>36</sup>

49 There are, of course, many socially constructed factors other than gender – such as ethnicity, age, sexuality and mental and physical ability – which affect, often profoundly, groups made up of both men and women. But those factors operate in an environment in which gender counts, with the result that they do not have identical effects for men and women. For women, as is plain from statistics, and as has been emphasised in the Commission’s many meetings – especially with Maori women, Pacific women, lesbians and disabled women – gender compounds other causes of disadvantage.

### **The social and economic context of New Zealand women’s lives**

#### *Women’s income levels*

50 One of the most obvious effects of gender is that, within the labour market, women are over-represented in occupations with low median incomes, such as clerical and service occupations, and in part-time paid work. Further, women do not participate in the paid workforce to the extent that men do and are over-represented among those on benefits. This is indicated by the New Zealand Census figures of 1991.<sup>37</sup> The median income from all sources for women aged 15 years and over in 1991 was \$11 278 (1996 ≈ \$12 405) compared with \$19 243 (1996 ≈ \$21 167) for men.<sup>38</sup> The median total income for Maori women in 1991 was \$10 027 (1996 ≈ \$11 029), 88% of that of non-Maori women.<sup>39</sup> The median total income for Pacific Islands women in 1991 was \$9750 (1996 ≈ \$10 670).<sup>40</sup> Women’s total weekly earnings, including overtime, were on average 74% of men’s at February 1993.<sup>41</sup> In 1991, women

<sup>35</sup> The results of the 1996 Census were not available at the time this paper went to print.

<sup>36</sup> *Equality Before the Law* (ALRC, DP54, 1993) 1.

<sup>37</sup> Statistics New Zealand advises that from 1991 until the end of 1995, the Consumer Price Index moved upwards by 10.4%. Income levels did not move upwards to that extent, however. Also, different groups within the population will have experienced different shifts in their income levels over that period. A rough indication of the current value of the 1991 income dollar figures can be achieved by multiplying the 1991 figures by 10% (see bracketed figures).

<sup>38</sup> *All About Women in New Zealand* (Statistics NZ, Wellington, 1993), 109.

<sup>39</sup> *All About Women in New Zealand*, 109.

<sup>40</sup> *Samoan People in New Zealand* (Statistics NZ, Wellington, 1995), 45.

<sup>41</sup> *All About Women in New Zealand*, 112.

comprised 36% of the full-time labour force (defined as 30 hours or more in paid work per week) and 76% of the part-time labour force (defined as 1–29 hours in paid work per week). At all ages, women are much more likely than men to be working part-time. In 1991, 31% of employed women worked part-time compared with 8% of employed men.<sup>42</sup>

### *Women as caregivers*

51 A second result of gender difference is that women are much more likely to take primary responsibility for children and the associated economic burden. In 1991, over 164 000 (22%) of all New Zealand children lived in sole parent families. The majority of children in sole parent families (86%) lived with their mother.<sup>43</sup> Eighty-four percent of sole parents with children were women.<sup>44</sup> The median income of mother-only families in 1991 was \$14 599 (1996 ≈ \$16 058), only 85% of the median income of father-only families,<sup>45</sup> and 34% of the median income of two-parent families.<sup>46</sup> Sole-parent families are far less likely than other families to own their own house and women sole parents are less likely than men sole parents to own their own house.<sup>47</sup> In 1991, 39% of sole mother families lived in rental accommodation, compared with 29% of sole father families.<sup>48</sup>

52 Research into relationship breakdown has found that women usually carry the responsibility for children of the relationship and provide primary or sole care for them.<sup>49</sup> Overseas studies indicate that women in these situations typically have either no financial resources or fewer than their male partners, and considerably less earning potential. Research in the United States showed that divorced women and their children, on average, experienced

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<sup>42</sup> *All About Women in New Zealand*, 103.

<sup>43</sup> *New Zealand Now – Children* (Statistics NZ, Wellington, May 1995), 22.

<sup>44</sup> *All About Women in New Zealand*, 111.

<sup>45</sup> The greater income of father-only families results from the greater tendency for male sole parents to be in the full-time labour force.

<sup>46</sup> The median income of couples with dependent children was \$41,947: see *All About Women in New Zealand*, 111.

<sup>47</sup> *All About Women in New Zealand*, 123.

<sup>48</sup> *All About Women in New Zealand*, 126.

<sup>49</sup> The high proportion of sole parent families headed by women is partly because of the divorce rate and also the number of women raising children on their own. In 1991, 52% of divorces involved children. Of all sole parents in 1991, over half were divorced or separated. “The true figure for maternal custody of all the children for the total sample would probably lie somewhere between 80% and 74% at 6 months after separation, 81% and 71% at one year and 77% and 67% at two years after separation: *A Survey of Parents Who Have Obtained a Dissolution* (Family Court Custody and Access Research, Report 2, Department of Justice, Wellington, 1990), 44. At the time of dissolution the most usual arrangement was for the children to live with their mother (46).

a 73% decline in standard of living after the first year of divorce, whereas their former husbands experienced a 42% rise in their standard of living.<sup>50</sup> A Canadian study produced similar findings,<sup>51</sup> as did an Australian study.<sup>52</sup> Some New Zealand information is contained in a 1990 study by the Department of Justice which showed that overall the income for males was higher than the income for females: 49% of males had a weekly income of more than \$350 (approximately \$18,200 net per year) compared with 20% of females. And 54% of custodial males had an income over \$350 compared to 20% of custodial females.<sup>53</sup>

### *Violence against women*

53 Violence against New Zealand women is also an effect of gender as was apparent from the disturbing number of women who spoke to the Commission about the violence to which they had been subjected in their own homes. In 1996, police attended almost 30 000 incidents involving family violence. Over 8000 prosecutions were brought. There were 12 homicides arising from family violence and of the victims six were women killed by their male partners.<sup>54</sup> During the 6-month period 1 July to 31 December 1996, 3520 applications were made for protection orders, 93% of which were made by women.<sup>55</sup> In the 10 month period 1 July 1996 to 30 April 1997, 2647 women and 4282 children were admitted to women's refuges and a further 3136 women and 3761 children sought refuge assistance.<sup>56</sup>

54 While there has been no nationwide study, a 1981 Hamilton study estimated that 25% of Hamilton women are physically abused by a male partner during their lifetime and a 1986 Christchurch study estimated that 2–3% of Christchurch women are abused during any one-year period. A 1988 study estimated that 16% of women in Otago are physically abused during their lifetime. Overseas research estimates that between 14% and 25% of women are physically abused by a male partner at some time during their life, with between 0.2% and 14.4% of women being abused in any one-year period.<sup>57</sup>

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<sup>50</sup> See Lenore Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (1982), 185. The data was collected as part of a 10 year study of the social and economic effects of California's no fault divorce reforms. The research involved the analysis of statistical random samples of 2500 court workers and in-depth face-to-face interviews with over 400 attorneys, judges and divorced men and women. Kathleen Mahoney in *Gender Bias in Family Law – Deconstructing Husband Privilege* (paper presented at the New Zealand Law Society Family Law Conference, 1995) commented that “[a]lthough no empirical study has been done in New Zealand, fifteen years of matrimonial case law reveals the same patterns” citing Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (OUP, Auckland, 1992), 231.

<sup>51</sup> Marnie McCall and Diane Pask, *How Much and Why? Economic Implications of Marriage Breakdown: Spousal and Child Support* (Canadian Research Institute for Law and the Family, Calgary, 1989).

<sup>52</sup> *The Economic Consequences of Marriage Breakdown in Australia* (Australian Institute of Family Studies, Melbourne, 1985).

<sup>53</sup> *A Survey of Parents Who Have Obtained a Dissolution*, 26.

<sup>54</sup> The other six victims were children and were also killed by male perpetrators.

<sup>55</sup> Statistics supplied by P Doone, Commissioner of Police in a speech delivered at the Judicial Gender Equity Conference, May 1997.

<sup>56</sup> Statistics provided by the National Collective of Women's Refuge National Office (June 1997).

<sup>57</sup> Julie Leibrich, Judy Paulin, Robin Ransom, *Hitting Home: Men speak about abuse of women partners* (Department of Justice, 1995) 28 (footnotes omitted).

55 The 1995 Department of Justice report, *Hitting Home: Men speak about abuse of women partners*, includes the following statistics:

- Between 1978 and 1987, 47% of the 193 female homicide victims were killed by an existing or former male partner, and there was a history of abuse in 56% of those cases.
- In 1992 there were 1902 reported offences of common assault (domestic); the police attended 21 093 domestic disputes; breaches of non-molestation orders rose to 1066 up from 675 in 1987; and 5148 women were admitted to women's refuges and a further 6638 women sought other kinds of support and assistance from women's refuges.<sup>58</sup>

56 A recent report commissioned by the National Collective of Rape Crisis and Related Groups of Aotearoa Inc, *The First Five Years – Rape and Sexual Abuse in New Zealand 1992-1996 Clients*, provides the following information about the Collective's women clients:

- 10 901 telephone, face-to-face and mail contacts were by or about women who reported that they had experienced rape or sexual abuse.
- Rape or sexual abuse was disclosed by 77.5% of Rape Crisis clients; incest was reported by 32.9%; emotional, mental or verbal abuse by 15%; sexual harassment by 11.6%; and physical abuse by 10.1%
- More than half of Rape Crisis clients (53%) reported that they were raped or sexually abused when they were children, 34.8% when they were adolescents and 42.3% when adults.
- 92.6% of Rape Crisis clients reported that they knew the sexual offender(s) at the time of the rape or when the sexual abuse began. Blood relatives were almost half (46.6%) of the known sexual offenders reported.<sup>59</sup>

#### *What the Commission has been told*

57 This section provides a brief overview of women's experiences with their lawyers. Many women relayed instances of lawyers' lack of awareness of the effects of gender and told the Commission that their interactions with lawyers were the cause of their alienating experiences with the legal system. Those experiences resulted in some women abandoning the enforcement and protection of their legal rights. For other women the perception that contact with lawyers would be difficult meant that they did not attempt to invoke the legal system even when aware that their problems warranted it.

58 The most frequently mentioned concerns arose from perceptions that lawyers do not appreciate the financial difficulties that constrain many women's lives. Often, those perceptions had arisen because women's lawyers had failed to provide them with fee information. Less often, the perceptions had arisen because lawyers had failed to consider women's eligibility for legal aid - sometimes in circumstances where eligibility was later established.<sup>60</sup> While the New Zealand Law Society *Poll of Lawyers* found that 73% of lawyers think that "the high cost of lawyers' fees is discouraging the use of lawyers by the public", it also found that a far smaller proportion of lawyers - 13% - think that this is one of the three most important problems the legal profession needs to address in the next 5 years.<sup>61</sup> At the Commission's meetings with

<sup>58</sup> *Hitting Home: Men speak about abuse of women partners*, 28–29.

<sup>59</sup> Holdt and Associates Evaluation and Research Services (April 1997), 1.

<sup>60</sup> See *Information About Lawyers' Fees* (NZLC MP3) and *Women's Access to Civil Legal Aid* (NZLC MP8).

<sup>61</sup> *Poll of Lawyers – The New Zealand Law Society* (MRL Research Group, Wellington, February 1997), 15 and 79. This poll was a random self-completion survey amongst 670 lawyers. The characteristics of this sample are similar to the known characteristics of the population of lawyers.



lawyers, many were clearly surprised to learn that the median income of New Zealand women in 1991 was \$11 278.

59 Lawyers' incomplete understanding of the socio-economic context may reinforce stereotypical views of the roles of men and women and affect the advice given to clients.

“[T]he family business and home were to be assigned to a family trust in consultation with the accountant and solicitor. The woman whose signature was required was not consulted on this nor advised about the desirability of doing so and then was asked to sign a mound of papers at the conclusion of this process. At this point she had to risk embarrassing her husband by asking questions, overturn months of work by refusing to sign, or to acquiesce and sign the documents in the hope that ‘he knows best’ and that her interests would be protected. She should certainly have been consulted throughout (especially by her husband) but the male solicitor assumed that dealing with and informing the male partner was sufficient. One wonders whether a woman setting up such a transaction with the accountant and solicitor would be automatically assumed to be acting for both partners.” – *Submission 244*

60 It seems that many lawyers are unaware of the prevalence of violence against women. At every consultation meeting with women and in many of the submissions made to the Commission, examples were given of lawyers failing to respond appropriately to women seeking protection from violent partners. For many women this has been distressing and dangerous.

“After being told I was over-emotional, not trying to understand my husband’s needs, not thinking that the children might want to be with their (violent) father, did not need a non-molestation order, was not necessary to get an interim custody order (even after the children had to be put in a safe house as they were all on his current passport) and he had tried to lift them twice – all I needed was counselling!! – I became very angry and very desperate. I could not change lawyers even though I was quite frightened and intimidated by him. He was and still is a very well respected and liked lawyer I believe.” – *Submission 124*

“One woman was told by her lawyer that she was over-reacting to her husband’s requests. The woman had been to refuge twice. The lawyer told her she didn’t need a non-molestation order and that it would jeopardise her chances of getting custody and a matrimonial property settlement.” – *Submission 333 (telephoned)*

61 Many women with low incomes provided examples of their lawyers treating them as second class citizens. Often, it was said, the lawyers’ reactions eroded the women’s faltering confidence in the prospect of asserting their legal rights.

“The majority of victims of violence feel that lawyers tend to treat legal aid clients as ‘less than’ the average client. Legal aid clients are not encouraged to assert their

rights and lawyers tend to portray the attitude of wanting to close up the file as quickly as possible in order to get along with ‘real’ business. Many Maori (and low socio economic women) feel that they are treated with little respect by lawyers with such an ‘attitude problem’.” – *Submission 228*

“A very upsetting process in marriage break-up is the often condescending attitude of the young lawyer – often a woman – who is appointed to cases through legal aid.” – *Submission 257*

62 It was common too for women to tell the Commission that they felt forced by their lawyers to behave in ways the lawyers expected them to behave, usually passive and unemotional, when that was at odds with their nature or situation.

“If you’re assertive you are deemed to be too controlling or aggressive. We are expected not to complain. If you get stressed they often believe you can’t control yourself and they use that against you in your case.” – *Submission 267*

“I felt like that if I acted like a woman in court I would be seen to be unstable and so I had . . . to play by their rules otherwise I would be judged to be unstable and hysterical.” – *Submission 16*

## The law

63 Women have been under-represented in the making and application of our laws. In 1893 New Zealand women obtained the right to vote but it was not until 1919 that women won the right to stand for Parliament. It took until 1933 for the election of the first woman to Parliament and it was not until 1946 that the first woman entered Cabinet.<sup>62</sup> Before October 1996 only 44 women had ever been elected to New Zealand’s Parliament, 20 of whom were in the last Parliament and one of whom was in Cabinet.<sup>63</sup> The October 1996 election brings to 64 the number of women who have ever been Members of the New Zealand Parliament. There are currently 36 women in the 120 member Parliament. Only one woman is a member of Cabinet.

64 New Zealand women gained the right to practise law in 1896. However, it was not until 25 years ago that women began entering the legal profession in any numbers. In 1971, women made up less than 4% of the annual intake to the legal profession. In 1981, 30% of the new admissions were women; in 1985, 45% were women; and in 1991 women slightly outnumbered men for the first time.<sup>64</sup> Women now make up 28% of the practising profession.

65 The first woman judge was appointed in September 1975 and the first woman High Court judge was appointed in 1993. There are now four women judges (and one woman master) in the High Court,<sup>65</sup> and 20 women District Court judges.<sup>66</sup> There have been no women appointed to the seven member Court of Appeal.

<sup>62</sup> *Ministers and Members in the New Zealand Parliament* (ed) GA Wood (University of Otago Press, 1996) 115.

<sup>63</sup> *Ministers and Members in the New Zealand Parliament*, 115–116.

<sup>64</sup> Figures supplied by New Zealand Law Society.

<sup>65</sup> There are 41 High Court judges.

66 The Australian Access to Justice Advisory Committee commented in its report to the federal government:

One result of the predominance of men in legal institutions has been the establishment of laws and legal systems that reflect and represent social ideals of masculinity. Adversarial legal procedures assume a contest between equal competitive, autonomous, self-interested actors, each eager to best the other, a role for which it may be said that men are more likely than women to be fitted by their socialisation. Tests of “reasonableness” have assumed the values of the reasonable man, excluding and marginalising women’s experience in a wide range of areas of the law, from torts to sexual harassment to self-defence.<sup>67</sup>

The lesson is likely to apply also in New Zealand.

67 The majority of women who spoke to the Commission focused on the difficulty of obtaining appropriate legal services rather than the inappropriateness of the rules of law. However, many did provide examples of laws which may not take into account fairly the position of women. By far the most common examples concerned the operation of the laws governing the division of matrimonial and de facto property in the light of caregiving responsibilities after family breakdown.<sup>68</sup>

“The assets are split 50/50 but I’m four fifths of the family [ie the woman and her three children] and he’s only one fifth. We’ve only been split just a year and already he’s been able to buy himself a motorbike. So where’s the justice in that?” – *Report on Consultation with Lesbians, 10*

68 While the courts in matrimonial cases divide the property between the parties without apportioning blame and, where children are involved, protect the welfare of those children, studies indicate that women almost always suffer financially after relationship breakdown.<sup>69</sup> Similar data prompted Justice L’Heureux-Dubé of the Supreme Court of Canada to state:

the general economic impact of divorce on women is a phenomenon the existence of which cannot reasonably be questioned and should be amenable to judicial notice.<sup>70</sup>

69 Under the present common law, a de facto partner has to show that her or his contribution to any property in which a share is claimed gave rise to a reasonable expectation on their part that they would have a share in it. Contributions by way of service, including domestic services, will suffice, but the contribution must be one that relates to the property not to the relationship itself.<sup>71</sup>

<sup>66</sup> There are 112 District Court judges.

<sup>67</sup> AJAC, *Access to Justice – An Action Plan* (Canberra, 1994) para 2.14 (footnotes omitted).

<sup>68</sup> The Government has approved proposals to amend the Matrimonial Property Act 1976 and to introduce a statutory property regime for de facto partners.

<sup>69</sup> See para 52.

<sup>70</sup> *Moge v Moge* (1993) 99 DLR (4th) 456, 497.

<sup>71</sup> See *Gillies v Keogh* [1989] 2 NZLR 327; *Lankow v Rose* [1995] 1 NZLR 277. Claimant partners regularly obtain interests of between 15% and 40% of property held in the defendant partners’ names: Helen Cull, “De facto Couples and Family Law – What Protection?” (New Zealand Suffrage Centennial Women’s Law Conference Paper, 1993), 259. See also *Succession Law : A Succession (Adjustment) Act* (NZLC R39) paras 19–26 and 56–59.

“The break-up of [de facto] relationships impacts adversely on women because the property of the couple remains the possession of the person who earned the money for it – usually the male partner – regardless of the woman’s contribution as homemaker/caregiver to the children. . . . many women fail to protect their interests while men routinely protect theirs and may even enrich themselves at the expense of their female partners. The lack of legally enforceable property rights in a de facto marriage discriminates particularly against the interests of women in most cases.” – *Submission 244*

[J] is totally shocked by the unfairness of her situation – given that her ex-partner is on a salary of \$37 000, is collecting a good rental from the family home and has bought another house with their savings. Meanwhile, she and their children face a permanent future in low cost rental accommodation while doing their best to cope on a Domestic Purposes Benefit until [J] can obtain the training she needs to get a job which will support them . . .” – *Submission 65*

### **Interpersonal communication skills**

“The skills that are essential for successful lawyering are listening, empathy and sound advice in a form accessible to your clients.” – *Submission 398*

70 A competent lawyer requires many different skills to perform proficiently in day-to-day legal practice. These include drafting, advocacy, research, presentation and communication skills. From the Commission’s consultations it is plain that lawyers’ skills of interpersonal communication are of the utmost importance to women clients. Throughout the consultation process, many women spoke of shortcomings in their lawyers’ interpersonal communication skills and observed that communication failures between lawyers and their clients prevent clients from being informed of their legal rights and options. It was notable that women across the spectrum of socio-economic levels and educational achievements made uniform criticisms in this regard. It was said that communication failures between lawyers and clients are caused by the complexity of lawyers’ language and by lawyers not always listening to, or understanding, their clients, and not always ensuring that clients understand their legal situations and the processes and timeframes involved in dealing with them. Many of these issues have been discussed in the consultation paper *Women’s Access to Legal Advice and Representation* (NZLC MP9).

“The language of the law is too difficult.” – *Meeting with rural community workers, Southland 1996*

“The lawyer talks to you in big words. They think you can understand but they never ask, ‘Do you understand me?’” – *Report on Consultation with Pacific Island Women 3*

“One woman was told by her older male lawyer during her matrimonial property

“In general I’ve found lawyers have not kept me informed of realities – what to expect, the purpose of meetings – I was just expected to understand.”

– *Submission 267*

71 Lawyers’ ability to communicate effectively with clients depends on their understanding of the social context of clients’ lives. For example, without a knowledge of the effects of family violence, a lawyer may not detect the clues that abused women give when seeking help from the law. One woman told the Commission that she was not able to tell her lawyer openly that her husband physically and sexually abused her but did disclose that her husband kept a knife beside the bed. The lawyer never asked the woman whether her husband was violent towards her with the result that she remained silent about the abuse (Submission 388).

“I guess my overall opinion of the legal system is that it is wrong as you are treated as another number with little hope of someone really listening to what you are trying to say. I guess you need to search for a lawyer with whom you are happy and [who] hopefully will be interested in your concerns.” – *Submission 47*

72 Proficiency in communication skills is also tied very closely to client satisfaction with lawyers’ services. Recent district law society annual reports include the following comments:

[T]he vast amount of complaints received do not amount to “misconduct” by a practitioner as such, but rather arise out of a lack of communication by the practitioner . . .<sup>72</sup>

It is clear from the Committee’s experiences that most of the problems could be avoided by better communication.<sup>73</sup>

73 In 1995, the Law Society of New South Wales commissioned an evaluation of their Specialist Accreditation Programme. The results of the study illustrate that client satisfaction is based only in part on expectations of the outcome of legal matters. This is because clients’ knowledge of the outcome is limited: certainly clients hope that the service they receive is “bigger, better, faster and cheaper” but they have no certain way of telling whether it is. The study found that clients make their assessment of the quality of the service by relying on their own interactions with their lawyers.

Clients complained about the quality of their lawyers’ services in terms of inaccessibility, lack of communication, lack of empathy and understanding, and lack of respect (“he made us feel small and unimportant”). Equally, they acknowledged and commended these qualities when they are exercised (“He was more than a solicitor, he was human”). Indeed, the pre-eminence for clients of indicators of process over outcome is encapsulated, at an anecdotal level, by one client describing how she didn’t mind her lawyer losing her case

<sup>72</sup> Waikato Bay of Plenty District Law Society Second Annual Report 1995–1996, 9.

<sup>73</sup> Canterbury District Law Society Annual report and Statement of Accounts for the Year Ended 31st December 1996, 12.

because she knew “he had done everything that could be done”; and by another, “he made me feel like I was his only client (even though of course I knew that I wasn’t)”.<sup>74</sup>

74 The study also found that clients become dissatisfied with their lawyers because lawyers tend to focus on delivering outcomes but can overlook the process of delivering their service. It was suggested that

consideration should be given by the profession to introducing additional training to redress identified performance deficits in the related areas of *Inter-personal skills* and *client management techniques*. This training should be client focused, rather than transaction focused; it should train practitioners to recognise that client needs are not confined to attaining objective outcomes; and it should help lawyers to listen to clients more attentively, diagnose their various levels of needs and demonstrate empathy. This training should equip lawyers to operate more effectively with the people who are invariably their clients. Ultimately, the message from clients about service is quite simple. Clients trust practitioners who care.<sup>75</sup>

75 New Zealand research also illustrates that lawyers do not always communicate effectively with clients in terms of style, content and timeliness. The 1991 Department of Justice report of a study on *Custody and Access Orders: Interviews with Parents About Their Court Experience*, found that a large number of the interviewees believed their lawyers had not given them sufficient information.<sup>76</sup> A large number also believed that their lawyers had not explained things well or kept them informed.<sup>77</sup> In a 1992 study, *The Lawyers’ Perspective*, 68% of lawyers said they sometimes failed to give their clients sufficient information about their cases. Amongst the reasons given were that the lawyers sometimes assumed, wrongly, that their clients knew and understood what was happening, and that some clients were too stressed, emotional, or confused to absorb the information given to them.<sup>78</sup>

76 The 1995 survey of criminal legally aided litigants conducted as part of the Legal Services Board study *In the Interests of Justice* found that the concerns women had with their lawyers

arose from the style of communication between them and their lawyers. Failure to take instruction and, more particularly, a failure to take the client “seriously” were repeated comments made by the women respondents.<sup>79</sup>

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<sup>74</sup> Livingston Armytage, “Client Satisfaction with Specialists’ Services: Lessons for Legal Educators”, conference paper presented at the International Conference at the College of Law in Sydney, New South Wales Australia, 4–8 September 1996, 357, 365. The Annual Report 1995–96 of the Office of the Legal Services Commissioner (NSW) notes that “no communication” is raised in 56% of complaints (33).

<sup>75</sup> Livingston Armytage, 366. The Annual Report 1995–96 of the Office of the Legal Services Commissioner (NSW) notes that “[t]he dissatisfaction expressed by many complainants to the [Office] also seems to indicate that there is a large gap between the standards of conduct and service members of the public expect from their legal practitioners and the standards applied by the [Legal Services] Tribunal. Members of the public, for example are often more concerned about rudeness and what they perceive as bullying by legal practitioners than with other matters, such as breaching undertakings, which the profession regards as serious” (21).

<sup>76</sup> Department of Justice, Wellington, 1991, 21. The research involved a total sample of 61 participants.

<sup>77</sup> *Custody and Access Orders*, 22.

<sup>78</sup> Department of Justice, Wellington, 1992, 18.

<sup>79</sup> *In the Interests of Justice: An evaluation of criminal legal aid in New Zealand* (Legal Services Board, Wellington, March 1995), 114.

## PART 3 – THE TREATY OF WAITANGI AND MAORI CULTURAL ISSUES

77 Since the signing of the Treaty of Waitangi the English-style legal system imported to this country has had an enormous impact on Maori society. The Commission's consultations with Maori women provide strong evidence that the New Zealand legal system is failing Maori in a number of different ways. The clear message from the consultation process is that being Maori has a profound effect on access to legal services.<sup>80</sup>

78 This section of the paper illustrates the importance of lawyers having an understanding of the Treaty of Waitangi and Maori cultural issues. Responses to the Commission's consultation process suggest that, at the very least, lawyers need to have an appreciation of the Treaty of Waitangi, the history of Maori and Pakeha relations and its effect in New Zealand society today, and an understanding of Maori values and customs.

### The context

79 Statistics illustrate that, by comparison to non-Maori, Maori are disadvantaged in terms of virtually every socio-economic indicator. The following statistics are taken from the 1991 Census, at which time:

- 39% of Maori children lived in sole parent families, compared with 16% of non-Maori children.<sup>81</sup>
- The median income of Maori couples with children was one-third lower than non-Maori couples with children.<sup>82</sup>
- Maori sole-parent households had a median income almost one-third lower than non-Maori sole-parent households.<sup>83</sup>
- Only one-fifth of Maori school students stay on to seventh-form compared with almost half of non-Maori school students.<sup>84</sup>
- The median income of Maori women was \$10 024, 88% of the median income of non-Maori women (\$11 452). The median income of Maori men (\$12 958) was 65% of the median income of non-Maori men (\$20 023).<sup>85</sup>
- 49% of all Maori men and 58% of Maori women received some income from an income support programme (other than family benefit) in the 12 months before the 1991 Census. This compares with 38% and 45% for non-Maori men and women respectively.<sup>86</sup>

80 Low socio-economic status decreases the likelihood of invoking the protection of the legal system. Yet it is likely to increase the need for legal services. This is because people on low incomes have a higher rate of interaction with state agencies for housing and benefits and

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<sup>80</sup> A wider theme is that Maori are dealing with an imposed monocultural legal system which cannot deliver justice until Treaty and Maori cultural issues are fully addressed. This will be dealt with more fully in the forthcoming Maori women's access to justice consultation paper. For further discussion of the topic see Moana Jackson, *The Maori and the Criminal Justice System, A New Perspective: He Whaipanga Hou Part 1* (Department of Justice, 1988).

<sup>81</sup> *New Zealand Now: Maori* (Statistics NZ 1994), 17.

<sup>82</sup> *New Zealand Now: Maori*, 22.

<sup>83</sup> *New Zealand Now: Maori*, 22.

<sup>84</sup> *New Zealand Now: Maori*, 28.

<sup>85</sup> *New Zealand Now: Maori*, 45.

<sup>86</sup> *New Zealand Now: Maori*, 47.

are high users of credit facilities to purchase necessary goods and services.<sup>87</sup> Many Maori women commented to the Commission that they would not seek the assistance of the law because of the high costs involved in lawyers' fees, transport from remote communities to lawyers' offices, and childcare. But there was an added dimension that prevented Maori women from resorting to the law for assistance: a distrust that predominantly non-Maori lawyers could provide appropriate legal advice.

81 Crucial to the understanding of the Treaty of Waitangi and the special place of Maori as tangata whenua is an appreciation of nga tikanga Maori: a set of values and ways of organising life which are distinctly Maori.<sup>88</sup> Nga tikanga Maori maintains the rule of law and covers the whole range of human behaviour, including moral and spiritual aspects.<sup>89</sup> Also important is an understanding of the structures of Maori society especially the whanau, hapu and iwi, as well as the pivotal roles of kuia and kaumatua.

82 The Treaty of Waitangi is now recognised as the founding constitutional document of New Zealand and has profound implications for the way in which Maori participate in New Zealand society. Because lawyers perform a key role in society as policy makers and law makers, their need for an understanding of the Treaty of Waitangi and the position of Maori as tangata whenua is evident. This knowledge is even more necessary for those providing legal services to Maori clients.

83 There was a widely held perception among Maori women that many lawyers currently fail to understand the effects of colonisation, the meaning of the Treaty of Waitangi, and Maori culture and values. As a result, Maori women's disillusionment with and alienation from the legal system is heightened.

"It's horrible to say, but it is terrible communicating with Pakeha [lawyers, court personnel, judges]. The power goes to their heads and leaves their heart. The culture of Pakeha is not sensitive to our cultural ways. If someone would just try to understand our ways." – *Transcript of hui held with Maori women in Rohe 3*

"Two people can operate in a happy medium, it can be done. Both cultures need to be recognised and respected. Instead of us jumping on this waka and being disempowered. Exploitation is the biggest problem . . . The whole system is archaic. It's been around for some many hundreds of years. They have chucked away their wigs and I think they need to chuck away a lot more. Or empower us [Maori] to be able to implement our own ideas; the things that have worked for us. They don't know what has worked for us. They have had this system since the twelfth century and it doesn't work. It still doesn't work . . . One of the basic underlying problems that I see is that we are working within a Pakeha structure." – *Transcript of hui held with Maori women in Rohe 3*

"No-one knows about the legal system here and to be honest some don't want to know until they are confronted by the system. But what we do know is that many Maori, especially our women, are scared of the law and perceive it as a very negative subject." – *Transcript of hui held with Maori women in Rohe 7*

<sup>87</sup> See *Legal Aid and the Poor – A Report by the National Council of Welfare* (Canadian Government, 1995).

<sup>88</sup> Nga tikanga Maori has been described as customary or custom law. See ET Durie, "Custom Law: address to the New Zealand Society for Legal and Social Philosophy" (1994) 24 VUWLR 325.

<sup>89</sup> See Joan Metge *New Growth From Old – The whanau in the Modern World* (Victoria University Press, Wellington, 1995), 22.



“The Treaty of Waitangi has been completely ignored by Pakeha in the system. We have no power to change things which go against our people. Isn’t the Treaty supposed to be a partnership between two cultures? But it seems that it’s okay to

“The law does not wish to understand us Maori people. Because the justice system is predominantly male that causes our women even more problems in getting help.” – *Transcript of hui held with Maori women in Rohe 8*

“The system is not fair, it’s an injustice. The Maori is usually too shy to speak up. The judge is sitting up there in his high chair looking down on us Maori like we are little people.” – *Transcript of hui held with Maori women in Rohe 3*

“The whole court system is alienating to our people. It just treats us like a herd of cattle. There is no dignity or respect given to us at all.” – *Transcript of hui held with Maori women in Rohe 3*

### The law

84 Inadequate awareness of the Treaty and Maori culture may result in lawyers providing services without recognising the impact that particular laws have on their Maori clients. This may in turn lead to inappropriate legal advice about the effect of those laws.

85 Maori have been traditionally under-represented in the institutions which have made and applied law in New Zealand.<sup>90</sup> While all men over 21 years of age who fulfilled certain property requirements were entitled to vote for a New Zealand Parliament in 1852, the communal basis on which Maori held unregistered lands effectively meant that Maori men could not vote. In 1868, after the creation of the four Maori seats, Maori men were first elected to Parliament. It was not until 1893, when universal suffrage was granted to men and women regardless of land holdings, that all Maori were entitled to vote for all Members of Parliament. In 1899 the first Maori member of Cabinet, John Carroll, was appointed the Minister of Native Affairs. The first Maori woman Member of Parliament, Iriaki Ratana, was elected in 1949 and Whetu Tirakatene Sullivan became the first Maori woman Cabinet Minister in 1972. There are now 15 Maori Members of Parliament.

86 The first Maori lawyer, Apirana Ngata was admitted to the bar in 1897. The first Maori women lawyer, Georgina Te Heuheu, was admitted 84 years later in 1971. Currently, approximately 3% of lawyers are Maori.<sup>91</sup> Approximately 5% of the members of the judiciary are Maori.

87 During the Commission’s consultation process, Maori women highlighted the exclusion of Maori cultural values from the law. Most commonly mentioned were the family law statutes, in particular those rules relating to adoption, custody and access, and succession. Donna Durie-Hall and Dame Joan Metge comment that the field of family law presents

three related challenges to the legal system and its practitioners: first, how to recognise, understand, and accommodate tikanga Maori relating to the family; secondly, how to

<sup>90</sup> See generally “A History of Maori Representation in Parliament” by MPK Sorrenson in the *Report of the Royal Commission on the Electoral System – Towards a better democracy* (December 1986).

<sup>91</sup> Figure provided by the New Zealand Law Society.

understand and mediate conflict in marriages between Maori and non-Maori; and thirdly, how to formulate and administer family law so that it guarantees all citizens equal consideration and respect for their cultural views and practices, given the special status of the Maori people as signatories of the Treaty of Waitangi on the one hand, and the imbalance in access of Maori and Pakeha to political power on the other.<sup>92</sup>

88 Many of the values underlying family law conflict with Maori understandings and practices regarding the family. For example, s 7 of the Adoption Act 1955 provides that consent to an adoption must be obtained from both parents if married to each other; if not, the father's consent is required if he is a guardian but otherwise only if the court decides it is expedient to seek it. No other relative is recognised as having a right to be consulted. However, Maori would expect that the child's natural father should have the right to participate in discussion about the child's future, and other relatives, especially whanau members, should also be able to express their views on the child's future. Further, while the Adoption Act allows consenting parents to stipulate a condition relating to religion,<sup>93</sup> neither Maori birth parents nor other relatives have a right to stipulate that the child be brought up with a knowledge of her or his cultural heritage, including te reo and tikanga.

“[M]y grandchildren have lost our name and they have lost their identity. It's not right. . . . What rights do I as a Maori grandmother have over my grandchildren?” – *Transcript of hui held with Maori women in Rohe 2*

“Grandparents have no rights to adopt their mokopuna and their access to the child is denied.” – *Transcript of hui held with Maori women in Rohe 2*

“Our whangai<sup>94</sup> children need to be provided for by us as parents. As Maori we often whangai children and they have the best of both families. It is when we face the legal system about our culturally accepted ways then we have problems.” – *Transcript of hui held with Maori women in Rohe 10*

89 Whether arguments are put on behalf of Maori clients regarding Maori issues in family law proceedings depends very much on the knowledge of the lawyers. Where the law is open to interpretation favourable to the incorporation of Maori values, the success of these arguments depends ultimately on the discretion of the judges.<sup>95</sup>

90 Women also described how little their lawyers know about Maori land issues and how judges are not always aware of the importance of land to Maori.

<sup>92</sup> D Durie-Hall & Joan Metge “Kua Tutu Te Puehu, Kia Mau, Maori Aspirations and Family Law” in M Henaghan & B Atkin (eds) *Family Law Policy in New Zealand* (Oxford University Press, Auckland, 1992) 54, 55.

**Error! Main Document Only.**<sup>93</sup> Section 7(6).

<sup>94</sup> Whangai means to nourish, bring up. Whangai children are those adopted according to customary Maori practices.

<sup>95</sup> The Maori Committee of the Law Commission is currently sponsoring a project on Maori Custom Law which will result in the preparation of an outline of Maori concepts for use by judges, lawyers and others. See discussion by B Atkin and G Austin in “Cross Cultural Challenges to Family Law in Aotearoa/New Zealand”, in N Lowe and G Douglas *Families Across Frontiers* (Martinus Nijhoff Publishers, Netherlands, 1996) 330–331; also *B v Director-General of Social Welfare* (27 May 1997, HC Wellington, Gallen and Goddard JJ, AP 71/96).

“What we are actually doing is paying the lawyer to do the learning. We don’t have a Maori Land Court here so the client has to pay for extra expenses.”

– *Transcript of hui held with Maori women in Rohe 10*

“Pakeha judges do not understand what land means to Maori. If they had some people who know about Maori land ownership that would have been better.”

– *Transcript of hui held with Maori women in Rohe 3*

91 There are now many statutes which recognise the principles of the Treaty of Waitangi (for example the State Owned Enterprises Act 1986, the Conservation Act 1987, and the Resource Management Act 1991) or call for processes to involve Maori (for example consultation with local iwi in the Resource Management Act 1991.)<sup>96</sup> There is also a range of matters in which an understanding and interpretation of the Treaty is increasingly important (for example, fishing, land, health and education). To be able to provide effective advice to Maori and non-Maori clients in these areas, lawyers need to be well informed about the Treaty and Maori cultural issues.

### **Interpersonal communication skills**

92 Maori women provided many examples of unsatisfactory interactions with lawyers which suggest that successful interpersonal communication was precluded because lawyers were not sufficiently informed about Maori values and culture.

“[Lawyers] are not even trained to look after Maori clients.” – *Transcript of hui held with Maori women in Rohe 5*

“The attitudes of lawyers to Maori women is terrible, to the point where Maori women are discriminated against.” – *Transcript of hui held with Maori women in Rohe 2*

“[Lawyers] consider Maori people are not capable of making informed businesslike decisions.” – *Transcript of hui held with Maori women in Rohe 2*

“A lot of these non-Maori lawyers have a true departure from the issues of this country. Some of them practise inappropriate law. They should be doing contracts rather than worrying about family situations. Give up that and then provide us with lawyers who really care about New Zealand communities.”

– *Transcript of hui held with Maori women in Rohe 5*

93 One common example related to the mispronunciation of Maori words by lawyers and also by court personnel.

<sup>96</sup> For a more extensive list see Appendix D in Legislation Advisory Committee, *Legislative Change – Guidelines on Process and Content* (rev ed, Report No 6, 1991).

“Why can’t we have more Maori in court who we can relate to? The pronunciation of Maori names is disgusting and very offensive to us all. If they can’t give their staff some basic public relations training on cultural sensitivity then they should not be there.” – *Transcript of hui held with Maori women in Rohe 4*

“I would like to see some of the judges in this area retired early. Only because they have no perception about how the other half lives. For us Maori the judges have no knowledge of our culture. God, the way they pronounce our names is like a loud screeching noise being placed in our ears.” – *Transcript of hui held with Maori women in Rohe 9*

94 It was made clear to the Commission that many Maori women have little confidence that non-Maori lawyers understand or care about the needs of Maori clients and believe that lawyers lack the cultural knowledge or sometimes even the willingness to understand those needs. For many Maori women the perception of lawyers as uncaring, culturally ignorant, or simply racist represents a significant barrier to their access to justice. Not surprisingly many Maori women called for more Maori lawyers.

“Only a Maori can understand what Maori go through. We need to connect with another Maori woman, this is really important for us.” – *Transcript of hui held with Maori women in Rohe 2*

“We need more Maori women lawyers . . . . Someone who can understand where we come from as Maori. Someone who we do not have to explain ourselves to.” – *Transcript of hui held with Maori women in Rohe 1*

“We have not one Maori male or woman lawyer who we can turn to and who will understand us as Maori first. We badly need more Maori lawyers in our area.” – *Transcript of hui held with Maori women in Rohe 4*

## PART 4 – PROFESSIONAL RESPONSIBILITY

95 Parts 2 and 3 of the paper suggest that there are widespread perceptions of deficiencies throughout the legal profession in the understanding of gender, Treaty and Maori cultural issues. This part explores the possible impact of such deficiencies upon the performance of a lawyer's professional duties.

96 The way lawyers carry out their professional duties is important not only for individual clients but also for society at large because lawyers' behaviour affects the way the community perceives the system of justice and influences how much faith the community or parts of the community have in that system.<sup>97</sup> It is therefore important that lawyers have a sense of their role as law professionals and of the role of law in a democratic society. This means more than an awareness of the content of the *Rules of Professional Conduct for Barristers and Solicitors*.<sup>98</sup>

97 The concept of professional responsibility for lawyers in New Zealand has recently been defined in the Cotter Report, commissioned by the New Zealand Law Society and the Council of Legal Education, as

a critical understanding of: the individual's own values and attitudes; of the legal profession, its structures, roles and responsibilities; and the roles and responsibilities of lawyers in their provision of professional services.<sup>99</sup>

98 There has been growing concern both in New Zealand and in other common law countries about inadequacies in professional responsibility and decline in ethical standards within the law profession. In the United States it has been suggested that:

Law students need concrete ethical training. They need to know why pro bono work is so important. They need to understand their duties as "officers of the court". They need to learn that cases and statutes are normative texts, appropriately interpreted from a public regarding point of view, and not mere missiles to be hurled at opposing counsel. They need to have great ethical teachers, and to have *every* teacher address ethical problems where such problems arise.<sup>100</sup>

99 The New Zealand Law Society *Poll of the Public*<sup>101</sup> found that 87% of the public thought lawyers were professional. However, what members of the public mean by the term "professional" is unclear when it is noted that:

- 41% thought that lawyers were not as knowledgeable as they should be,
- 29% thought that lawyers do not explain things well enough,
- 21% thought that lawyers do not always act in the client's best interests,
- 45% thought that lawyers took a long time to get things done, and
- 28% thought that lawyers could not be trusted with money. (12–13)

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<sup>97</sup> Robert Cumbow, "Educating the 21st Century Lawyer" (1996) 36 Idaho LR 407.

<sup>98</sup> 4th Edition, 1996. The *Rules* contain 11 chapters relating to conduct of practice generally, and relations with other practitioners. Within each chapter, there are a number of rules relating to that area, and each rule is then supported by a commentary.

<sup>99</sup> The Cotter Report, 17.

<sup>100</sup> Judge Harry T Edwards, "The Growing Disjunction Between Legal Education and the Legal Profession" (1992) 91 Mich LR 34, 38.

<sup>101</sup> MRL Research Group, Wellington, 1997

100 The *Poll of Lawyers* found that 88% of lawyers rated the profession most positively for “being professional”. However, the meaning which lawyers ascribe to the term “professional” is also unclear when it is noted that:

- 72% of lawyers thought that lawyers were sometimes not as knowledgeable as they should be,
- 38% thought that lawyers do not explain things to clients well enough (only 36% of lawyers thought that lawyers explain things well to clients),
- 15% thought that lawyers do not always act in the best interests of their clients (only 59% thought that lawyers always act in their clients’ best interests),
- 41% thought that lawyers take a long time to do things,
- 36% tend to put clients off to someone more junior and less experienced (56–57), and
- 60% agreed that the ethical standards of the profession are declining (15).

101 The Commission’s consultation process has amassed a great deal of information which supports the need for education about professional responsibility. Much of the information relates to lawyers’ non-compliance with the *Rules of Professional Conduct for Barristers and Solicitors*.

102 The most common example provided to the Commission of lawyers’ failure to understand or demonstrate commitment to the ideals of professional responsibility related to lawyers’ provision of information about civil legal aid to women clients. The commentary to Rule 1.02 of the New Zealand Law Society *Rules of Professional Conduct for Barristers and Solicitors* states that “[i]f a client is eligible for legal aid the [lawyer] has a duty to draw that fact to the client’s attention”. Many women told the Commission that they had not been informed of the existence of civil legal aid. Over half the lawyers surveyed in the *Poll of Lawyers* (56%) said that they do not always assess whether the client is eligible for civil legal aid – including 33% who never or rarely assess. Only 27% of the lawyers polled said that they always assess whether the client is eligible for civil legal aid (156). The reasons given for not pursuing civil legal aid with clients included:

- the low remuneration rate for civil legal aid work,
- the forms required to be completed to apply for civil legal aid are too long,
- that payment for work done for an aided person is too slow, and
- too much red tape. (159)

103 These reasons indicate that a significant proportion of lawyers are either not aware of the relevant rule of professional conduct or disregard it because of the inconvenience the civil legal aid scheme poses to the administration of their practices. They also appear to highlight lawyers’ lack of awareness of the economic position of many women and the fact that without civil legal aid many would be unable to contemplate enforcing and protecting their legal rights.<sup>102</sup>

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<sup>102</sup> See further *Women’s Access to Civil Legal Aid* (NZLC MP8).

“My lawyer didn’t even explain to me about legal aid. It was after I went to another lawyer that I realised I was eligible. Someone isn’t doing their job properly and making sure we know about it.” – *Transcript of hui held with Maori women in Rohe 7*

104 Another example commonly provided related to lawyers’ delays in progressing legal matters. The commentary to Rule 1.02 states that “it would be improper for a practitioner to accept instructions unless the matter could be handled promptly . . .”. Women told the Commission how lawyers took a long time to get back to them and that in some cases they did not hear from their lawyers for some months.

“The whole process took two years before it went to a hearing. [My] lawyer kept on saying ‘I hear you’ and then doing nothing.” – *Submission 354*

“Lawyers should not take on clients if they cannot process their requirements within a reasonable timeframe. Taking 3 or 4 months to write a letter on behalf of a client – who then has to wait anxiously for 3 or 4 months for a reply from the other lawyer – is simply not good enough. We hear complaints about this continuously.” – *Submission 9 on Women’s Access to Civil Legal Aid, (NZLC MP8)*

105 The commentary to Rule 1.02 also states that “it would be improper to accept instructions unless the matter could be handled . . . with due competence . . .”. It is questionable how strictly this rule is adhered to when so many women have provided examples to the Commission of their lawyers’ inadequate understanding gender or cultural issues. Lesbians also described how lawyers were often unaware of the legal issues surrounding same sex relationships.

“Right from the very first meeting [my lawyer] was aware that there was a same sex relationship and my expectation of her was that she would be able to say to me that this is the story and that she would be able to lay her hands on the most up to date material available in New Zealand and we didn’t see it.” – *Report on Consultation with Lesbians 36*

106 Another very common criticism related to the provision of fee information. The *Costing and Conveyancing Practice Manual*,<sup>103</sup> provides lawyers with guidance as to whether and what type of information should be provided to clients about fees. The *Manual* notes that in many, if not most, transactions, it should be possible for a practitioner to give some estimate to a client on the basis of details then known and on the assumption that the transaction will not prove to be substantially more complex or time consuming than can reasonably be expected. Despite the

<sup>103</sup> These are rules approved by the Council of the New Zealand Law Society on 22 June 1984 to be observed from 1 November 1984.

*Manual*, many women have told the Commission that fee information was not forthcoming from their lawyers. Again this suggests a failure on the part of many lawyers to adopt the best practices of their profession, a failure that may further illustrate lawyers' lack of awareness of the economic position of many women clients.<sup>104</sup>

107 Many women were of the view that their lawyers were primarily interested in making money and not as interested in seeking to enforce and protect their clients' legal rights. This contrasts with the findings of the New Zealand Law Society polls of the public and lawyers which found that 83% of the public and 90% of lawyers agreed with the statement that lawyers are interested in getting a good result for their client.<sup>105</sup>

“There is really only one winner and that’s the solicitor.” – *Submission 504*

“I believe it is in the solicitors’ financial interest to prolong court cases. . . . we are all at the mercy of these people.” – *Submission 43*

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<sup>104</sup> See *Information About Lawyers’ Fees* (NZLC MP3).

<sup>105</sup> New Zealand Law Society, *Poll of Lawyers*, 10. There would appear to be two significant reasons for this difference. First, the Commission heard from women predominantly in relation to family law disputes and criminal matters whereas the *Poll of the Public* reveals that the three most common matters for members of the public to consult lawyers about are property transactions, making a will and borrowing money/arranging finance. Only 4% of adult New Zealanders had ever consulted a lawyer in relation to family violence, 16% in matrimonial matters, 10% in custody and access matters, 4% as witnesses in criminal matters and 3% as defendants in criminal matters (20). Secondly, the *Poll of the Public* was conducted with 500 randomly selected members of the public whereas the Commission’s consultations were with women whose experiences had led them to believe that the law, its processes and agents do not always treat women fairly.



## PART 5 – PREPARING LAWYERS – THE UNIVERSITIES’ CURRICULA

[L]aw cannot helpfully be abstracted from its social, economic, and political milieu, it cannot truly be understood except in the context of human endeavour. Yet it is also a practical subject which seeks solutions to difficult problems of policy and justice. In the best of all possible worlds [the study of law] is a general education which prepares graduates to face and adapt to change in all aspects of their lives, but especially throughout their legal careers. Law is anything but static: it is effective lawyers who can respond to dynamic forces with which they are bound to be faced.<sup>106</sup>

108 Lawyers have made numerous comments to the Commission to the effect that their university training did not prepare them to practise law in the “complex milieu” of New Zealand society. The following comments are illustrative:

“In [an] attempt to be gender neutral [legal training] fails to recognise the gender issues and address them in a useful way.” – *Submission 290 (lawyer)*

“[Law school] was far too academic. It taught almost none of the actual skills necessary to be an effective lawyer, ie, organisation, advice, listening, advocacy skills, assertiveness, problem analysis, lateral thinking. Legal problems do not present nicely packaged as ‘land law’, ‘equity law’, etc. Issues should be presented for learning in a manner akin to real life. This would make for better learning by far.” – *Submission 437 (lawyer)*

“There must be a substantial element of preparation for practice as a practitioner, as the majority of graduates do practise at some stage and also because of the implications of practising without sufficient training on the public.” – *Submission 85 (lawyer)*

“More practical exercises would be good, eg, moots, practising interviewing, learning about professionalism.” – *Submission 83 (lawyer)*

“The degree is almost entirely pitched at an academic level with no focus on communication skills, gender and culture issues . . .” – *Submission on Women’s Access to Legal Advice and Representation (lawyer)*

109 In the 1987 *Report on the Reform of Professional Legal Training in New Zealand* it was stated:

Law study should provide opportunities to expand understanding. Lawyers need to know the relationship between theory and practice. They also need to know the relationship between law and business, human and industrial relations, politics, social policy and so on. The study of laws alone is an insufficient preparation for work in the complex social milieu of a dynamic nation.<sup>107</sup>

110 In 1988, when the core curriculum was reduced to six subjects, Sir Ivor Richardson, then Chair of the Council of Legal Education, stated that this would allow the

<sup>106</sup> Neil Gold, *Report on the Reform of Practical Legal Training in New Zealand for the New Zealand Law Society and the Council of Legal Education* (January 1987) 17.

<sup>107</sup> Neil Gold, (1987) 19–20

development of courses to meet or anticipate current needs. Several areas may be noted. One group involves minority rights, the Treaty of Waitangi, cultural influences in law and women's studies; another includes dispute resolution, professional responsibility, ethical responsibility and clinical education; and a third interdepartmental studies in law and economics and law and sociology.<sup>108</sup>

The concerns voiced to the Commission, by women clients and lawyers, appear to question the development that has occurred since 1988 in several of those important areas.

### Teaching gender – context and the impact of law

111 Chief Justice Malcolm of the Supreme Court of Western Australia has said:

The judiciary, the profession and all who work in the courts need to be aware of and understand the hidden or unconscious gender bias in the law and the administration of justice so that it can be consciously and conscientiously eliminated and avoided.<sup>109</sup>

112 The perceived need for law students and lawyers to enhance their understanding of gender issues is highlighted by judges' acceptance of their own need for training. The 1996 report on a Colloquium for Asian and South Pacific Senior Judges on women's human rights contains the following statement:

The importance of educating the judiciary and the legal profession with respect to international human rights standards and principles relevant to gender issues was stressed, as well as the need for national judiciaries to carry out studies on gender bias in the judicial process.<sup>110</sup>

113 The consistent recommendation of the numerous Canadian and United States' Taskforces which have reported on gender bias in the courts has been for education programmes for judges on the effects of gender. This recommendation has been widely implemented.<sup>111</sup> In New

<sup>108</sup> Sir Ivor Richardson, "Educating lawyers for the 21st Century" (1989) NZLJ 86, 88.

<sup>109</sup> Chief Justice Malcolm, "Women And The Law: Proposed Judicial Education Programme On Gender Equality And Taskforce On Gender Bias In Western Australia" (1993) 1 Australian Feminist Law Journal 139, 144.

<sup>110</sup> "The Conclusions of the Asia/South Pacific Regional Judicial Colloquium for Senior Judges on the Domestic Application of International Human Rights Norms Relevant to Women's Human Rights" (Hong Kong, 20–22 May 1996) in *Commonwealth Judicial Colloquia on Women's Human Rights* (Gender and Youth Affairs Division, Commonwealth Secretariat, London, June 1996) 8–9. In New Zealand and overseas, judges recognise their need to have an understanding of the effects of gender, especially in their task of interpreting statutes in light of international obligations, for example, the Convention on the Elimination of All Forms of Discrimination Against Women (to which New Zealand is a party).

<sup>111</sup> By 1993, in the United States, some 38 states had conducted gender bias inquiries by means of taskforces led by the judiciary. See for example, New York Taskforce, *Women in the Courts* (1986); Washington State Taskforce, *Gender and Justice in the Courts* (1989); Nevada Supreme Court Gender Bias Taskforce, *Justice for Women* (1989); Wisconsin Equal Justice Taskforce, *Final Report Gender Bias Taskforce* (1991).

In Canada, law societies, bar associations and government agencies have assumed responsibility for similar inquiries. See, for example, *Report of the Gender Bias Committee Law Society of British Columbia* (1992); *Gender Equality in the Canadian Justice System* Federal/Provincial/Territorial Working Group of Attorneys General Officials (1992). The Western Judicial Education Centre has, since 1989, delivered a programme on Gender Equality in Judicial Decision Making and the National Judicial Institute of Canada is now providing social context education programmes with a focus on gender.

In Australia, the Commonwealth Government established a specific inquiry to report on gender bias in federal courts: *Gender Bias and the Judiciary*, Senate Standing Committee on Legal and

Zealand, a subcommittee appointed by the Courts Consultative Committee in 1995 recommended that a judicial education programme on gender issues be developed. The Judicial Working Group on Gender Equity was then established to organise the first two day judicial seminar on gender equity. Held in May 1997, the seminar was attended by nearly all of New Zealand's judges and is widely reported to have been well received.

*The law schools' curricula*

114 The core law school curriculum is currently limited to six subjects. There is no indication given by the Council of Legal Education in its short course prescription of the desirability of teaching the core subjects in any social context. The extent to which these subjects are taught in a context which is mindful of the impact of gender is left to individual lecturers.

“As a Faculty we have not discussed the idea of including in courses generally material focusing on the impact of gender.” – *Correspondence from University A*

“The Faculty has [not] canvassed the notion of including gender-related material across the syllabus. . . . The Faculty has a general concern that certain skills are covered across the syllabus, notably skills in research and writing, but hitherto it has regarded content as an individual matter.” – *Correspondence from University B*

115 To varying degrees, New Zealand law schools have recognised the importance of understanding the law in the light of the effects of gender. In the *Report on the Review of the School of Law* at the University of Canterbury, the Review Panel welcomed the introduction of a course in Feminist Legal Theory and recommended further consideration of the development of courses bringing wider perspectives to legal studies.<sup>112</sup> The Review Committee of the Auckland Faculty of Law took a different view, stating in its report that:

An optional paper, “Women and the Law” has been offered almost continuously for the past twenty years, but this is taken by few students. Some prominent members of the profession were of the opinion that papers such as this did not enhance a graduate's employment prospects; this view was countered by others. In the face of an already full core curriculum and with many optional papers of a more practical nature, the offering of one paper in this subject area would appear adequate.<sup>113</sup>

116 Some law school optional courses specifically address gender issues in the law. Four of the law schools offer optional courses on Feminist Jurisprudence. Waikato School of Law offers a course on Law, Society and Domestic Violence Law and (although this was not offered in 1997) one on Women, Law and Policy Issues. Canterbury School of Law offers a course in Feminist Legal Theory. In all law schools the Family Law course appears to include some gender analysis. It also seems usual for jurisprudence courses to include feminist legal theory.<sup>114</sup> However, while gender issues may be considered in all of these subjects, the emphasis given undoubtedly varies from one course to another and, where a course is taught by more than one

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Constitutional Affairs (1994). In addition, the Chief Justice of Western Australia established a taskforce on gender bias, which reported in 1994.

<sup>112</sup> *Report on the Review of the School of Law* (University of Canterbury, September 1995), 21 (Canterbury Review).

<sup>113</sup> *Report of the Committee Established to Review the School of Law* (The University of Auckland, March 1994), 19 (Auckland Review).

<sup>114</sup> Jurisprudence is a compulsory subject at Auckland, Waikato and Otago.

lecturer, may vary between lecturers. Also, as these courses are not compulsory at all law schools, not all law students will be exposed to the material.

117 Women academic staff are especially well placed to develop and teach material on gender issues for the New Zealand legal context. The demographic information available about law students indicates that women are entering law school in greater numbers than men. However, there is still a small number of women academic staff in New Zealand law schools, a fact that was commented on in both the Auckland and Victoria Reviews. In 1993, at Victoria Law Faculty there were only seven women staff members (two senior lecturers, three lecturers and two assistant lecturers) and the Review Committee looked for “a continued effort to increase the proportion of female members.”<sup>115</sup> In 1997, there are 31 members of the academic staff at Victoria Law Faculty, including ten women (two senior lecturers, seven lecturers and one assistant lecturer). When all five law schools are considered together, women make up a small percentage of the academic staff and a smaller percentage of senior academic staff.<sup>116</sup> Only four of the twenty two professors of law in New Zealand are women (two at Waikato University and two at Auckland University). There are three women associate professors of law out of a total of twenty two; and seventeen women senior lecturers in law, out of a total of fifty four.<sup>117</sup>

118 The Review of the Auckland Law Faculty concluded that further work needed to be undertaken on the under-representation of women. One of its recommendations was:

[t]hat the Faculty undertake an analysis of the reasons why women are underrepresented at higher academic levels and, if as a result of such analysis, discrimination, whether indirect or direct is found to be a contributing cause, to put in place strategies to eliminate the adverse effects of such discrimination. (13)

119 As a result, a report was commissioned and completed in December 1996. While finding that there was no evidence in 1996 of “any direct or overt discrimination affecting appointment levels or promotions” it concluded that “there are concerns that not enough effort is being put into recruiting women for higher academic positions.”<sup>118</sup> Initiatives to improve the position of women staff at each of the law schools may need to be considered.

120 While more women staff may be part of a solution, it is not the whole solution.

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<sup>115</sup> *Review of the Faculty of Law at Victoria University of Wellington – A confidential report to the Vice Chancellor from the Review Panel* (1993), 14 (Victoria Review).

<sup>116</sup> Waikato Law School has 17 women and 13 men academic staff.

<sup>117</sup> This information is drawn from the 1997 Law School Handbooks, updated to take account of the recent appointment of the second woman professor in the Auckland Faculty of Law.

<sup>118</sup> Nadja Tollemache, *Analysis undertaken on the basis of recommendation 3.5 of the report of the Committee set up to review the Law School* (Auckland, December 1996), 46.

“Not all the women teach gender issues by any means. I think partly this is because they were not taught this material so they don’t recognise it as being relevant, some don’t know much about the ideas behind feminist approaches to law and ‘don’t have time’ to learn, and I think some are resistant on the basis that they want to maintain their ‘mainstream legitimacy’ among other members of Faculty.” – *Correspondence from law academic*

121 In 1989 the Auckland women law academics prepared a report which included the recommendation that a student be contracted to prepare a bibliography and synopsis of legal writings presenting women’s perspectives to assist incorporation of such material into course reading lists. The bibliography and synopsis became available to all academic staff in 1990.<sup>119</sup>

122 Three years later, the Auckland Law Faculty reported to the Review Committee on the results of a questionnaire circulated to its academic staff, in terms which highlight some of the difficulties inherent in attempts to encourage the exploration of gender issues in law courses:

[M]ost staff are aware of some issues of particular concern to women raised by the subject-matter of their courses, or of relevant feminist perspectives. There were inconsistencies between different staff as to whether any such issues were recognised. It appears that in some of the core papers, issues of particular concern to women are addressed in one or two streams. In another stream in the same subject, the lecturer may not consider that there are any such issues.<sup>120</sup>

123 The Faculty’s submission to the Review Committee suggested a number of ways by which those inconsistencies might be reduced:

- increased library purchases
- regular updating of our existing “Bibliography and Synopsis of Legal Writings Which Present Women’s Perspectives”
- greater availability of relevant conference and seminar papers
- general debate and discussion amongst staff
- more use of guest lecturers or female colleagues to address particular issues
- more women staff to draw upon
- greater integration of these issues into more courses so that students would be more familiar with the issues and arguments, and more comfortable about expressing their views and experiences in class
- more time, so as to be able to read more widely and become familiar with the literature.<sup>121</sup>

124 In Canada, a 1993 report *Touchstones for Change: Equality, Diversity and Accountability*<sup>122</sup> made comprehensive recommendations to enhance the status of women in the legal profession. Written by the Canadian Bar Association Task Force on Gender Equality in the Legal Profession, which was chaired by the Hon Justice Bertha Wilson, the report emphasised the need for Canadian universities to make further efforts to add and integrate courses that

<sup>119</sup> Letter from Lecturer, Faculty of Law, Auckland University, 21 August 1996.

<sup>120</sup> Submission of the Faculty of Law to the *Review of the Faculty of Law*: (chapter 4 Gender). A list of issues and women’s perspectives which were identified is reproduced in the Appendix.

<sup>121</sup> Submission of the Faculty of Law, 42–43.

<sup>122</sup> Canadian Bar Association, Ontario, 1993.

address gender and minority issues. Its recommendations in this regard were premised on the “principle of equality” which:

makes it clear that: a male perspective is not neutral; a white perspective is not neutral; a heterosexual perspective is not neutral; and so on. No one’s perspective is neutral. Therefore, legal education must include a diversity of approaches to the law that reflect more than just one or two perspectives.<sup>123</sup>

125 The report noted that curriculum reform occurs in a number of ways: by increasing the sensitivity of academic staff to issues of diversity; by encouraging voluntary incorporation of new perspectives on course material; by making curriculum material available and by recruiting academic staff who reflect a diversity of experiences.<sup>124</sup> To this end, the Task Force recommended that:

- the Canadian Council of Law Deans conduct a study of race and gender bias in law schools’ curricula
- that the Council act as a clearinghouse for curriculum development so that law faculties can exchange material
- that the Council facilitate the preparation and dissemination of model course materials that focus directly on gender and minority issues, as well as integrate these issues into traditional areas of teaching.<sup>125</sup>

126 Later, in its report, the Task Force again emphasised the need for the recommended reforms, explaining that

gendered and minority forms of legal scholarship, especially by younger faculty, are often challenged and marginalized in law school settings, especially by students, but by some faculty members as well.<sup>126</sup>

It then recommended that the Canadian Council of Law Deans develop videotape materials and seminars to illustrate the challenges experienced by faculty members who teach material involving gender and minority issues, with the purpose of exposing and exploring student and faculty responses, as well as remedial strategies.<sup>127</sup>

127 The 1994 report of the Australian Law Reform Commission (ALRC), *Equality Before the Law*,<sup>128</sup> also included recommendations about the content of university law courses. Its main recommendation in this regard was that:

Law schools should ensure that the curriculum includes content on how each area of the law in substance and operation affects women and reflects their experiences. The curriculum includes the core curriculum and elective curriculum.<sup>129</sup>

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<sup>123</sup> *Touchstones for Change*, 30.

<sup>124</sup> *Touchstones for Change*, 31.

<sup>125</sup> *Touchstones for Change*, 31.

<sup>126</sup> *Touchstones for Change*, 171.

<sup>127</sup> *Touchstones for Change*, 171.

<sup>128</sup> ALRC, R69, Part II.

<sup>129</sup> Recommendation 8.1, ALRC, R69, Part II, 156.

128 The ALRC further recommended:

- that law schools ensure that feminist legal theory is offered in separate elective subjects or in elective subjects that deal with legal theory;
- that the department of Employment, Education and Training undertake, as part of its annual quality evaluations, an assessment of the incorporation of the experiences and perspectives of women in the law schools' curricula;
- that law schools encourage staff members to exchange information on the incorporation of women's experiences and perspectives in the content of all subjects;
- that staff selection criteria should assess applicants' awareness of gender issues relevant to the subject area to be taught; and
- that all aspects of tertiary legal education, including assessment tasks and course materials, employ gender inclusive language and avoid sexist stereotypes of the roles of women and men in society.<sup>130</sup>

129 Australian academics are now assisted by materials funded by the Department of Employment, Education and Training (DEET). The gender-focused teaching materials are designed to be used selectively as teaching modules within the core curriculum of 11 prescribed subjects: criminal law and procedure; torts; contracts; property; equity (including trusts); administrative law; federal and state constitutional law; civil procedure; evidence; professional conduct; and company law.<sup>131</sup> In the introduction to one volume of the materials, Professor Graycar and Associate Professor Morgan comment:

Incorporating materials about gender across the law curriculum, by way of specified themes or issues, serves two important functions. First, it will assist law students (future lawyers and judges) to think laterally about these issues. For example, it will help them to understand how violence might be relevant to a legal dispute, for example, over property (by explaining how 'undue influence' can be exercised), and not just relevant to the criminal law. Or it might lead students to think about how women's work in the home could (or should) be valued a different way in the context of a claim against a deceased person's estate (and thus that women's work is relevant in, say, a succession or wills course, and not just in labour law). More broadly, the materials will make women and women's concerns more visible to law students and to those teaching them.<sup>132</sup>

130 Plainly, this approach provides a stark contrast to that taken in law schools where the primary recognition of the relevance of gender to law consists in the offering of optional courses on "women's" or "feminist" issues. Commentators have criticised law schools' use of optional courses as the sole or predominant means of exploring the connections between gender and law, on the basis that such an approach tends to suggest that the issues canvassed are marginal and a tack-on to "real" legal studies. As a result, the courses tend to attract students who have already thought about the issues and are interested in learning more.<sup>133</sup>

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<sup>130</sup> ALRC, R69, Part II, 156.

<sup>131</sup> The materials are available on the Internet at website <http://uniserve.edu.au/law>. This project was supported by the Committee of Australian Law Deans (CALD) which plays an important role in legal training in tertiary institutions. It discusses issues of educational policy and relations with government and the practising profession. (See ALRC, R69, Part II, para 8.21.) Neither DEET nor CALD is formally monitoring the use made of the materials by the 28 Australian law schools.

<sup>132</sup> *Work and Violence Themes: Including Gender Issues in the Core Law Curriculum* (Part 1 of 2), 3.

<sup>133</sup> For example, Professor Mary Jane Mossman has suggested that specialist courses can marginalise the content, marginalise the students who are doing them (who are already likely to be sympathetic to the ideas anyway, leaving their less interested colleagues unaffected) and lead an institution to believe it has achieved gender equality. See M Mossman, "Otherness and the Law School: A Comment on Teaching Gender Equality" (1985) 1 *Canadian LJ of Women and the Law* 213, 214.

## QUESTIONS

- 1 **Should each of the five law schools develop a policy about the inclusion of gender materials in their curricula?**
- 2 **If so, what should that policy be?**
- 3 **What other specific measures should be taken by law faculties?**
- 4 **Should the Council of Legal Education have a role? Should it develop a policy about the inclusion of gender materials in the core law school curriculum?**
- 5 **If so, what should that policy be?**
- 6 **Should materials like those produced by DEET in Australia be developed in New Zealand?**
- 7 **If so, by whom and how should they be used?**

### The Treaty of Waitangi – context and the impact of law

“They need training or education on gender issues, the Treaty of Waitangi or they should even be put through a decolonisation hui. It needs to start back in law school before they get let loose in the legal system.” – *Transcript of hui held with Maori women in Rohe 7*

131 The constitutional significance of the Treaty of Waitangi provides a compelling reason why Maori material should be included in the law schools’ curricula. The foundation dean of Waikato Law School, Professor Margaret Wilson, has said that a commitment to the Treaty of Waitangi requires “the Maori perspective to be reflected in all aspects of the curriculum and the activities of the School”.<sup>134</sup> The Dean of Auckland Faculty of Law, Professor Bruce Harris commented recently:

In a bicultural and multicultural society, like ours, the university is committed to encouraging cross-cultural understanding. Against the constitutional background of the Treaty of Waitangi, this is done most deliberately in the law faculty in respect of Maori culture and Maori perspectives on the law.<sup>135</sup>

132 A need to include Treaty and Maori cultural material in university law courses has been emphasised in recent reviews of three of New Zealand’s law schools. In 1993, the Victoria Review recommended that the Faculty promote and develop courses in Treaty jurisprudence up

<sup>134</sup> Professor Margaret Wilson, “The Making of a New Legal Education in New Zealand” (1993) 1 Waikato LR, 4

<sup>135</sup> Letter from Professor Bruce Harris, Dean of the Faculty of Law, University of Auckland, to Northern Law News Issue No 12, April 18, 1997, 3.



to postgraduate level.<sup>136</sup> The 1994 Review of the Auckland University Faculty of Law commented:

In the past decade or so there has been an increased appreciation in the community at large of the Treaty of Waitangi and its place in New Zealand society. With this has come the clear expectation, from the Maori community at least, that both Maori and non-Maori students will receive training in the School of Law adequate to ensure that they can service the needs of the Maori community. Members of the profession have noted a demand for practitioners trained in these aspects. In terms of the University's responsibilities under the Treaty of Waitangi this is a reasonable expectation.<sup>137</sup>

And in the 1995 Review of the School of Law at the University of Canterbury it was stated:

Maori issues have a very significant influence on contemporary New Zealand society. Lawyers representing or dealing with Maori clients, or dealing with Maori matters, need to have an appreciation of Maori issues.<sup>138</sup>

133 At each law school there are a number of courses which have material on the Treaty and Maori cultural issues. These include:

- *Auckland Faculty of Law* – Legal System, Public Law, Jurisprudence, Treaty Issues, Maori Land Law, Mining and Natural Resources Law, Studies in Public Law, Indigenous Sovereignty and Self-Determination.
- *Waikato School of Law* – Legal Systems, Law and Societies, Public Law A, Land Law, Maori Land Law, Treaty of Waitangi in Contemporary Aotearoa/New Zealand, Maori Resources Law.
- *Victoria Faculty of Law* – Public Law, Maori Land Law, Natural Resources Law, Jurisprudence, Public Law.
- *Canterbury School of Law* – Legal System, Public Law, Landlord and Tenant, Contemporary Issues in Real Property.
- *Otago Faculty of Law* – Maori Land Law, Treaty of Waitangi.

134 The amount of class time spent on Treaty and Maori cultural issues, and the importance attached to them, varies from law school to law school.<sup>139</sup> At Waikato Law School, where the commitment to teaching law in a bicultural manner is explicit, Maori students have said:

It would have been good to have more Maori content in our courses and having lecturers that can teach you about Maori stuff instead of assuming that because you are Maori that you know it all already . . . and I think that's just part of them being professional anyway, part of their job.

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<sup>136</sup> Victoria Review, 23. In 1984 the Faculty of Law passed a resolution containing the following:

the Faculty undertakes to develop attitudes, appropriate course content, and processes which recognise Maori cultural values and aspirations, with the objectives that greater numbers of students may be attracted to the successful study of law in the Faculty and that the bicultural implications of the Treaty of Waitangi be reflected in the Faculty to the benefit of all students and staff in the Faculty.

The Review commented that “[d]espite the good intentions evident in the wording of the resolution progress has been slow” (14).

<sup>137</sup> Auckland Review, 45.

<sup>138</sup> Canterbury Review, 20.

<sup>139</sup> Letter from Professor Bruce Harris, Dean of the Faculty of Law, University of Auckland, to Northern Law News Issue No 12, April 18, 1997, 3.

Definitely there has to be a lot more emphasis on Maori issues. Can't be stressed enough in all sorts of areas, not just the protectable safe areas like Treaty of Waitangi fourth year paper or . . . Maori Land Law. It has to be integral throughout the whole of the curriculum because it is needed in all those areas.<sup>140</sup>

135 Maori academic staff are best placed to present material on the Treaty and Maori cultural issues and to do the research that is needed to develop such materials. However, the number of Maori academic staff at law schools is very low, a fact that was identified in the Auckland, Victoria, and Canterbury Law School Reviews as a barrier to increasing Maori content of law courses.<sup>141</sup> It would seem that to increase the pool of staff there is a prior need to increase the number of Maori completing undergraduate and graduate law degrees.

136 At Waikato law school the number of Maori students has increased steadily without a quota system.<sup>142</sup> Maori students have said that they were attracted to the school because of its bicultural commitment and the expectation that this meant that there would be substantial Maori content to reflect the bicultural nature of New Zealand society.<sup>143</sup> Methods of creating a more comfortable atmosphere for Maori students, and leading to an increase in Maori academics and lawyers, include:

- *Providing assistance to Maori Law Students' Associations* – Maori law students associations have been set up by students at each of the law schools to provide mutual support. The law schools' provision of assistance to the associations would be one way of making the law school environment a more comfortable place for Maori students. For example, administrative time could be allocated to support the operations of the association and to assist Maori students to access academic and personal assistance available from the university and other sources.<sup>144</sup>
- *Greater use of Maori language* – The greater use of Maori language, where appropriate, may also assist in the creation of a more comfortable environment for Maori students. Maori words and phrases are coming into more frequent use in the courts and it seems sensible that students and staff should learn correct pronunciation.
- *Offering pre-law programmes* – Experience with encouraging indigenous people to enter law school in Australia and Canada seems to centre on the offering of bridging courses or pre-law courses to indigenous students.<sup>145</sup> The aims of the courses are generally to increase the number of indigenous students succeeding at law school by providing an introduction to law and legal language and to basic legal skills such as legal research and reasoning. The courses may also provide tutorial programmes for the students as they go through the first year of law school, which is considered the most difficult. These courses seem to have had some success in the retention of indigenous students.

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<sup>140</sup> Stephanie Milroy, *Waikato Law School: An experiment in bicultural legal education* (University of Waikato, 1996), unpublished thesis, 41.

<sup>141</sup> Auckland Review, 44-45; Victoria Review, 23; and Canterbury Review 20.

<sup>142</sup> Stephanie Milroy, 53.

<sup>143</sup> Stephanie Milroy, 56-57.

<sup>144</sup> For example, at Waikato Law School the position of Maori student liaison officer was created to assist students to access scholarship and research funds and to publicise the same, to gather information on important conferences or hui and assist in organising student attendance, to help organise tutoring and study groups and many other activities.

<sup>145</sup> See, for example, Patricia Monture, "Now that the door is open: First Nations and the Law School Experience" (1990) 15 Queen's LJ 179; Heather Douglas, "Indigenous pre-law programs: the Griffith University experience" (1996) 83 Aboriginal Law Bulletin 8 (which also mentions other universities in Australia which have run such courses); and D Lavery, "The participation of Indigenous Australians in legal education" (1993) 4 Legal Education Rev 177.

137 The possibility of staff or student resistance to the inclusion in university law courses of material on the Treaty and Maori cultural issues raises similar issues to those canvassed in the previous section on the inclusion of gender issues. It may be that until materials on the Treaty and Maori cultural issues are incorporated across the law schools' curricula and seen as being intrinsically important to the development of knowledge about the law, the teaching of Maori issues will be regarded as an unnecessary frill, taking up time in which "real" law should be taught.

138 Again, Australian and Canadian initiatives may be instructive in this regard. In 1985 the Faculty of Law at Monash University undertook a project, funded by the Victoria Law Foundation, to introduce cross-cultural training into the law curriculum through the first-year "Legal Process" course. In 1994, DEET funded a project for the development of curriculum materials on cross-cultural issues for core law subjects with the intention that the materials be widely distributed throughout Australia and that law teachers be encouraged to use the materials in their teaching.<sup>146</sup>

139 The relevant recommendations made by the Canadian Bar Association Task Force in *Touchstones for Change: Equality, Diversity and Accountability* have already been noted.<sup>147</sup> That report emphasises the "different dimension" on which Canadian Aboriginal students encounter law schools' curricula and suggests that its recommended initiatives to integrate minority issues into traditional areas of law teaching may not be sufficient to tackle the "fundamental problem" that Aboriginal students begin from a different legal perspective: "their relationship to the legal world is one of disempowerment and despair." As a result, the report further recommended that a study be commissioned into the feasibility of an Aboriginal law school.<sup>148</sup>

140 When considering whether and how New Zealand law students' and lawyers' understanding of Treaty and Maori cultural issues could be enhanced, lessons might also be drawn from judicial cultural training initiatives. Overseas, the Australian Institute of Judicial Administration has launched a project to develop and facilitate a model of cross-cultural judicial education.<sup>149</sup> The New South Wales Judicial Commission has also developed a number of structured sessions relating to Aborigines and the law and to ethnicity in the courtroom.<sup>150</sup> In Canada, the Western Judicial Education Centre, a project of the Canadian Association of Provincial Court Judges, has designed, developed and delivered judicial education programmes on the Delivery of Justice to Aboriginal People and on Racial, Ethnic and Cultural Equity.<sup>151</sup> The National Judicial Institute of Canada is now providing 3 to 5 day social context education programmes for federal judges. The programmes focus on first nation peoples, women, the disabled and those suffering from poverty or unemployment.<sup>152</sup>

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<sup>146</sup> AIJA, *Cross Cultural Awareness for the Judiciary - Final Report to the Australian Institute of Judicial Administration* (July 1996), 41

<sup>147</sup> See paras 124–126.

<sup>148</sup> *Touchstones for Change*, 32.

<sup>149</sup> Julie Stubbs, Chris Cunneen, Janet Chan, Joanne Travaglia, Lici Inge, *Cross Cultural Awareness for the Judiciary: Final Report to the Australian Institute of Judicial Administration* (1996), v.

<sup>150</sup> Sessions have included Equality before the law, with particular reference to Aborigines; Findings of the Royal Commission into Aboriginal deaths in custody; Aboriginal law enforcement issues and perspectives; Modern Aboriginal Society and Customs; An Aboriginal View of the Criminal Justice System; Discrimination in contemporary Australian Society; Being Aboriginal – a role reversal; Stereotyping; Cultural perceptions, behaviours and values; and Meeting tribal elders. See Livingstone Armytage, "Judicial Education on Equality" (1995) *Mod Law Rev* 160, 182-183.

<sup>151</sup> Judge DR Campbell, Director WJEC in address to Gender Awareness Seminar, Family Court of Australia, April 1994 "How is your vision?"

<sup>152</sup> Address by Hon Justice Jackson to Second Worldwide Common Law Judiciary Conference, May 1997.

141 In New Zealand, it was expected that the Institute of Judicial Studies, which was granted establishment funding in the 1996/97 financial year, would provide cross-cultural training for judges. The *Report of the New Zealand Judiciary 1996* noted that “[t]he judges see the Institute as one means to ensuring that they are fully briefed on the implications of contemporary social issues.” (19) The Institute has not, however, received funding for the 1997/98 financial year.

### QUESTIONS

- 8 Should Treaty of Waitangi and Maori cultural matters be taught at law school?**
- 9 If so, what courses should include material on the Treaty of Waitangi and Maori cultural issues?**
- 10 How should law schools develop teaching expertise in the Treaty of Waitangi and Maori cultural issues?**
- 11 Should each law school develop a policy on the integration throughout the curriculum of material on the Treaty of Waitangi and Maori cultural issues?**
- 12 Should the Council of Legal Education have a role?**
- 13 If so, what should its role be?**

### Professional responsibility

142 Until the late 1960s, law students attended university part-time while also employed as law clerks. With the introduction of the full-time law degree course, fresh questions arose about the location of responsibility for lawyers’ professional training. Through subsequent changes to the style and content of the “professionals” course which law graduates must complete before admission as a barrister and solicitor, the debate has continued, with fresh stimulus being provided by the proposals in the Cotter Report.

143 There is currently little focus in the New Zealand law degree on the responsibilities of lawyers. Only at two law schools, Auckland and Waikato, is a subject on professional responsibility offered and then only on an optional basis. Professional responsibility is not taught pervasively throughout the law school curriculum at any law school. The effect is illustrated in part 4 of this paper and is the subject of the Cotter Report, where it is stated:

Time and again we were told of ignorance of the *Rules of Professional Conduct for Barristers and Solicitors* (the Rules), or of a lack of realisation of how inviolate the Rules are. It seems the meaningfulness or significance of the Rules is not appreciated. We were told there was not so much a lack of knowledge of the Rules; rather a conscious risk-taking to get around them, because of commercial convenience, or potential loss of the client, or simply the desire to win.<sup>153</sup>

144 The Cotter Report expressed the opinion that law school instruction on professional responsibility can:

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<sup>153</sup> The Cotter Report, 10.

- enhance the capacity of students to think clearly, to feel intelligently and to act knowingly with respect to questions related to the legal profession and the roles and responsibilities of lawyers; and
- enable students to learn about themselves and their own relationship to the profession and the roles performed by lawyers in our society.<sup>154</sup>

145 With respect to law school training, the Report recommended that

- the law schools, ideally through a cooperative venture, develop a legal ethics curriculum which exposes all law students to a course of study in legal ethics and which enables them to achieve the recommended objectives (set out below); and
- that whatever course of study is adopted at each law school, it include a formal assessment of students with respect to the subject matter of legal ethics.<sup>155</sup>

146 The Cotter Report stated four objectives of university law school training on professional responsibility, as follows:

At the conclusion of this comprehensive program, those undertaking it will:

with respect to the legal profession:

**Objective 1**

1. have been introduced to the nature of professions, and the organisation, structure and responsibilities of the legal profession;
2. have been informed about the various historical, philosophical, political, economic, legal and other perspectives which have contributed to this organisation, and from which perspectives the profession and the roles of lawyers may be analysed;
3. be able to evaluate the organisation of the legal profession and its effectiveness in fulfilling its various responsibilities

**Objective 2**

have been introduced to a range of ethical issues and principles which are reflected in, and underlie, legal ethics.

...<sup>156</sup>

**Objective 5** (also to be taught in IPLS and continuing legal education)

have developed their attitudes and values with respect to the legal profession and professional responsibility.

**Objective 6** (also to be taught in continuing legal education)

be able to engage in a process of ethical reasoning so as to be able to:

- evaluate the appropriateness of professional roles and their personal implications for them; and
- develop a framework for evaluating the various professional obligations and selecting appropriate courses of action when these obligations come into conflict.

147 The Report considered whether the objectives for law school training in professional responsibility should be achieved by means of a separate subject and/or taught pervasively

<sup>154</sup> Cotter (1992), 3–8.

<sup>155</sup> The Cotter Report, 62 (recommendations 5 and 6).

<sup>156</sup> Objectives 3 and 4 are relevant to the IPLS course and are set out in para 166.

throughout the law degree. It noted that there are several arguments in favour of professional responsibility being taught in a pervasive way; in particular, that this method of teaching emphasises that professional responsibility issues are relevant to all areas of the law. However, the Report concluded that the pervasive approach alone would not be sufficient and that each law school would have the option of providing education programme/s, based on the objectives, pervasively throughout the law degree, and in a first year subject and/or as a separate final year subject.<sup>157</sup>

148 The Cotter Report recommendations are currently the subject of consideration by the New Zealand Law Society and the Council of Legal Education.

### Interpersonal communication skills

“Lawyers should undergo training in ‘bedside manners’ throughout their degree.” – *Meeting held in Hastings, February 1996*

“Lawyers’ training needs to be about basic communication skills.” – *Meeting with Rural community Workers, 14 June 1996*

149 The subject of practical skills training has received frequent attention in legal publications. One typical observation is that:

Few law students have any contact with actual clients in a clinical setting before graduation; and even courses that simulate aspects of law practice other than trials – such as interviewing, counselling, and negotiation – are relatively uncommon. As a result, many new lawyers are unprepared to deal with the actual people who become their clients and have little idea how to translate classroom theory into practice.<sup>158</sup>

150 A great deal of the debate has focused on the merits of incorporating the teaching of skills into the curricula of law schools as opposed to having skills training as a separate course within or at the end of university education.<sup>159</sup> The skills most often seen as being in need of development are those related to communication: listening and understanding, giving appropriate information, interviewing, and cross-cultural and other skills associated with client relations.

151 In Australia, there is a movement towards integrating skills training into the university law degree.<sup>160</sup> The approach has often been to “repackage” legal training and education so that while part of practical legal training is included in the academic stage, post university training has mixed into it some of the elements traditionally taught at law school. The Law School at Flinders University of South Australia has appointed a Skills Director to integrate practical legal skills throughout the curriculum.<sup>161</sup>

<sup>157</sup> The Cotter Report, 12, 34–37. The Report recommended that professional responsibility be a compulsory subject for the purposes of admission to practice, and noted that this would, for a significant number of students, make it a de facto compulsory subject (31).

<sup>158</sup> Melissa Nelkin, “Negotiation and Psychoanalysis: If I’d Wanted to Learn About Feelings, I Wouldn’t Have Gone to Law School” 46 J of Legal Ed 420, 422.

<sup>159</sup> Alan Lever, “Developing the Complete Lawyer” (1994) 16 Law Society Bulletin 33.

<sup>160</sup> Allan Clay “If not an LLB and PLT, then what?” (1994) 12 J of Prof Legal Ed 39.

<sup>161</sup> Alan Leaver, “Developing the Complete Lawyer” (1994) 16 Law Society Bulletin 33

152 An argument that may be presented against teaching practical skills in universities is that the university degree is not solely aimed at preparing lawyers for practice. On this view training in skills is a 'trade' school task and not a proper concern of the law school.<sup>162</sup> Against this argument, however, is the fact that the core subjects prescribed by the Council of Legal Education are very much practice orientated and do not include the more generalist subjects, for example, jurisprudence. Further, practical skills will be useful in any career to which a law graduate may turn.

[L]awyers' skills are an essential subject of attention in any academic study of law because those skills are part of the subject matter of 'the law' and to ignore them is to provide students with an unrealistic view of the areas they are studying.<sup>163</sup>

153 New Zealand law school courses have traditionally had a strong emphasis on written communication skills, and more recently on the use of plain language. There has also been a focus on advocacy skills and drafting through courses in Legal Research and Writing, Trial Advocacy and Civil Procedure.

154 In the Review of the School of Law at the University of Canterbury, the Review Panel welcomed the shift in Faculty thinking which led to the introduction of more skills training in the curriculum.<sup>164</sup> In the Review of Auckland Law Faculty it was noted that the study of law necessarily involved some attention to practical skills.<sup>165</sup>

155 Despite the law schools' increasing focus on skills, it appears that there is little emphasis upon the development of the skills of interpersonal communication with clients.

### QUESTIONS

- 13 Should the university law schools accept a responsibility for professional training?**
- 14 If so, what should that responsibility be?**
- 15 If not, where and how should such training occur?**
- 16 Should interpersonal communication skills be taught at university?**
- 17 If so, how might those skills be taught?**

<sup>162</sup> Fiona Martin, "The Integration of Legal Skills into the Curriculum of the Undergraduate Law Degree: The Queensland University of Technology Experience" (1995) 13 J of Prof Legal Ed 45, 46.

<sup>163</sup> John Goldring, "Academic and Practical Legal Education: Where Next? An Academic Lawyer's Response to Noel Jackling and Neil Gold" (1987) 5 J of Prof Legal Ed 105, 106.

<sup>164</sup> Canterbury Review, 20.

<sup>165</sup> Auckland Review, 17.

## PART 6 – PREPARING LAWYERS FOR ADMISSION – THE IPLS COURSE

Pre-admission practical training and experience, for the purposes of s 38(1)(a) of the Law Practitioners Act, should cover those matters, in addition to the degree, with which it is necessary, in the public interests, for all lawyers to have sufficient familiarity, before being admitted to the profession and commencing to practise law.<sup>166</sup>

156 The Institute of Professional Legal Studies (IPLS) course proceeds on the basis that its students have been schooled in the substance of law and how to find it. The primary focus of the 13-week course is skills. This part of the paper discusses the IPLS course in connection with the teaching of gender, Treaty of Waitangi and Maori cultural issues, professional responsibility and interpersonal communication skills.

### Context

157 While the basis of the IPLS course is that clients are individuals and need individual service, there are few materials in the course which suggest that clients are diverse.

### Gender

158 Although the IPLS course has been reviewed a number of times since its inception, there has been little specific focus on the needs of women clients. Gender issues are not a prescribed part of the context in which the course is taught. For example:

- Although many of the skills covered and assessed are relevant to family law practice, none of the transactions is commonly and specifically undertaken by family law practitioners. Matrimonial property issues are not considered in the Commercial/Property module; neither are issues specific to women covered in the sections on the sale and purchase of a business or house (such as the issue of a wife’s effective guarantee over her husband’s potential business debts arising out of a joint all-obligations mortgage).
- Although one of the Fact Analysis fact patterns in the Criminal Litigation module deals with s 194 of the Crimes Act 1961 (“that being a male he did assault a female”), and does so in the context of family violence, there is no indication in the instructors’ sheets that family violence and its dynamics should or could be discussed.
- In another fact situation a man is charged with discharging a firearm outside a Family Court counselling centre where his estranged wife was receiving counselling. The fact pattern raises issues about the defendant’s mental state in that he is incoherent and makes threats against his wife while giving instructions to his lawyer to seek bail. There is no indication in the instructors’ sheets that the dynamics of domestic violence and, especially, the seriousness of violence at the time of separation, should or could be discussed.

159 While those fact patterns could give rise to discussion of contextual matters relevant to family violence, including the role of support groups and the availability to victims of benefits and civil legal aid, it may be that the focus on skills excludes a consideration of the wider issues which form the context of the particular “transaction”.

160 A number of the submissions from lawyers suggested that there should be more focus on gender issues in the IPLS course. A related concern has been expressed about Australian practical legal training:

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<sup>166</sup> *Review of Practical Legal Training*, viii.



It is of concern that family law practice has been omitted from the list of skill areas to be completed in practical legal training. The inadequacy of lawyers' skills in this area, particularly in the context of domestic violence, is highlighted in submissions.<sup>167</sup>

161 The Australian Law Reform Commission also suggested in its report that gender awareness materials could be developed for inclusion in practical legal training.<sup>168</sup>

#### *The Treaty of Waitangi and Maori clients*

162 The 1987 *Report on the Reform of Professional Legal Training in New Zealand* recommended that the course contain

a special section . . . on Maori language and culture. . . . As with all cultures the knowledge of local customs and laws is fundamental.<sup>169</sup>

163 There is no material in the IPLS course on the Treaty of Waitangi and the needs of Maori clients.<sup>170</sup> For example, there are no fact situations which deal with Maori issues such as transactions involving the Maori Land Court.<sup>171</sup>

164 Cross cultural communication is not addressed despite a focus of the course being on communication skills. This omission persists despite two reviews since the course's inception which recommended that the Maori content of the course be increased.

165 In 1990, a consultant engaged to review the IPLS course recommended that the course materials have at least one chapter on practical aspects of institutions such as the Maori Land Court and the Waitangi Tribunal. It was also recommended that there should be greater use of Maori full-time and guest instructors and that they be involved in the course design and planning.<sup>172</sup>

#### *Professional responsibility*

166 Currently the IPLS course contains 2 days of non-assessable instruction on professional conduct integrated throughout both modules. The Cotter Report recommended increasing the IPLS course material on professional responsibility and making it an assessable part of the course. During 1997 and 1998 the IPLS will develop the professional conduct component of its course based on recommendations which come out of the Cotter Report.<sup>173</sup> The three objectives for IPLS training proposed by the Cotter Report are as follows:

At the conclusion of this comprehensive program, those undertaking it will:

**Objective 3** have been introduced to the responsibilities of lawyers in various professional roles and contexts.

<sup>167</sup> *Equality Before the Law* (ALRC R69 Part II), para 8.35 (footnotes omitted).

<sup>168</sup> *Equality Before the Law* (ALRC R69 Part II), para 8.37.

<sup>169</sup> *Report on the Reform of Professional Legal Training in New Zealand*, 25.

<sup>170</sup> During 1997 and 1998, at the direction of the Council of Legal Education, the IPLS is considering the Council's responsibilities arising from the Treaty of Waitangi. *The Institute of Professional Legal Studies Handbook 1996*, 3.

<sup>171</sup> In the fact patterns some clients have Maori names but the transactions do not (at least explicitly) raise Maori cultural or Treaty issues.

<sup>172</sup> Christopher Roper, *Report of a Review of the Institute of Professional Legal Studies* (Council of Legal Education, October 1990) 30–31.

<sup>173</sup> *The Institute of Professional Legal Studies Handbook 1996*, 3.

**Objective 4** (also included in continuing legal information) be able to identify these responsibilities when they arise in specific professional contexts.

**Objective 5** (also included in law schools and continuing legal education.) have developed their attitudes and values with respect to the legal profession and professional responsibility.<sup>174</sup>

### Interpersonal communication skills

“There is a need to promote skills with people handling – making clients feel at ease, advising in clear logical and where possible non-legal language. More training in these areas would be helpful.” – *Submission 35*

“I think professionals [IPLS] should be a longer course (and cheaper!) and could usefully go into some areas a bit more deeply.” – *Submission 361 (lawyer)*

“Professional Legal Training seemed to skip over areas because of the limited time available. We only touched on skills like interviewing technique.”  
– *Submission 351 (lawyer)*

“Despite the fact that I would characterise myself as an effective communicator I often wondered whether I had explained legal issues adequately to the clients. After all the only practice we had during the ‘Professionals’ course was on other law students who already understood the law.” – *Submission on Women’s Access to Legal Advice and Representation (NZLC MP9) (lawyer)*

167 Many of the comments made to the Commission by recently qualified lawyers were very positive about the IPLS course. However, these were invariably qualified by criticism of the brevity of the course, its superficial coverage of material, and its failure to adequately bridge the gap between university study and work: a case of “too little too late”.

168 Given the number of reviews of the IPLS course and, particularly, the fact that its 13-week duration has been confirmed as appropriate, it would appear that there is little room to increase the skills training provided in the course. As a result, the integration of skills training throughout the law degree and continuing legal education would seem to be the most appropriate way to increase newly qualified lawyers’ practical skills.

## QUESTIONS

<sup>174</sup> Objectives 6 and 7 are relevant to continuing legal education and are reproduced in para 186.

- 18** Should materials focusing on gender issues be developed for inclusion in the IPLS course?
- 18** Should materials with a focus on the Treaty and Maori cultural issues be developed for inclusion in the IPLS course?
- 19** If so, who should be responsible for developing materials?
- 20** How else could such materials be incorporated into the IPLS course?
- 21** Should the Council of Legal Education prescribe objectives for the teaching of material on gender and the Treaty of Waitangi and Maori cultural issues?
- 22** What comments do you have on the Cotter Report proposals for professional responsibility training in the IPLS course?

## PART 7 – IMPROVING LAWYERS’ COMPETENCE – CONTINUING LEGAL EDUCATION

Lawyers have continuing legal education needs in both technical subjects (caseflow management, dispute resolution techniques, the use of technology) and awareness training (cultural diversity, equality and cross-cultural issues).<sup>175</sup>

169 The excerpt is taken from a recent Canadian report but may apply equally to the practice of law in New Zealand. While continuing legal education is widely regarded as important by New Zealand lawyers, its pursuit is left very much to individuals or in some cases their employers:

Those fortunate to join firms which offer comprehensive training programmes to all their professional staff will receive thorough training and monitoring of their work day performance. Some new practitioners will receive no training at all. Others will at least be given the opportunity of attending New Zealand Law Society and District Law Society seminars and workshops. The situation is entirely uneven. From all points of view this is unsatisfactory.<sup>176</sup>

170 This part of the paper addresses the role of the New Zealand Law Society in promoting an ethic of continuing legal education amongst its members.

171 The Commission received many positive comments from lawyers about the New Zealand Law Society’s continuing legal education programme.

“Continuing Legal Education, particularly the commercial area I practise in is I think excellent. The variety and generally the standard of the seminars is very high.” – *Submission 87 (lawyer)*

“CLE courses [are] generally very good – increasing emphasis on practical problem examples, provision of precedents etc.” – *Submission 95 (lawyer)*

“Continuing Legal Education is superb – it is well focussed on problem solving in practice.” – *Submission 282 (lawyer)*

172 There was only one commonly expressed concern: the voluntary nature of the New Zealand Law Society continuing legal education programme. This was said to have two distinct effects:

- those lawyers who would most benefit from attending a continuing legal education programme did not do so; and
- those (usually younger) lawyers who would like to attend seminars are being prevented from doing so by their employers because of the cost involved.

<sup>175</sup> *Report of the Canadian Bar Association Taskforce on Systems of Civil Justice* (The Canadian Bar Association, August 1996), 73.

<sup>176</sup> Richard Scragg, “Law, skills and transactions: The opportunity for an expanded curriculum” (1995) NZLJ 234, 237.

“CLE could be improved by being compulsory.” – *Submission 295 (lawyer)*

“Continuing Legal Education (seminars etc) very useful but often seminars are poorly attended and those who should attend don’t.” – *Submission 364 (lawyer)*

“[CLE] is a big help because it is much more practically oriented. But I think a lot of the courses should be compulsory and freely available in case you have stingy partners in firms who (a) don’t provide you with time to go or (b) the money to go to them.” – *Submission 193 (lawyer)*

“The [CLE] seminars that I can convince my firm to send me to are worth every penny.” – *Submission 317 (lawyer)*

173 Support for compulsory continuing legal education was also reflected in the New Zealand Law Society *Poll of Lawyers*. Two-thirds of lawyers were in favour of compulsory continuing education for lawyers in their first 3 years of practice and one half favoured compulsory continuing education for all lawyers.<sup>177</sup>

174 A mandatory approach to continuing legal education has been adopted in many states of the United States, in England and in New South Wales, where lawyers are required, for example, to undertake a certain minimum number of hours training every year.

175 The arguments for and against mandatory continuing legal education in New Zealand have most recently been canvassed in the Cotter Report. The benefits were described as:

- ensuring that all lawyers participate so that those most in need of educational programmes cannot avoid it; and
- the professional body is able to claim that all of its members have had a minimum level of exposure to, and hopefully involvement in, the education programme.<sup>178</sup>

176 The arguments against mandatory continuing legal education include:

- it makes little difference to competence;
- mandating anything is against the culture of the legal profession; and
- it is against the basic principles of adult learning.<sup>179</sup>

177 Any implementation of mandatory continuing legal education programmes for all lawyers or particular groups of lawyers by the New Zealand Law Society, the District Law Societies or the Council for Legal Education would be dependent on law reform. The New Zealand Law Society does not appear to have the power to impose mandatory continuing legal education on its members and the Council of Legal Education does not have power over continuing legal education. District Law Societies may require lawyers wishing to practise on their own account

<sup>177</sup> *Poll of Lawyers*, 117.

<sup>178</sup> The Cotter Report, 43.

<sup>179</sup> The Cotter Report, 44.

to complete the “Flying Start” programmes (Law Practitioners Act 1982: s 55). In other respects their powers are the same as the New Zealand Law Society.<sup>180</sup>

178 The development of specialist sections within the profession may also lead to the imposition of training and proficiency requirements on lawyers wishing to be members of the particular sections. In New Zealand the first formal specialist section is currently being developed.<sup>181</sup>

### **Context and the impact of law**

179 There is growing awareness internationally of the need to provide continuing legal education in a context that recognises the effects of gender and race. For example, a 1996 Canadian Bar Association Task Force Report has recommended that professional development programmes should include:

- learning new attitudes toward clients and about gender, race and equality in the workplace; and
- acquiring cross-disciplinary education to meet the needs of clients.<sup>182</sup>

180 The implementation of continuing legal education programmes on the needs of women and Maori clients could improve the pool of knowledge of more experienced practitioners and foster the provision of more appropriate services to clients. Such programmes could be designed to build upon the prior training received by newly admitted lawyers.

### *Gender*

181 The New Zealand Law Society has not yet canvassed the notion of including educational material focusing on the impact of gender across the CLE programme, nor of addressing areas of the law that may be particularly important to women clients. In the 1997 programme there are approximately 28 seminars and only one is obviously focused on women and the legal system – Women in the Criminal Justice System. A further seminar looking at women and the law is planned for 1998.<sup>183</sup>

182 It seems from the information received from district law societies that, at district level, there have not been any seminars or workshops which focus on the impact of gender on the application of law or the delivery of legal services.

“[I]f individual lawyers wish to focus on the needs of women clients and issues of particular concern to women, then nothing need stand in their way.”  
– *Correspondence from District Law Society A*

<sup>180</sup> Law reform is unlikely until the completion of the E-DEC review of the law societies’ functions, powers and structures. There are de facto forms of mandatory continuing legal education in New Zealand, for example the duty solicitor programme and also training for Counsel for the Child.

<sup>181</sup> See Kate Bicknell, “Consultation continues: the Section and district family law committees”, Law Talk 480 7 July 1997 13

<sup>182</sup> *Systems of Civil Justice Task Force Report*, 73

<sup>183</sup> Letter from New Zealand Law Society Director of Education dated 13 November 1996.

*The Treaty of Waitangi and Maori*

183 There have been few seminars in the New Zealand Law Society Continuing Legal Education programme which focus on the Treaty of Waitangi or Maori cultural issues. In the 1997 programme only two seminars focus on Maori legal issues: Maori Land – what every practitioner needs to know, and Treaty of Waitangi Issues – the last decade and the next century. From the information received by the Commission from district law societies there have been few seminars or workshops at district level on issues relating to the Treaty of Waitangi and Maori.

*Professional responsibility*

184 The New Zealand Law Society has conducted seminars which include ethical issues (for example Conflicts, Undertakings and Privilege – the must knows, and Taking control – Loss Prevention and Risk Management). However, ethical matters and material relating to professional responsibility more generally are not integrated as a matter of course into the continuing legal education programme. One problem experienced by the New Zealand Law Society in this area is the lack of experts available to present seminars on these issues.<sup>184</sup>

185 The Cotter Report recommended that all lawyers holding practising certificates should be required to attend certain courses within a 2-year period. Thereafter, newly admitted lawyers would attend particular modules and other modules would be developed for more senior lawyers.<sup>185</sup>

186 The four objectives of training in professional responsibility for the continuing legal education programme, as proposed by the Cotter Report, are as follows:

At the conclusion of this comprehensive program, those undertaking it will:

- |   |   |
|---|---|
| <b>Objective 4</b> (also included in IPLS)                  | be able to identify these responsibilities when they arise in specific professional contexts.   |
| <b>Objective 5</b> (also included in law schools and IPLS.) | have developed their attitudes and values with respect to the legal profession and professional responsibility  |
| <b>Objective 6</b> (also included in law schools)           | be able to engage in a process of ethical reasoning so as to be able to: <ul style="list-style-type: none"> <li>• evaluate the appropriateness of professional roles and their personal implications for them; and</li> <li>• develop a framework for evaluating the various professional obligations and selecting appropriate courses of action when these obligations conflict.</li> </ul> |
| <b>Objective 7</b>  | be able to conduct professional work in a competent, efficient, organised, and professional manner.   |

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<sup>184</sup> The need to build up a group of well qualified teachers at all levels was noted in the Cotter Report, 37.

<sup>185</sup> The Cotter Report, 12.

**QUESTIONS**

- 23** Should the New Zealand Law Society adopt a policy about the inclusion and integration of material focusing on gender issues and the Treaty of Waitangi and Maori cultural issues within the continuing legal education programme?
- 24** If so, how should that policy be developed? What should its objectives be?
- 25** What comments do you have on the Cotter Report proposals for professional responsibility training in lawyers' continuing legal education?
- 26** What other initiatives could be considered?

**Interpersonal communication skills**

187 In the past 2 years the number of skills-based courses offered by the New Zealand Law Society has increased significantly. During 1997 the skills of writing, drafting, negotiation, reading accounts and balance sheets, and time and stress management will be the subject of seminars. The entry level courses which form part of the planned 3-year curriculum also focus mainly on "learning by doing".

188 To meet the concerns of women about their lawyers' interpersonal communication skills, it may be desirable for the New Zealand Law Society to include training in interpersonal communication, including cross-cultural communication, in its continuing legal education programme.

**QUESTIONS**

- 27** Should interpersonal communication skills training be incorporated into the New Zealand Law Society continuing legal education programme?
- 28** In what other ways could lawyers' skills of communication with diverse clients be improved?



## CONCLUSION

It is not a simple task to develop lawyer competence. A competent lawyer must be able to reflect the values of the profession and be skilful in a number of personal and professional areas in what is an increasingly specialised and competitive market.<sup>186</sup>

189 This paper explores concerns voiced by New Zealand women about lawyers' understanding of the "personal and professional areas" in which they must be skilful in order to provide competent service to all clients. Inevitably, those concerns raise questions about the adequacy of the education and training received by New Zealand lawyers.

190 The paper is intended to stimulate further consideration of the aims, content and effectiveness of law students' and lawyers' education and training. We would be very grateful for your comments on the issues raised.

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<sup>186</sup> *Review of Practical Training in New Zealand*, 32.



APPENDIX – AN EXCERPT FROM THE SUBMISSION OF THE AUCKLAND UNIVERSITY FACULTY OF LAW TO THE REVIEW OF THE FACULTY

In response to a questionnaire distributed by a working group on gender in 1993 the following issues were identified as relevant to the law curriculum. It is not intended to be comprehensive. (Chapter 4 40–41)

*Legal system/Jurisprudence/Law and State/Legislation/Comparative*

- Gender imbalance among law makers with consequent bias against or invisibility of women in laws and institutions.
- Impact of law on women in general.
- The role of the State as regards women.
- Gendered bias of legal theory, structures, doctrines and personnel.
- Feminist jurisprudence.

*Criminal Law/Criminology/Criminal Law and Policy/Advanced Criminal Law*

- Rape.
- Domestic Violence.
- “Battered women’s syndrome”.
- Pre-menstrual syndrome and diminished responsibility.
- Infanticide.
- Prostitution.
- Feminist perspective on crimes and punishment.

*Torts/Advanced torts/Remedies*

- Accident compensation payments.
- Medical misadventure.
- Consent to medical treatment.
- Compensation for victims of rape.

*Contract/Advanced Contract*

- Feminist critiques of the public/private distinction as regards intention to create legal relations.
- Married women’s historical incapacity.
- Feminist jurisprudential perspectives on contract generally.

*Public Law/Advanced Constitutional/Human Rights/Administrative Law*

- Gender bias in the application of discretionary power.
- Feminist critiques of the public/private distinction.
- Sex discrimination.
- Gender equality as a human right.
- Gender equality and the Bill of Rights.

*Equity/land/Restitution*

- Constructive trusts in de facto relationships.
- Equitable relief in cases of domestic violence.

*Industrial Law*

- Sexual harassment.
- Pay equity.
- Sex discrimination.
- Pregnancy discrimination.

- Equal employment opportunity.

*Legal History.*

- The emphatically subordinate role of women.

*Family Law/Advanced Family/Matrimonial Property*

- Equality of actual treatment of men and women in the context of a non-equal practical situation.
- Gender imbalance and gender bias among law makers.

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