

# EDEN crescent

Faculty of Law Annual 2010



**Judge Andrew Becroft on  
creating young criminals**

**Tributes to Professor  
Jock Brookfield (1928-2010)**

# Contents



Seven of the Law School's Deans (From left): Brian Coote, Mike Taggart, Paul Rishworth, Jock Brookfield, Julie Maxton, Grant Hammond, Bruce Harris.  
Photo: Scott Optican

## EDEN crescent

The University of Auckland  
Faculty of Law Alumni magazine

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# Message from the Dean



At the end of 2010 I complete my five years as Dean. This prompted me to re-read the message that our dear friend, and sadly missed, Mike Taggart penned in the *Eden Crescent* of 1995 when he was passing the Dean's baton to the incoming Professor Bruce Harris. Mike, as those who knew him would expect, had surveyed the literature: "Why Deans Quit" [1987] *Duke LJ* 342; "Why Deans Stay" (1992) 51 *Maryland LR* 483; and "The Five Roles of the Law School Dean: Leader, Manager, Energiser, Envoy,

Intellectual" (1989) 29 *Emory LJ* 605 (all roles, incidentally, that Mike certainly fulfilled in abundance). As Mike said, no Dean can survive long without the support of the vast majority of his or her colleagues, as well as that of the judiciary, profession and alumni.

Like Mike, I have greatly appreciated that support during my time. It has been a particular privilege to interact with those outside the Law School - as "envoy". I have attended alumni gatherings in Fiji, Tonga, Hong Kong, Shanghai, New York and London. I have been struck by the range of careers in which Auckland alumni are to be found all over the world, by their great appreciation of our Law School and of the opportunities that their Auckland degree has given them.

It is a truism that the strength of a law school lies in its people: in its staff, students and alumni. So far as law school rankings go, it is the academic staff who establish a law school's national and international reputation, but this depends in turn on there being an excellent body of administrators, an outstanding research library and staff, talented students that engage with their teachers, and a supportive profession that is interested in the Law School's success. Auckland Law School continues to do extremely well on each of these fronts. For me, a highlight of the last five years was the result of the PBRF evaluation exercise (2007) in which the Auckland Law School ranked first amongst the nation's law schools for the research quality of its academics. (The next evaluation is released in 2013.) Another highlight has been the successes of our students in national and international competitions - this year, for example, Auckland mooters won the New Zealand title for the fourth year in a row, becoming eligible once again to compete in the international Jessup Mooting Competition in Washington DC.

There are some challenges for us. A key one is to attract a new generation of private law scholars into academia. Global trends in law have opened up many new fields that rightly press for a place in law schools' curricula - international trade law and dispute resolution, international criminal law, environmental law and sustainability, human rights, to name a few. Many of our brightest students are exploring these subjects and other public law topics in their graduate degrees. Yet the fundamentals of private and commercial law remain as important as ever. And all law schools are finding that the greater financial rewards of legal practice can make it difficult to recruit stellar graduates who are keen to pursue an academic career in private law or commercial law. This is but one reason we feel keenly the departure of contract scholar Professor Rick Bigwood, who leaves us at the end of 2010 to take a new position at Bond University in Australia. As the leading law school in the nation's commercial capital, it is vital that we maintain and enhance our strength in commercial law. I have been very appreciative of the support shown to us by the leading commercial law firms in participating as lecturers and offering courses. Another highlight this year was Professor Peter Watts winning the Legal Research Foundation's JF Northey Prize for the best law book published

in 2009 by a New Zealand author - *Directors' Powers and Duties* (LexisNexis, 2009).

The Law School is conscious, too, that Auckland is New Zealand's multicultural capital, and the largest Polynesian city in the world. Over the last five years we have sought to develop our strength in Pacific law: graduate and undergraduate courses in South Pacific Legal Studies are now a regular part of our offerings. This year we conducted our first Pasifika mooting competition, the final being held in the University's impressive Fale and comprising a hypothetical further appeal from a 2009 decision of the Tuvalu Court of Appeal in a case about the clash between freedom of religion and culture. In 2011 the LRF is to host a major conference on South Pacific constitutionalism. And a group of our Pacific students delivered papers and mooted at a conference on Law and Culture held at the University of the South Pacific.

Another challenge for us is the declining public funding for universities as a proportion of costs. Here I have been heartened by the response of our alumni to the Law School's annual appeals, and to the significant individual donations that have been made to advance our mission to be amongst the world's leading law schools. A number of scholarships are now available, and funds are being accumulated for others. These bring real advantages to us as well as to the students, in enabling research masters theses to be completed.

The challenge for a law school that strives for excellence is to be a part of the international network of legal scholarship. We strive in various ways to be connected to that network: through our academic staff presenting their research at international conferences and publishing in international journals, through inviting distinguished academics and others from overseas to teach in our postgraduate programme or present seminars, and facilitating our students in going on exchange to our international partner schools. Senior Lecturer Peter Sankoff, who, sadly, is leaving us to return to his native Canada, has been an exemplar of international engagement through research collaborations and teaching.

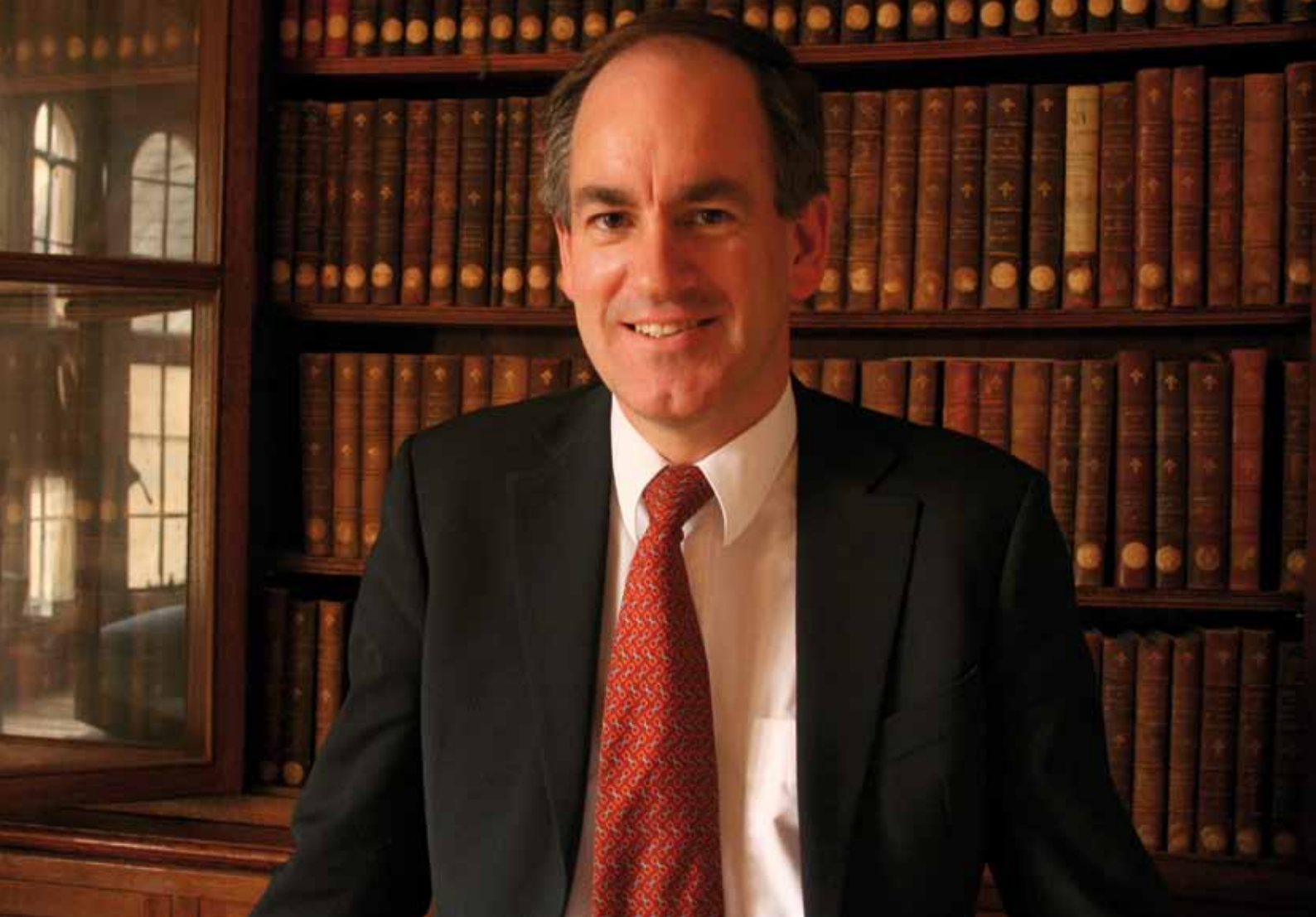
The core of our mission, however, remains to prepare excellent graduates for careers in which their legal study will be an asset. The quality of our student body, as measured by the grade point average required for entry, continues to rise. This makes for a virtuous circle: Auckland law students are rewarding for academic staff to teach and supervise; discussion and debate in classes stimulates research and inquiry; and students gain from being taught by research-active scholars. Our students excel in other dimensions as well: the student-run Equal Justice Project continues to do excellent work in providing pro bono legal assistance and resources in the community.

A great law school should also be a national resource. The research of staff can contribute to the issues of the day, as well as to the work of lawyers and the courts. This year, for example, Warren Brookbanks and Richard Ekins have been tireless contributors to the national debate about the "Three Strikes" law, while colleagues Bill Hodge and Scott Optican are known across the land for their incisive media commentary on important legal issues as they arise.

A law school can also serve as a focus for the profession, providing opportunities for further education for graduates. Conversely, the Law School is itself enriched by the involvement of the profession; as guest lecturers, as part-time teachers, tutors, and competition judges. Our aim is that lawyers will not feel they have severed their ties with us when their student days are over, but that they will still be able to participate in law school events throughout their career.

Overall, I believe the Law School is in good heart. It remains only for me to thank my colleagues, our students and our alumni for all their support over the last five years. I wish incoming Dean Andrew Stockley all the very best as he joins us next February.

**Paul Rishworth**



## New Dean for the Law School

The Law Faculty has a new Dean of Law - Dr Andrew Stockley, a New Zealander currently based at Oxford University. He will take up the post in February 2011, succeeding Professor Paul Rishworth who has been Dean since 2005.

Dr Stockley has a particularly strong background in management and relishes the opportunity to take up a leadership role at the Law School. He says that the "Auckland Law Faculty is well known internationally for the calibre of its staff and the quality of its teaching and research. I am looking forward to heading one of the world's best law schools."

Since 2006 Dr Stockley has been the Senior Tutor of Brasenose College at Oxford. In this role he has charge of the academic life of one of Oxford's oldest colleges. He oversees the College's academic staff along with students' academic studies and performance, supervises marketing and student recruitment, and coordinates strategic planning of academic activities. As one of the senior officers of the College, he has a major role in all aspects of College life, including welfare, student support and financial management. He also has university-wide responsibilities, particularly as Deputy Chairman of the Graduate Committee and as a member of the University's Joint Resource Allocation Advisory Board, which helps allocate £235 million per annum to departments and colleges.

Dr Stockley holds a BA in History and Political Science and an LLB from Victoria University of Wellington, a BA (First Class Honours) in History from Canterbury, and a PhD in History from Cambridge. His doctoral thesis has been published as *Britain and France at the Birth of America* (dealing with the European powers and the Peace of 1783). His

speciality is constitutional law and he has written widely on the role of the Crown, judicial independence, proportional representation, and eighteenth century political and diplomatic history.

During his career, Dr Stockley has been a member of the academic staff of the Law School at Canterbury University (including a period as Head of the Law School and a member of Canterbury University's Senior Management Team). He was also Principal of College House in

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**"Auckland Law Faculty is well known internationally for the calibre of its staff and the quality of its teaching and research. I am looking forward to heading one of the world's best law schools."**

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Christchurch, New Zealand's oldest university college, for ten years.

Dr Stockley is looking forward to engaging with Auckland's alumni. He says that "the Law School does extremely well at preparing students for legal practice and other careers and I know how appreciative graduates are for the quality of the education they receive. I look forward to meeting as many alumni as possible during the next few years."

# New appointments and promotions

## Richard Ekins



Richard Ekins has been promoted to senior lecturer. Richard is a graduate of Auckland in Law and Political Science, and of Oxford. Upon graduation as Senior Scholar at Auckland, Richard worked for two years as a Judges' Clerk in the Auckland High Court. He was then awarded a Commonwealth Scholarship to Balliol College, Oxford. There, he first completed the BCL degree, being the joint winner of the Herbert Hart Prize for Jurisprudence and Political Theory in 2004. He proceeded to study for the DPhil degree. In 2005 he took up a position as Lecturer here, on a fractional basis whilst he completed the DPhil. He returned to Auckland each year to teach Jurisprudence for the Faculty, while also undertaking tutoring for Balliol College. He moved to fulltime teaching in 2009, teaching both Jurisprudence and a course in Statutory Interpretation.

Not long after completing his undergraduate Law degree, Richard had an article accepted for the *Law Quarterly Review*, a remarkable start for a recent graduate. This article was subsequently referred to by Lord Bingham of Cornhill in the House of Lords in *A v Secretary of State for the Home Department* [2005] 2 AC 68. Richard has continued to publish most impressively, with publications in the UK in *Public Law*, the *King's College Law Journal*, the *European Human Rights Law Review*, and again in the *Law Quarterly Review*, and in the US in the *Journal of Markets and Morality*. He has also become a prominent contributor to public discourse in New Zealand, most recently in relation to the Regulatory Responsibility Bill, and the "three strikes" sentencing law.

Richard and his wife Rebecca have two sons, James and Alexander.  
Peter Watts

## John Ip



John Ip was promoted to senior lecturer in 2010. John graduated with a BA in Political Studies (1997) and an LLB(Hons) degree (2000) from the University of Auckland (winning a Senior Prize in both faculties). After Law School, John was a Judge's Clerk for the Auckland High Court and was admitted to the Bar in 2002. He subsequently obtained his LLM degree from Columbia University Law School in the United States (2003), where he was both a Fulbright and James Kent Scholar. After completing the LLM, John stayed in the United States to work on Guantánamo Bay and death penalty litigation at the International Justice Project in Virginia. He joined the Faculty of Law in 2005.

John's scholarship and research focuses on human rights law; issues in counter-terrorism; and criminal justice. His article, "Comparative Perspectives on the Detention of Terrorist Suspects", 16 *Transnational Law and Contemporary Problems* 773 (2007), was reprinted in Amos Guiora (ed.), *TOP TEN GLOBAL JUSTICE LAW REVIEW ARTICLES 2007* (Oxford University Press 2008). He currently teaches courses in Counterterrorism Law and Policy, Public Law, and Law and Society.

John is married to An Hertogen, whom he met at the Columbia LLM program and who is currently completing a PhD in Law at the University of Auckland. They recently bought a house in Mt Eden, where John indulges his passion for world sports with their large flat screen television while An does something productive.

As John's former teacher - and longstanding friend and colleague - I can say how lucky we are to have John return as a member of the Faculty. He is a first rate academic who brings his vibrant intelligence and winning personality to the Law School. Not to mention making his parents - Dr Yuk Ming Ip and Professor Manying Ip (of the Auckland University Asian Studies Department) - very proud.

Scott Optican

## Ron Paterson



In May this year we welcomed Ron Paterson back to the Law School to a chair. Ron joined the Faculty in May, completing ten years as Health and Disability Commissioner. The Dean, Professor Paul Rishworth, expressed his delight at Ron's return: "We are extremely fortunate to have attracted someone of his calibre and wealth of outside experience. He brings new strength and leadership to our teaching and research in the health law field."

Ron came to the Auckland Law School as a law student in 1975 - "a wonderful experience" - where he made great friends amongst his classmates, notably Mike Taggart: "Mike inspired me with his enthusiasm for law and life." Ron's interest in medical law started as a student, with a paper for Pauline Tapp's Family Law class on consent to medical treatment for minors, which won the annual Auckland Medico-Legal Society prize and was later published. The teachers who had "the biggest influence" on Ron at Law School were Francis Dawson and Jim Evans. Francis Reynolds also taught Ron in two courses during a sabbatical visit, and encouraged him to consider Oxford University for postgraduate study. Having gained his LLB(Hons), and sharing with his friend Mike the Auckland District Law Society Prize for the best

undergraduate record, several scholarships took him to Oxford where he graduated BCL with first class honours.

Ron's legal career has not followed a traditional path. After three years in practice (Russell McVeagh and Sheffield, Young & Ellis), he held assistant professorships at the Universities of Ottawa and British Columbia before joining the Auckland Law School in 1986 as a lecturer. Here he went on to become a senior lecturer and Deputy Dean, and was founding editor of *New Zealand Recent Law Review*. He "loved teaching" at the Law School in the late 1980s and early 1990s. This was the time of the Cartwright Inquiry, and he seized the chance to develop a course on medical law and to start researching and writing in the area. Within a fairly short time he found himself getting opportunities to work in the field and was drawn into working in the health sector and for the Ministry of Health. After a year as a Harkness Fellow in Health Care Policy, he became Deputy Director-General of Health (Safety and Regulation) in 1999, and Health and Disability Commissioner the following year.

The Health and Disability Commissioner (HDC) legislation was a significant step forward for New Zealand. Ron played a key role in the

## Stephen Penk

drafting of the Code of Patients' Rights. There is a broad consensus that, as the country's second and longest-serving Commissioner (2000 to early 2010), he discharged this difficult and important role with outstanding success, and he is widely and highly regarded for his contribution. Reflecting on this intense and productive period of his life, Ron refers to "the wonderful privilege of being able to put the flesh on the bones of the Code, and to be able to develop a new organisation. Many of the cases which come to HDC are very hard, with a lot of emotion on both sides, and I found it a challenge and rewarding to try to reach a fair resolution of difficult cases. I would like to think HDC is now on a secure footing in our health regulatory landscape."

Somehow during that time Ron also managed to chair two major health system reviews in Australia. He is co-editor of the textbook *Medical Law in New Zealand*, has published widely in books and journals, and written numerous health sector reports, reviews and comments as well as giving frequent invited lectures and conference presentations. He is a regular media commentator on health law, ethics and policy issues.

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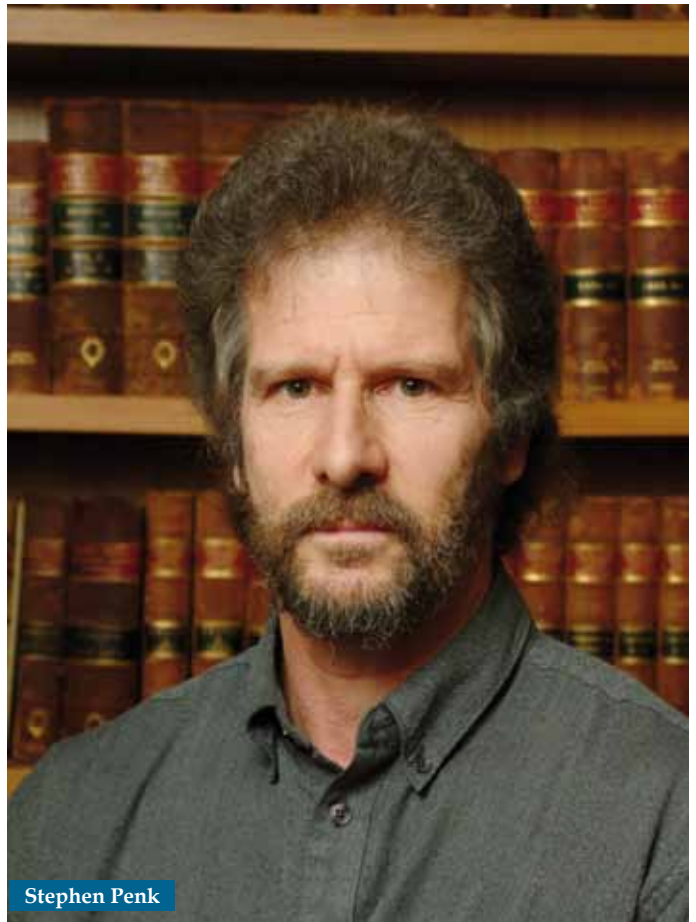
**The Health and Disability Commissioner (HDC) legislation was a significant step forward for New Zealand. Ron played a key role in the drafting of the Code of Patients' Rights. There is a broad consensus that, as the country's second and longest-serving Commissioner (2000 to early 2010), he discharged this difficult and important role with outstanding success, and he is widely and highly regarded for his contribution.**

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In 2009 Ron was awarded the New Zealand Law Foundation International Research Fellowship to undertake research entitled "The Good Doctor - finding the optimal balance between professionalism and external regulation to ensure patient safety." Ron's research will examine the balance between traditional models of self-regulation and major reforms resulting in increased external regulation, including the Health and Disability Commissioner system, asking whether the current balance is appropriate and how best the public can be confident that an individual, registered doctor is a "good doctor."

Having been immersed for over a decade in dealing with some of the hard questions when things go wrong in health care, Ron is now welcoming the opportunity to "stand back from the fray and reflect on some of the broader issues and hopefully also encourage students to get interested in this field." He is also enjoying the freedom to take on new roles as Chairman of the New Zealand Banking Ombudsman Scheme and as a member of the Board of the Royal Australasian College of Physicians.

Jo Manning



Stephen Penk

Stephen Penk is in that small minority of academics who enjoy administration, and in that even smaller minority who are good at it. For 11 years from 1984 he served very ably as Faculty Registrar, and is known to generations of law students for his efficient and humane service in that role.

In the late 1990s he decided to become a law student himself. With prizewinning performances in Latin in his BA at Auckland and in his MA at Otago, and a quite remarkable facility in mental arithmetic, he had little trouble taking to law. He proceeded to complete the LLB(Hons) degree. It was the Faculty's good fortune that at this stage Stephen was willing to be re-employed by the University as a senior tutor in law, allowing him to combine a love of learning and conveying this to students with his outstanding talents at administration. He has been Associate Dean (Academic) since he took up his position. He subsequently completed an LLM thesis on the topic of vicarious liability.

Having built up a profile of publications alongside all his teaching and administration, it has made sense for Stephen to move to the position of senior lecturer so that his research can be recognized as part of his job description, and not just an add-on to the tutorship role. Under his and Rosemary Tobin's editorship there has recently been published *Privacy Law in New Zealand* (2010, Thomson Reuters, Wellington). Stephen was responsible for four chapters of this book, and co-wrote a fifth. He continues to perform superbly administrative roles within both the Faculty and the wider University. In particular, his knowledge of the panoply of Faculty and University rules is encyclopaedic, and he possesses both the prosecutor's and the defence lawyer's prowess in applying them.

Stephen and his wife Debbie have five sons, two of whom have completed a Law degree at Auckland. Son Alex, who went on to obtain an LLM from Cambridge, is currently teaching a stream of Legal Method for the Faculty.

Peter Watts

## Khylee Quince



Khylee Quince

Khylee Quince joined the Faculty in 1998, after practising for three years as a criminal and family lawyer, becoming a full-time member of staff in 2000. She has been promoted to senior lecturer.

Khylee is a passionate teacher and communicator, having taught Criminal Law, Jurisprudence, Māori Land Law, Women and the Law

and Personal Property at undergraduate level. Her teaching highlights have been developing and teaching, with Alison Cleland, the first Youth Justice course to be taught in a New Zealand law school in 2009 and co-teaching the Comparative Indigenous Peoples and the Law course with Dr Nin Tomas in 2007 - an LLM course taught via live video link with five other law schools. Khylee is keen to explore innovative modes of teaching and assessment and to develop relationships with academics in other disciplines in the University.

Khylee's research to date has focussed on Māori and criminal justice, in particular penal policy and its effects on Māori women. Her LLM by major thesis, submitted in 2008, concerned the invisibility of Māori women in New Zealand penal policy and practice. This has led to several publications and conference papers since, as well as consultations within the public and private sectors. In 2008, Khylee secured research funding for a project looking at comparative initiatives and facilities for indigenous peoples in prisons in New Zealand and Canada. While in Canada she visited the University of Saskatchewan, University of Manitoba and University of British Columbia to speak with academics, practitioners and penal programme providers. Khylee has also published recently on Māori concepts in privacy; apology and remorse in criminal justice; and the implications of private prisons for Māori. She is currently working on research concerning developments in marae-based justice initiatives, the lack of specific reference to Māori in criminal law statutory drafting practice and the pedagogy of co-teaching in law, and is planning a co-authored text on youth justice in New Zealand.

In 2008 Khylee was appointed to the newly created position of Tumauaki/Associate Dean Māori. This role involves working with the Pouawhinga/Māori Student Advisor, overseeing the Māori Academic Programme, and pastoral care for the more than 200 Māori law students enrolled in law studies at Auckland. The Tumauaki also works alongside the Pro Vice-Chancellor Māori, as a member of the university-wide Runanga Committee, established to ensure that the Faculty is complying with the University's obligations pursuant to the Treaty of Waitangi.

In her spare time, Khylee is a mother to three young children, and Chairperson of the Edendale Primary School Board of Trustees.

### Nin Tomas

## Nin Tomas



Nin Tomas

Dr Nin Tomas has been promoted to Associate Professor. She joined the Faculty in 1991, where her academic contributions have been broad-based, covering both Māori/Indigenous and non-Māori ideas of law.

Nin has made an enormous contribution in terms of the establishment and oversight of the Māori student academic programme, which she led from 1990-2007. The programme was introduced to increase the number of Māori successfully completing law at Auckland, and is built around maintaining whanaungatanga (kinship obligations) in academic study. It has an "honours" component, in which students who do well in prior years have the honour of contributing to the education of those who follow in successive years - by way of tutoring, mentoring and academic support.

Nin completed her PhD in 2006, and graduated alongside her son Inia who had completed his medical studies. Her thesis was entitled *Key concepts of Tikanga Māori (Māori Custom Law) and their use as regulators of human relationships to natural resources in Tai Tokerau, past and present*. This was ground-breaking research which demonstrated that a jural system of land tenure, based on broad fundamental principles, existed in the Tai Tokerau (Central Northland) in the period before colonisation - and continues to exist.

Nin has an international profile that has seen her invited to speak all



over the world in recent years. She also founded the *Te Tai Haruru Journal of Māori Legal Writing* as a forum for focusing on Māori issues and Māori concepts of law.

In the period 2006-2009 Nin taught the New Zealand component of Comparative Indigenous People and the Law, a course which brought together students from the universities of Auckland, Monash and Queensland in Australia, Ottawa and Saskatchewan in Canada, and Oklahoma in the United States. Taught by video-conference, each contributing country provided expert teaching for global sharing. Described by students as "revolutionary" the course gave students a "virtual OE" in which they gained valuable overseas experience without leaving home.

In 2008 Nin was awarded a \$175,000 Research Grant by Ngā Pae o te Māramatanga, to investigate "Nga Tikanga Mate". Prompted by a series of cases in which Māori have repatriated family members for

burial in their home territories (against the wishes of their spouses and/or children), the research is interdisciplinary and comparative. It brings together law, history and anthropological approaches to answer the question: Who "rightfully" should decide where a Māori person is buried? The international component looks at African constitutions under which customary law is the law of the land and compares this with the Aotearoa/New Zealand approach. It is hoped that the outcomes will lessen legal disputes and recourse to the courts in the future.

Nin is currently teaching at Waikato Faculty of Law for the period July 2010-2011, where she hopes to further develop her bicultural approach to law, and after which she will return to Auckland.

**Khylee Quince**

## Gift to the Law School



Auckland lawyers Greg and Shelley Horton have endowed a substantial gift to the University of Auckland Law School. It is the largest gift yet to the Law School's Innovation and Development Fund established last year. Income from the Greg and Shelley Horton Gift, as it is known, will fund areas of need at the discretion of the Dean. The Dean could use it, for example, to retain or attract academic staff to enhance the Law School's effectiveness and reputation.

Greg Horton, an Auckland graduate (LLB(Hons), BCom), is a partner in Harnos Horton Lusk Limited, a specialist corporate law firm in Auckland. He has wide experience of mergers and acquisitions, takeovers, securities and finance. A member of the University's Leading the Way Campaign Leadership Committee, he

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**Greg and Shelley believe strongly that graduates should support their schools, to recognise the impact and benefits of strong teaching on their law careers. In making the donation, they have expressed the view that they would like to see all alumni contributing to the law school, irrespective of the size or nature of the contribution.**

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has also been active with other law alumni in supporting the Law School to achieve its vision.

Greg and Shelley (who is a graduate of Victoria University Law School and Fordham University) believe strongly that graduates should support their schools, to recognise the impact and benefits of strong teaching on their law careers. In making the donation, they have expressed the view that they would like to see all alumni contributing to the law school, irrespective of the size or nature of the contribution.

Thanking Greg and Shelley Horton for their generosity, Professor Paul Rishworth said the endowment would help the Law School achieve national and international eminence. "It will allow us to boost our capability in key areas as opportunities arise."



Professor Manfred Nowak

## Post-graduate programme

For ten years the University of Auckland has been spearheading the development of postgraduate education in law within New Zealand. Most notably, every year the Auckland LL.M brings some 18 or so distinguished overseas teachers to teach intensive courses in the programme. By calling on some of the world's leading law teachers from a range of top law schools, and combining their expertise with that of Auckland's own staff, the Auckland Law School is able to offer an array of talent and course offerings that is not only unmatched in New Zealand but is comparable with the best taught-LL.M programmes in the common law world. Frequently, this mix is further enhanced by including in the team of teachers internationally renowned law practitioners from such places as London, New York, and Ottawa. It is not surprising, therefore, that the programme attracts many enrolments from abroad, as well as from all parts of New Zealand. Some 400 students, many part-time, are enrolled in the programme at any time.

2010 has been a busy and productive year for the programme. Despite the Government's withdrawal in 2009 of the long-running exchange agreements with France and Germany, many of its courses have been fully subscribed. Visiting professors from abroad have included David Campbell (Durham University), Jim Ryan (University of Virginia), Fred Soons (Utrecht University), Michael Bridge (London School of Economics), Francis Reynolds (Oxford University), Ben Boer (University of Sydney), Lawrence Solum (University of Illinois), Sanford Gaines (Aarhus University), Tim Edgar (University of Western Ontario), Robert Frater (Department of Justice, Canada), and Ben Richardson (York University).

There was a marked difference in our student body compared to 2009. In the first semester of 2010 the last of the cohort coming under the agreements with France and Germany completed their courses, but right from the beginning of the year there were more Auckland LL.B graduates than we have had in recent years. We continue to have

significant numbers of international students; some are still coming from Germany, and others have come from Norway, Sweden and the USA.

In 2011 we are again offering a wide range of courses over the three specialisations - Commercial Law, Environmental Law and Public Law. The overseas institutions from which we have drawn teachers for 2011 include Cambridge University, the University of Vienna, University College London, the University of Oslo, George Washington University, and the University of Virginia. The table that follows is the full list of 2011 courses. Special mention should be made of the visit of Professor Manfred Nowak from the University of Vienna. He will be teaching a

course in International Human Rights Law. Professor Nowak was one of the judges of the Human Rights Chamber for Bosnia and Herzegovina between March 1996 and December 2003, and is currently the United Nations Special Rapporteur on Torture, well known internationally for his fearless denunciation of torture wherever it occurs.

Full course outlines are available on our website: [www.law.auckland.ac.nz](http://www.law.auckland.ac.nz).

Enrolments for 2011 open in November 2010. For further information, inquiries should be directed to Jeanna Tannion, Postgraduate Student Adviser. She can be contacted at [postgradlaw@auckland.ac.nz](mailto:postgradlaw@auckland.ac.nz) or +64 9 373 7599, ext 82123.

Semester One – Intensive courses	
Legal Research Methods	Carr/Mead, University of Auckland
Privacy Law	Gehan Gunasekara and Stephen Penk, University of Auckland
Commercial Insurance	Rob Merkin, University of Southampton
Multilateral Trading Systems and Protection of the Environment	Tom Schoenbaum, George Washington University
International Human Rights	Manfred Nowak, University of Vienna
Aspects of UK Taxation	John Tiley, Cambridge University
Corporate Finance	George Geis, University of Virginia
Mental State Defences in the Criminal Law	Ronnie Mackay, Leicester De Montfort University
Commercial Equity	Richard Nolan, Cambridge University
Resulting and Constructive Trusts	Robert Chambers, University College London
International Environmental Law	Klaus Bosselmann, University of Auckland
Commercial Arbitration	David A.R. Williams, University of Auckland
Comparative Energy Law	Ernst Nordtveit, University of Bergen, and David Grinlinton, University of Auckland
Semester One – Full-semester courses	
Criminal Law and Policy	Warren Brookbanks, University of Auckland
Resource Management Law	Ken Palmer, University of Auckland
Selected Aspects of Intellectual Property	Paul Sumpter, University of Auckland
Semester Two – Intensive courses	
Legal Research Methods	Carr/Mead, University of Auckland
Mergers and Acquisitions	Matt Sumpter and Roger Wallis, Chapman Tripp
International Fisheries Law	Kerry Tetzlaff
South Pacific Constitutions	Alex Frame
Patient Safety and the Law	Ron Paterson, University of Auckland
Remedies	Jeff Berryman, Universities of Windsor and Auckland
Law and Economics	George Barker, Australian National University
Law and Governance for Sustainability	Hans Christian Bugge, University of Oslo
Corporate Governance	John Farrar, University of Auckland and Bond University
Therapeutic Jurisprudence	Warren Brookbanks, University of Auckland
Semester Two – Full-time courses	
International Law	Caroline Foster, University of Auckland
Copyright	Alex Sims and Rob Batty, University of Auckland
Law and Policy	Jane Kelsey, University of Auckland
Insolvency Law	Mike Josling, University of Auckland
Natural Resources Law	David Grinlinton, University of Auckland



## Honorary professor's 'defining moment' at Harvard

Seventeen years of part-time law teaching culminated in David Williams QC's appointment as the Law School's first honorary professor earlier this year. David was very flattered to be appointed the Law School's first Honorary Professor especially since he has always had a high regard for the Auckland Law School. He also values the appointment for its recognition of the contribution made by many Auckland lawyers through their part-time teaching. "I think, for example, of those who taught civil procedure in my early days like Sir Muir Chilwell and Sir Ian Barker along with other who teach now such as Rodger Haines (immigration law) and Simon Mount (advocacy)".

David began teaching at the Law School in 1966 upon his return from taking an LLM at Harvard. "Dean Northey who had supported my application for admission to Harvard told me in no uncertain terms that it was now my turn to do something for the Law School. In that year he said he did not have a teacher in Taxation so I would teach tax. I knew nothing about tax but I did as I was told!" Over the years David has also taught Evidence, Medico Legal problems, Environmental Law and, "most recently and persistently", Arbitration. He currently teaches the LLM intensive on International Commercial Arbitration.

His route to law study and a distinguished legal career initially owed nothing to personal choice or ambition. Neither he nor his brother Michael Williams "had any instinctive interest in the law. When we

were about to finish secondary school our father announced that he was considering dentistry or the law for us. Fortunately he selected the law and simply announced that he had been to see the Dean of the Law School, Professor Northey, who had agreed to admit us and we should present ourselves at the Law School the following February." Their father, a hotel keeper, was lessee of the Station Hotel in Anzac Avenue just below the High Court. "We never inquired as to why he chose the law for us. Fortunately his choice was a good one because we have both very much enjoyed our legal careers." David, previously a partner of Russell McVeagh and a former High Court Judge is now a senior barrister with Bankside Chambers in Auckland and Essex Court Chambers in London, and a renowned international commercial arbitrator.

Although David came to university with a very poor academic record, having failed University Entrance on the first attempt, he had the good fortune to be taught in his first (Arts) year by three inspirational teachers, Professors John Reid (English), Keith Sinclair (History) and Robert Chapman (Political Studies). "For the first time I became strongly motivated in my studies. Then when I turned to the Law subjects I found them extremely interesting. I did what everybody did in those days namely, two years full-time and four years part-time." The number of students in the Law School in 1959 was much smaller than today and

the gender balance very different with only two women in his class: Justice Judith Potter and Elizabeth Wright.

The law teachers to whom he is primarily indebted include Bernard Brown who “showed that the study of law could be fun” and Professor A.G. Davis who “while a very dry teacher made one memorable statement that I have never forgotten. He said: ‘I preach to my students the doctrine of meticulous accuracy in all their work.’ Then there was the formidable Jack Northey who taught me international law.”

By the end of his degree David was enthusiastic about the law and considering overseas study. “In those days the first and prevailing view about postgraduate legal study was that it was a complete waste of time - one should go into practice as soon as possible and get one’s career under way. The second view was that if, for any strange reason, you wished to undertake postgraduate studies the only places to go were Oxford or Cambridge. ‘Law schools’ in America were regarded as strange choices.”

One Friday night by chance when drinking with fellow students at the Station Hotel David met an American lawyer Lurton Masee. “He told me about Northern American law schools and encouraged me to adopt a different approach and go to the US. He was a graduate of the Virginia Law School and the New York Law School.” David took his advice and applied for admission to about six law schools with the support of Jack Northey. He was fortunate to be awarded a Harvard Law School Fellowship. He happened to be at Harvard with Sir Kenneth Keith who was in his second year there. “That began a long friendship which lasts to this day.”

David calls the Harvard Law School experience “the defining moment of my legal career”. He had never before encountered such superb classroom performers, among them Professor Richard Baxter, later a Judge of the International Court of Justice, and Benjamin Kaplan who taught copyright and unfair competition. As a US Army Officer Justice Kaplan helped draft the indictment of the Nazi criminals who were tried at Nuremberg. He later became a Law Professor at Harvard and served nine years on the Massachusetts Supreme Court. When he died recently at 99 Justice Stephen Breyer of the US Supreme Court said he “was the greatest teacher I ever had”. Others were former US Solicitor-General and Watergate Prosecutor Archibald Cox and Dean Albert M. Sacks. “The memory of those teachers has been with me ever since. I was introduced by them to the glories of American law and in particular to the writings and judgments of great American judges such as Oliver Wendell Holmes Jr, Louis Brandeis, Benjamin Cardozo and Learned Hand.”

David was unable to pursue his interest in international law when in practice “except episodically. But, as events have turned out, it is now an essential part of my current practice in international investment treaty arbitration.”

One of his 1965 classmates was Trevor Clarke. “Trevor left Morpeth Gould to practise in the Cook Islands and was responsible for retaining me for some cases for the Cook Islands government. That has led to a 40-year-long association with the Cook Islands acting for various governments over the years and in more recent times serving as a Judge on the Cook Islands High Court (2000-2005) and as Chief Justice (2005-2010) and Court of Appeal from 2010.”

David’s main mentors in the law were David Beattie QC, Paul Temm QC and Lloyd Brown QC. He regards mentoring as a critical responsibility of senior lawyers. “It is for this reason that I hire an Auckland Law School student as a summer clerk every year to carry on the mentoring tradition followed by those leaders of the Auckland Bar.”

In his early years at Russell McVeagh, David was “doing what young partners did - matrimonial law and small commercial disputes with some shipping law, but on the side I became interested in environmental law as a result of my Harvard experience”. At Harvard he saw the possibilities of pro bono public interest lawyering. This led him, with several others to found the Environmental Defence Society in Auckland. “This also led to my specialisation for some years at Russell McVeagh in what is now called resource management law.” In 1978 he

produced his textbook *Environmental Law in New Zealand*, the first of its kind in New Zealand. It is now in its third edition under the editorship of Derek Nolan. Later he moved completely into commercial litigation which was his focus as a Queen’s Counsel.

His interest in international arbitration began with some major international arbitrations which came to Russell McVeagh. First was *Mobil Oil v NZ Government*, an ICSID (World Bank) arbitration heard in Washington DC. Then came *Badger Chiyoda v CBI*, a case which went up to the Court of Appeal on the legality of the “no appeals” provision in ICC (Paris) arbitrations, and then a major Cook Islands international arbitration. “I am a great believer in arbitration as a means of settling commercial disputes.” He has been involved in over 100 international arbitrations and is presently writing a book on *Commercial Arbitration in New Zealand* with co-authors Amokura Kawharu and Campbell Walker.

His current practice is rather demanding from a travel standpoint because by definition most of his work takes place abroad. “There are not many international arbitrations in New Zealand! However, the overseas cases are universally interesting and intellectually stimulating, especially the Investment Treaty cases brought by investors against host states pursuant to bilateral investment treaties.”

David’s brother Michael went to Sydney when the Accident Compensation reforms were introduced in New Zealand. “This was because his speciality was personal injury litigation and medical negligence. He has become a leader in that field in Sydney and was appointed an SC some years ago. We once had a case against one another in the early days in the High Court. I think I succeeded but it is a long time ago and I could be mistaken!”

When David’s two children asked about their careers he said they had “seen the very busy life that I led and if they had any sense they should not go into the law. I failed to understand that, unlike children in my youth, the modern generation usually do the exact opposite of what their parents tell them! Hence they both went to the Auckland Law School.” About half-way through her degree, and after a summer clerkship in Russell McVeagh, his daughter Melissa decided she wanted to be a journalist and, following a year at the Northwestern University Journalism School and a period in New York with *Seventeen* magazine, she returned to Auckland where she has been editor of *Fashion Quarterly* and involved in several other magazines. His son Nicholas stayed with the law. Encouraged by his father’s experience at Harvard he went to the Chicago Law School for his LLM and, after working with an international arbitration tribunal in Zurich and with Citibank in Geneva, he returned to Auckland and is now a partner at Meredith Connell.

**Bill Williams**

## Calling all former Auckland University Law Students’ Society members

Yvanca Clarisse, reviewing *Learned in the Law: The Auckland Law School 1883 - 2008* (Brian Coote with Bernard Brown, Peter Watts and Sean Kinsler), in the AULR in 2009, noted that only brief mention of the AULSS is made. This is despite the fact that in 2011 the AULSS celebrates 40 years since its incorporation as a registered society, and it has a history dating from before 1971. Research into the AULSS’s history was frustrated by the fact that little record of its activities has been kept by the AULSS. This year’s AULSS Executive has implemented a more effective record keeping system for the future. It is also hoped that further information on the history of AULSS can be unearthed in the coming years. To that end the AULSS welcomes anyone with information or records pertaining to the AULSS’s history to contact its Secretary, Chris Gillies, at [aulssecretary2010@gmail.com](mailto:aulssecretary2010@gmail.com).



## Seeking a legally binding sustainable future

In 2009 Professor Klaus Bosselmann, the Law School's guru on the ethics of sustainability, was the inaugural recipient of what has been dubbed the "Oscar of environmental law". He was awarded the first annual Scholarship Award as Best Researcher in the category of "environmental law academic with more than 10 years experience" from the IUCN Academy of Environmental Law. In the review process leading to the award his work was described by others working in the field as "groundbreaking", "visionary", "rigorous" and "of critical importance both within the academy and beyond."

The prodigious scholarly output and reach of Klaus shows no sign of slowing. This year he has written a 150-page book (*Sustainability for*

*New Zealand: National strategies in an international comparative perspective*), co-edited four books, and contributed three book chapters. Klaus has also been responsible for three articles in refereed journals. Not content with this impressive yield he has on the go numerous further publications and projects spanning different themes, as well as multiple jurisdictions.

Singling out individual examples of his industry is almost invidious, but one which stands out in more ways than one for its royal imprimatur is *The Earth Charter: A framework for global governance*, a 275-page book edited by Klaus and Ronald Engel, an American theologian and pioneer of environmental ethics. The book was launched

in June 2010 at The Hague in celebration of the Earth Charter's tenth anniversary. Present was Queen Beatrix of the Netherlands who has taken a close interest in the Charter from its inception. Her Majesty personally put together 25 paintings of free-flying birds by Dutch children, expressing their dreams for the future, on a box adorning the book's cover.

Another substantial book, also launched this year, of which Klaus is proud is *Democracy, Ecological Integrity and International Law* (508 pages) which he co-edited with Professor Ronald Engel and Professor Laura Westra, an environmental ethicist from Canada. In a series of essays, one by Klaus, who also wrote the introductions to the two of the book's four parts, scholars consider the all-important intersection of democracy, ecology and law. Klaus's chapter is on "Earth democracy: Institutionalising sustainability and ecological integrity," while his wife, Prue Taylor, co-director with Klaus of the NZ Centre for Environmental Law, wrote a chapter on "The imperative of responsibility' in a legal context: Reconciling rights and responsibilities".

Still to come are *Sustainability for New Zealand: National strategies in an international comparative perspective*, which Klaus wrote himself, and two works which he edited: *Water Rights and Sustainability* (145 pages) and *The Law and Politics of Sustainability* (275 pages).

A slim yet influential publication which appeared last year, addressing themes close to home, was *Strong sustainability for New Zealand: Principles and scenarios*. Produced by Sustainable Aotearoa New Zealand, with input from Klaus, it offers "insights for people who wish to engage in thinking and debate about a strongly sustainable New Zealand". It reflects Klaus's long-held view that this country should adopt the principles of sustainability "even if many other countries are not yet doing so". Complex global changes already under way "will cause abrupt and radical changes in human living, work and recreation". Initiatives leading to strong sustainability will come from "groupings of concerned citizens who are cognisant of the issues and challenges and are willing to act concertedly to effect the fundamental and systemic changes that are required", states the booklet.

As well as pressing on with various other publications, Klaus has at least four major projects in train which seek to give sustainability the legal underpinning it badly needs. He is involved in drafting climate change ethics guidelines for UNESCO to help governments and states attempting to negotiate a legally binding post-Kyoto Treaty to "shape more credible and committed climate change policies. The law of the future is what is being written into political concepts now."

Klaus is also working with a team at Yale University to define the link between climate change and biodiversity in legal terms. This work aims to produce a unified treaty covering both areas. "Climate change clearly has very negative impact on biodiversity, causing a continuing loss of species and rain forest. The two are entirely reciprocal."

The Earth Democracy Project is taking up plenty of Klaus's time. In his words, it is "a major effort to investigate forms of improving democratic systems to better accommodate long-term sustainability concerns in the day to day operation of government." Here Klaus is active on several fronts, chairing the IUCN's ethics specialist group and working with the University of Amsterdam in the Earth Systems Governance Network.

Finally, on the local front he is involved with a thematic research initiative proposed for the University of Auckland called "Transforming Auckland". This would analyse the "Super City" and its new government structure, in particular the spatial plan which the new Auckland Council has to develop and adopt. "How, for example, will it address sustainability and climate issues?" The Act setting up the Super City "avoids any mention of and, in fact, excludes long-term sustainability and climate change".

Bill Williams

## Ready access to conflicts jurisprudence

Conflictz (<[www.conflictz.auckland.ac.nz](http://www.conflictz.auckland.ac.nz)>), as it is known, comprehensively and systematically lists and indexes publications dealing with New Zealand conflict of laws/private international law in the areas of jurisdiction, choice of law, and recognition and enforcement of judgments in international cross-border litigation. The database is the work of senior lecturer Dr Elsabe Schoeman, who spent several years bringing the project to fruition. She was assisted by the Digital Services Department at the University of Auckland Library, who designed the database, and received generous sponsorship from the New Zealand Law Foundation. Elsabe said the project was "born out of frustration" at her inability to locate academic writing on conflict of laws in this country. She hopes it will "dispel notions of conflict of laws as 'a dismal swamp,'" as characterised by one legal commentator. New Zealand conflict of laws was "very different" from Australia, while this country was now largely excluded from whole areas of English law as Britain "moves ever deeper into Europe and opts into European Regulations". "Internationally we are really on our own and we can no longer refer exclusively to the English texts. We need to develop a New Zealand jurisprudence in conflict of laws and I hope this database will be the beginning of that."



Dr Elsabe Schoeman



## Promoting debate on Trans-Pacific Partnership negotiations

The creation of a comprehensive database of material on the negotiations for a Trans-Pacific Partnership Agreement (TPPA) is being led by Professor Jane Kelsey. The TPPA negotiations currently involve New Zealand and seven other countries (the US, Australia, Brunei Darussalam, Chile, Peru, Singapore and Vietnam) and the second round of negotiations took place in San Francisco in early June. The database is now on the Trans-Pacific Partnership Digest website. This website is part of a larger research project supported by a Faculty Research Development Fund grant from the School of Law to identify and critically evaluate the potential implications of the TPPA. Professor Kelsey says: "The website aims to provide an easily accessible and comprehensive database of resources for researchers, activists, officials and others to encourage informed debate and critical engagement with the issues arising from the proposed agreement - and to influence the negotiations." The website can be accessed at <http://p4tpp.dyndns.org>.



### Justice David Baragwanath:

## Can we globalise the law?

Justice David Baragwanath, one of the Auckland Law School's most illustrious alumni, did his alma mater the honour of delivering a valedictory address to a packed lecture theatre the day after he retired as a judge of the Court of Appeal. Recording his "debt of gratitude" to the Law School he said: "This vibrant community, whose dynamism has lifted it to its current world status, has contributed mightily to the rule of law here and abroad." Justice Baragwanath, who was on the eve of his departure for Europe, went on to discuss the interplay between domestic values and international needs.

He started by discussing the urgent need to articulate the duties of the State towards the citizen:

"[W]hen in *Ding v Minister of Immigration* (2006) 25 FRNZ 568 I tried to discern what are the rights of the citizen - there the New Zealand-born infant children of Chinese overstayers - I found no modern account of any substance. ... To its shame the common law has never developed a clear principle that the right to fundamental decencies... is possessed both by every citizen and by others whom we accept on our soil. Among the tragedies of Mike Taggart's premature departure is the termination of his work on *Constantine v Imperial Hotels* [1944] KB 693 which, had the judgment of Birkett J been picked up and run with by other judges, would surely have removed the need for legislation about race and other discrimination. So just what are the 'rights of British subjects', promised to Māori as among the rights to be preserved by the Crown in title of New Zealand, is something my generation has failed to answer. I hope yours can do better."

He then talked about the need to identify our core values as a nation state (he suggested the "principle of equality" as a "New Zealand fundamental") and to adapt our domestic law to protect and enhance what is distinctive to New Zealand, whilst also identifying and adopting ideas from elsewhere that are suited to our conditions.

Reflecting on what was happening in an international level he spoke about the recent phenomenon in which judges are increasingly co-operating across borders to assist in the enforcement of the legal systems of other jurisdictions in areas such as crime, family law, insolvency and tax. In this process he spoke of: "generally seeing New Zealand as a model international citizen. We are subscribing to the development of an international set of principles of private international law, even though such rules are part of domestic law."

He concluded by reflecting on the globalisation of the legal profession, telling students that they were "citizens of the international legal community. You can achieve great things by further globalising the law. Make the most of it."

Justice Baragwanath is a University of Auckland LLB graduate who became a Rhodes Scholar. He was appointed a judge of the High Court in 1995, was President of the New Zealand Law Commission from 1996 to 2001, and became a judge of the Court of Appeal in 2008. He will be a visiting scholar at the University of Cambridge, the University of Manitoba and Queen Mary, University of London before taking up an international position in 2011.



Sir Kenneth Keith:

# Judging at home and abroad - similarities and differences



Sir Kenneth Keith, New Zealand's first judge on the International Court of Justice, delivered an address at the University of Auckland in August. Sir Kenneth said that he had now been a member of 15 courts and tribunals, both national and international, and had sat with judges of 34 different nationalities. He said that there were three essential elements of the judicial function; a court or tribunal consisting of independent, impartial and professionally-qualified judges or arbitrators, supported by an independent Bar and effective staff; the following of due process; and deciding disputes submitted to it in accordance with the law.

Sir Kenneth said that the requirements of independence, impartiality and professional qualification appeared consistently in the legislative and treaty provisions establishing and regulating courts:

"But one major difference appears: as with arbitrations under national law, the parties to international litigation are often able to appoint an arbitrator or judge or to have a judge of their nationality remain on the court or tribunal. While that may appear contrary to principle, the law and practice is well established. The practice also shows that nationally-appointed members not infrequently do decide contrary to the positions of the States which appoint them or of which they are nationals. Their sense of independence of their role and their qualifications and expertise are key elements."

Sir Kenneth said that the expression in the third essential element of the judicial function, "decides disputes," would exclude the giving of advisory opinions, which had been the process involved in the International Court of Justice's most recent decision relating to Kosovo. He said that there had long been a dispute in common law jurisdictions as to whether courts should be able to give advisory opinions on legal questions.

"The United States Supreme Court refused to answer questions put to it for advice by President Adams about the neutrality obligations of the United States during the Napoleonic wars. The High Court of

Australia similarly held that a statute conferring on it the power to give advisory opinions was unconstitutional. By contrast, the Supreme Court of Canada gives opinions at the request of the executive government, for instance recently in respect of the possibility of the secession of Quebec, an opinion cited by many of the participants in the Kosovo case; many state courts in the United States give opinions on proposed legislation; English judges have over the centuries, in various forms, given advice, recently, for instance, through the Attorney-General's reference."

Sir Kenneth said that in 1919 the Covenant of the League of Nations had provided that the Permanent Court of International Justice might also give advisory opinions at the request of the council or assembly of the League of Nations. That power had been carried forward in the Charter of the United Nations and the Statute of the International Court of Justice.

"The PCIJ made it clear from the outset that in exercising that jurisdiction it was obliged to keep true to its judicial character. In its practice and rules it equated, so far as it could, its advisory procedure to the procedure it follows in cases between states - for instance, in terms of giving those affected, especially if they are seen as parties in dispute, equal opportunities to present their case and even to appoint a judge ad hoc."

One important early decision in the history of the World Court, said Sir Kenneth, had been about the form of judgments and opinions. The issue had been whether they should take the continental syllogistic form with a single anonymous text, or whether the common law form should be followed. The decision had been that judges could deliver separate opinions. The names of those who dissented were now always published, said Sir Kenneth. At least three reasons supported the right to dissent and to write separately.

"The first, in the words of a member of the court who had been a judge of the United States Supreme Court and who was to be Chief Justice of the United States, is that a dissent is an appeal to the brooding spirit of the law, to the intelligence of a future day."

Secondly, Sir Kenneth said that a single judgment must win the agreement of at least all in the majority. Accordingly, it tended to be no more than the highest common factor in their views. Thirdly, dissents and separate opinions safeguarded individual responsibility and the integrity of the court as an institution.

Sir Kenneth said that international cases might increasingly present issues of proof of facts. In the recent Genocide case (*Bosnia v Serbia*) Serbia had pleaded state secrets and the court had divided over the inferences to be drawn from that refusal to provide information.

"In that case and in the case between the Democratic Republic of Congo and Uganda, the court also addressed the weight it should give the factual findings of courts and inquiries. It did not hold the evidence to be inadmissible on the basis that it was hearsay or opinion. Rather it was a matter of weight, to be tested in ways the court indicated."

Sir Kenneth said that disputed issues of a scientific character also appeared to be arising more frequently. One recent instance had been the *Argentina v Uruguay* case, in which both the judgment and a number of judges in their opinions addressed the question of how to resolve such disputes. He concluded by predicting that: "Upcoming cases about Colombia's spraying of its coca crop brought by Ecuador and Japan's Antarctic whaling brought by Australia are also likely to present real issues about how scientific evidence is to be presented and addressed."

## Valmaine Toki appointed to UN position



Valmaine Toki

Valmaine Toki has been appointed to the United Nations Permanent Forum on Indigenous Issues. She is the first Māori to serve on this body. The Forum was established by the United Nations Economic and Social Council (ECOSOC). Its mandate is to discuss indigenous issues relating to economic and social development, culture, the environment, education, health and human rights. The Forum is called upon to provide expert advice and recommendations on indigenous issues to the UN system through ECOSOC, to raise awareness and promote the integration and coordination of relevant UN activities, and to prepare

and disseminate information on indigenous issues. Valmaine has been appointed for 2011-2013, representing the Pacific region.

Valmaine's daughter, Kiri Toki, a BA/LLB Honours student, attended the announcement in New York by the Minister of Māori Affairs, Dr Pita Sharples, of New Zealand's support for the Declaration on the Rights of Indigenous Peoples. With fellow Māori BA/LLB Honours student Kingi Snelgar, Kiri also represented the University of Auckland at the ninth session of the United Nations Permanent Forum for Indigenous Peoples.

## Colloquium on Maori issues

Te Tai Haruru, the Māori legal academic group from the Faculty of Law, gathered eminent Māori legal academics and politicians from across Aotearoa for a colloquium held at the University's Waipapa Marae in February 2010. Keynote speakers included the former Governor-General, Sir Paul Reeves; Māori Party President, Professor Whatarangi Winiata; University of Auckland Professor, Margaret Mutu; and Member of Parliament for Tai Tokerau, Hone Harawira, who spoke on constitutional issues relevant to Māori. In a very fruitful korero, led by the Law Faculty's Valmaine Toki and Dr Nin Tomas, the hui discussed scales of interaction from flaxroots iwi and hapu level to national constitutional transformation. "The colloquium was inspirational and arrived at some definite outcomes to support and facilitate the interaction between these levels," says Valmaine Toki. "The participants plan to formulate a proposition that may provide a focal point for starting the conversation about constitutional transformation and the ongoing significance of Te Tiriti o Waitangi."



(From left) Scott Optican, Jim Ryan, Tim Cameron, Paul Rishworth

## Human rights and prisoners rights

Kris Gledhill spoke on human rights and prisoners' rights at the recent annual meeting of the Pacific Islands Legal Officers Network (PILON) in Apia. PILON provides a forum in which Attorneys-General and other important legal office-holders in the Pacific can meet to discuss matters of interest to Pacific nations. Kris is concerned that the Pacific is a part of the world which does not yet have a region-specific human rights commission or court, and his paper was intended as part of a push for the creation of such an institution. Following Kris's presentation, the secretariat that supports PILON has been asked to prepare a paper for a future PILON meeting about the implications of a regional human rights instrument for the Pacific. Kris described this move on the part of PILON's secretariat as a "positive development."

# Professor Jim Ryan: Cameron Visiting Fellow

Professor Ryan from the University of Virginia said the doctrine of "originalism" - that the US Constitution should be interpreted in line with its framers' intent - had been "embraced in recent years by more and more liberals". Yet, until recently, it had been "associated with politically conservative judges and academics. Liberals generally subscribed to the idea that the Constitution is a living document.

"Our 'living constitutionalists' would have recoiled at the idea that those alive in the eighteenth and nineteenth centuries should be deciding how racial minorities, women and gays should be treated today. To subscribe to originalism was also thought to concede that key Supreme Court cases such as *Brown v Board of Education* [outlawing racial segregation in schools] and *Roe v Wade* [on women's right to abortion] were wrong."

Professor Ryan was speaking to the topic "Lawyers, guns and money: The principles and politics of modern American constitutional interpretation" in April. He said that "more and more liberals" had subscribed to originalism in the last four to five years, and that even retiring Justice John Paul Stevens, the most liberal member of the US Supreme Court bench, engaged in originalist analysis in some cases.

Professor Ryan identified several reasons why those on the political left had turned towards originalism. Academically, the principle that any justification for striking down legislation must be tied to the language of the Constitution had won the day. The disagreement was over how to practise originalism, liberals favouring the view that the meaning of the text, rather than the expectations of the framers, must be followed. "This form of originalism," Professor Ryan explained, "is not that different from living constitutionalism." Legally, some liberals took the view that "embracing originalism rather than running from the Constitution" and "arguing on the same turf as conservatives" was the way to win cases. Politically liberals were treating the Constitution as a progressive rather than a conservative document, and embracing it accordingly. "Politics is where the real payoff will be," said Professor Ryan.

"For too long conservatives have been able to claim fidelity to the Constitution, and liberals have not had a very good response to this. Liberals had to embrace the Constitution to be similarly effective in political terms."

Professor Ryan was the inaugural Cameron Visiting Fellow. As noted in last year's edition of *Eden Crescent*, the Cameron Visiting Fellowship was endowed by former law student Tim Cameron (LLB(Hons)/BCom 1994, LLM 1998 (Chicago)), now a partner at the leading New York law firm Cravath, Swain and Moore LLP. Tim, and his wife Kathy, generously

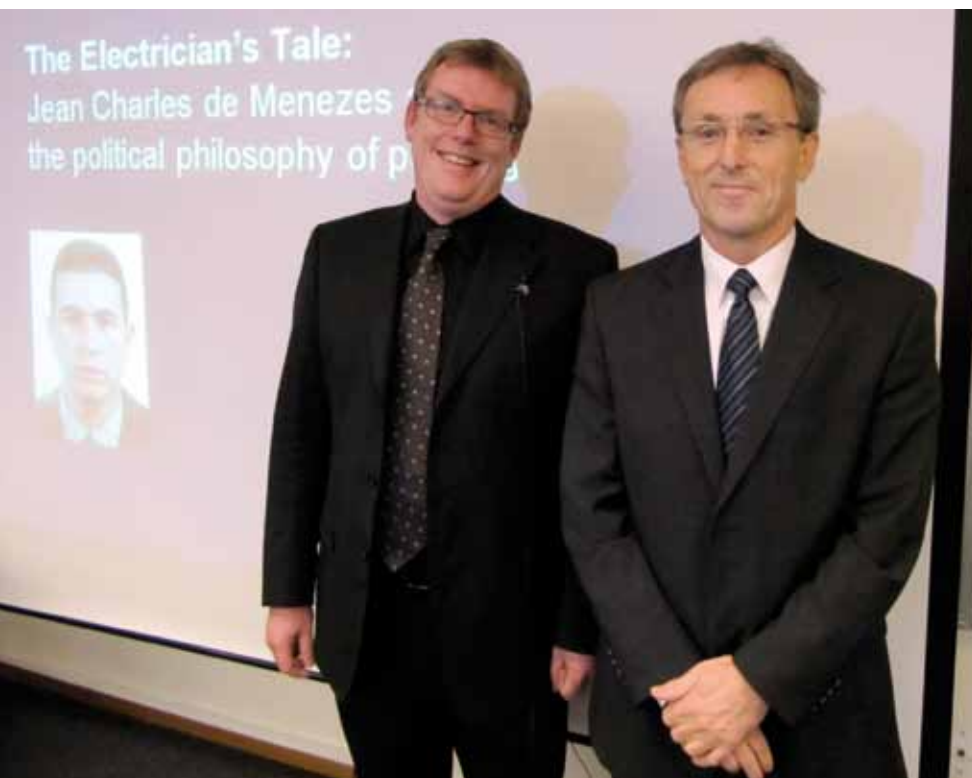
## Legal Citations of Aotearoa New Zealand

Legal Citations of Aotearoa New Zealand (LCANZ) ([www.lcanz.auckland.ac.nz](http://www.lcanz.auckland.ac.nz)) is a new website that provides guidance on the citation of all major New Zealand legal journals and law reporting series. More than 120 law journals and law reporting series are searchable by either title or abbreviation. This is the first online index to New Zealand legal citation and fills a conspicuous gap in New Zealand legal literature. The Index has been compiled by Mary-Rose Russell, formerly at the Davis Law Library and created in conjunction with staff at the Davis Law Library and the Library Digital Services team. This database is freely available to the general public: you do not need to be a staff member or student at the University to use it.



endowed the Fellowship in order to bring US academics to New Zealand to lecture and research at the Auckland Law School. The Law School community was certainly greatly enriched this year by the visit of Professor Ryan.

# Professor John Gardner: Legal Research Foundation Visiting Scholar 2010



Professor John Gardner, a Professor of Jurisprudence at Oxford, and the Legal Research Foundation's Visiting Scholar for 2010, proved a lively and stimulating presence at the Law School.

The Stone Lecture Theatre was packed for his public lecture on "The electrician's tale: Jean Charles de Menezes and the political morality of policing". Professor Gardner first sketched the events which led to three firearms officers following Mr de Menezes into the Stockwell Underground, London, and shooting him dead at close range. The fatal encounter in July 2005 followed the suicide bombings on London Transport and, the previous day, four more suicide bomb attempts. After pursuit and surveillance by officers of SO12 reporting to the Metropolitan Police's "Gold Command", control of the operation had passed to CO19, the Met's specialist firearms unit, as the victim entered the Tube station. This happened at a time when "many people barely identifiable as police officers" were walking the streets carrying submachine guns and other lethal weaponry, much to the consternation of many Londoners.

Following two inquiries by the Independent Police Complaints Commission, the Office of the Metropolitan Police Commissioner (MPC) had been prosecuted under the Health and Safety at Work Act; no-one had been prosecuted individually. The MPC had been convicted and fined with "no personal culpability" attaching to the operation's Commander. In 2008 an inquest had returned an open verdict.

The first question raised by the de Menezes case, said Professor Gardner, involved the "citizens in uniform doctrine". This held that, by default, the police had only the duties, powers and permissions of ordinary members of the public. Thus, while CO19 "had a lawful means to kill Mr de Menezes that many of us would not have had," they had "no permission to kill anyone that the rest of us would not have had. So

we have to ask: How would we react if a person who was not a police officer had done what was done by CO19, in a purported effort to stop a suicide bomber? Does the 'citizens in uniform' doctrine go too far in asserting a moral equivalence between the police and the rest of us?" In fact, Professor Gardner suggested that the doctrine "underestimates what is morally problematic about the killing of Mr de Menezes by the police. All things being equal, it is morally worse to be killed by the authorities than by others." There is "an aggravating betrayal involved when one is killed by those who are supposed to be one's protectors."

Professor Gardner said that although the authorities had a special moral duty not to kill, they could plead "defence of others" when those others were "also people to whom they have a special moral duty". If Mr de Menezes had been the bomber the police mistook him for, killing him as they did would have been justified. But if they had known him to be an innocent person, it would not have been justified. "Do the police get the benefit of their mistake or not? English law says they do." In fact, this was why no homicide prosecution had been possible in the case of Mr de Menezes. In 1988 the Privy Council in *Beckford v R* had "made

it impossible in law to inquire into the reasonableness of the police officers' beliefs (individually or as a group) about the threat posed by Mr de Menezes, even if they were outrageously ill-founded. Professor Gardner admitted to being "very worried about this rule". It not only makes negligence irrelevant, it "makes recklessness irrelevant too!" Furthermore it is inconsistent with the rules for other excuses, such as duress and provocation (which require reasonable fortitude and self-control respectively): "Why not reasonable attentiveness too?"

Professor Gardner was kept busy whilst he was at the Law School. He started with an entertaining and erudite student lecture on "Reasonableness (in the criminal law and beyond)". He contributed to a symposium on "Private law and justice", delivering a paper entitled "What is tort law for? The place of corrective (and distributive) justice". This paper, in gestation for seven years, addressed the underlying structure of obligations in private law. Then followed a seminar for the Society for Legal and Social Philosophy, on "The supposed formality of the rule of law". This was an analytic discussion of the concept of the rule of law, focusing on Joseph Raz's famous account. It addressed a succession of supposed but, in the end, unpersuasive explanations for the rule of law being a formal concept. Professor Gardner also presented a paper at the superior judges conference in Rotorua on the rule of law on the rule of law and human rights, specifically addressing Lord Bingham's argument (which he resisted) that the two are one and the same.

The Dean of Law, Professor Paul Rishworth, said "we were extremely fortunate to have someone of his calibre in our midst. Students, staff, the profession, the judiciary and the public at large all gained tremendously from exposure to John's deep knowledge and his thought-provoking insights."

# The resurgence of maritime piracy



Professor Soons delivered a lecture titled *The resurgence of maritime piracy - An international law perspective* at a function organised by the New Zealand Institute of International Affairs, the Faculty of Law, the International Law Association (New Zealand Branch) and the Maritime Law Association of Australia and New Zealand. Professor Soons teaches International Law of the Sea at Utrecht University, the Netherlands, and is the Director of the Netherlands Institute for the Law of the Sea.

Professor Soons said that a new interest in the law relating to piracy had been triggered by the situation off the coast of Somalia. Somalia had been without effective central government since 1991, although Somalia's regions of Somaliland and Puntland had reasonably capable governance. Surprisingly then, most of the piracy operations in Somalia were being conducted from the coast of Puntland. Several hundred million dollars had now been paid in ransoms to obtain the release of ships seized by pirates. The Somali pirates operated hundreds of kilometres offshore and usually attacked using small open boats. Ships seized in earlier raids were sometimes used as mother ships.

The United Nations had taken up the issue of the Somali pirates and had, from 2008, adopted various resolutions under Chapter VII of the United Nations Charter. The United Nations had even allowed action to

counter the pirates in Somalia's territorial sea and in Somalia itself. Since 2008, the navies of interested states had begun patrolling the area in which the pirates operated and had also escorted ships carrying United Nations relief supplies to Somalia.

Professor Soons said that a number of international law questions were raised by the actions of the pirates. These included: Which states were entitled to take action against the pirates? In which maritime areas could that be done? Which states had jurisdiction to prosecute arrested persons? Could those captured be transferred to other states for prosecution?

Article 100 of the United Nations 1982 Convention on the Law of the Sea (UNCLOS) imposed a duty on states to co-operate "to the fullest extent possible" to repress piracy. Professor Soons said that the duty was expressed in very general terms and it was accordingly difficult to derive any specific obligations from it. Article 105 provided that, on the high seas "every state may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board." He noted that the use of the word "may" meant that there was no obligation on states to take such action. The article went on to provide that the courts of the state which carried out the seizure "may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property". The wording of Article 105 raised the question as to whether only arresting states could prosecute, or whether other states also had this power.

In relation to the Somali pirates, there had been a problem in respect of the willingness or ability of arresting states to prosecute the pirates. Hundreds of suspected pirates had been seized or arrested off the coast of Somalia, but the outcomes in relation to them had been very different. From 2006, a practice had developed of some arresting states transferring suspected pirates to Kenya for prosecution there. Approximately 100 alleged pirates had now been prosecuted in Kenya, including a group sentenced earlier this month to 20 years in jail. Some pirates had been prosecuted and convicted in France, while five alleged pirates had recently been transferred by Denmark to the Netherlands for prosecution, following an attempted attack on a ship carrying a Netherlands flag. Professor Soons said that some suspects had also been transferred to Puntland to be tried, and 154 pirates had already been convicted there. A prosecution was at present underway in New York in relation to the 2009 seizure of an American merchant ship. Concerns had been expressed as to whether transfers to third states for prosecution complied with international law. Professor Soons said that it would be interesting to see how a Dutch court would deal with the issue of the lawfulness of transfers if it was raised in the case of the five suspects currently awaiting trial.

Catriona MacLennan, courtesy of Law News

# Auckland doctorate granted in recognition of distinguished career for “accidental academic”



NSW University Emeritus Professor David Brown has received a doctorate from the University of Auckland in recognition of his significant body of scholarship over more than three decades in criminal law, criminal justice, criminology and penology.

David Brown graduated LLB(Hons) from Auckland in 1971, and worked as a lawyer for Haigh Charters for two years. One of his earliest cases at Haigh Charters involved defending two Hare Krishna monks who were charged with stealing roses from the Auckland public rose garden. David recalls that the (then) Auckland Magistrates' Court, in which he made his first appearance in this case, was dominated by the formidable presence of David Lange who was appearing for many people at a reduced or no fee: “a sort of one person legal aid before legal aid.” When David Brown’s two shaven-headed and saffron-robed clients appeared on the theft charge the old style Magistrate “took one look at them and denied them bail,” remanding them in custody for a week. David successfully appealed the next day and secured his clients’ release. That night his father happened to remark that he had had a pleasantly quiet day at work because, “those blessed Hare Krishnas” had not been dancing and ringing bells outside his work-place that day. “Don’t hold your breath”, David told him. When David appeared for his clients on the theft charge the following week, he argued that they had not committed the crime for personal gain but had “done it for God” - the flowers were needed for religious ceremonies and the flower market where they usually bought the flowers had been closed that morning. The Magistrate, no doubt aware he had been overturned on bail, convicted and fined the monks.

David recalls that “the buzz” of securing the release of his clients on bail “stayed with me and influenced my subsequent choice to do criminology at Cambridge when I took the then obligatory trip overseas.” After doing postgraduate research in Criminology at Cambridge University, he intended to return to criminal law practice in New Zealand but was offered a job at the Law Faculty at the University of New South Wales in Sydney “out of the blue.” He describes himself as an “accidental academic,” as he intended to work there for no longer a couple of years. He joined the faculty in 1974, teaching a range of criminal law, criminology, penology and criminal justice courses at undergraduate and postgraduate level until retirement. He was appointed Professor in 1997 and Emeritus Professor upon his retirement in 2008.

David’s scholarship over his 34 years as an academic lawyer has been formidable, both in its volume, breadth of subject and in its level of critical and intellectual engagement. He is responsible for co-authoring or co-editing eleven books, including the seminal *Criminal Laws: Materials and Commentary on Criminal Law and Process in NSW*, now in its fourth edition. He has written 32 book chapters and 107 journal articles, in addition to published conference papers, book reviews, and newspaper articles, as well as delivering more than 110 unpublished conference papers and public addresses at institutions and events all over the world.

The breadth of subject matter that he has traversed in his academic commentary is equally impressive. Although central concerns emerge from David’s writing - particularly, prisons and penal practice, as well

as what he calls the “uncivil politics of law and order” - he has traversed a wide range of other topics, including miscarriages of justice and the various processes which produce them (in particular the practice of the police verbal or fabrication of confessional statements and the use of informer evidence); evaluations of the processes of criminal justice reform and the role of royal commissions; a sustained defence of the role of the jury; a critique of the pursuit of Justice Lionel Murphy and an appreciative analysis of his legacy; a critique of mandatory sentencing and an examination of sentencing changes and attacks on judicial discretion in sentencing; critical criminology; police culture and practice; juvenile justice; the technology of victim surveys; masculinity and violence in sport; the war on terror; organised crime; and an analysis of the way in which new themes and forces such as pressures for technocratic justice, the rise of risk analysis, the emergence of the victims’ movement and of a ‘new punitiveness’, the rise of the public voice and the declining influence of social and legal expertise, have impacted on criminal justice processes.

One almost expects a person who is as prolific as David has been to have compromised in quality to achieve research output, but this is strikingly not so. His work is searching, and scholarly - richly intellectually engaging - whilst also grappling at a grass roots level with, and being informed by, current social problems, developments and popular discourse. What he has brought to his discussion and practice as an academic lawyer is the ability to traverse at a

sophisticated level the disciplines of both law and criminology in order to offer a seamless critique of the formal rules and procedures, as well as the operation of these rules and procedures in the wider social context.

After his retirement, David was attached to the Centre for Criminology at Oxford for the second half of 2009 and has allowed himself more creative and literary reign in his scholarly work. Thus in “Strolling the Coastline: Criminology in Everyday Life: Through ‘Landscape’ from Gaol to ‘Badlands’” (2009) *13 Law Text Culture* 311, he recounts doing the coastal walk of the Eastern beaches in Sydney with two visiting international criminologists, observing the geographical contours of the actual and imaginative landscape, as well as recounting historical crimes and criminal justice institutions which have taken place or are marked in that landscape. Using these milestones and events, the discussion explores contemporary issues in criminological debate. He is currently working on the 5th edition of *Criminal Laws* and a major ARC funded project on penal culture - the Australian Prison Project ([www.app.unsw.edu.au](http://www.app.unsw.edu.au)).

Although David has lived out his professional life in Australia he regularly returns to New Zealand to visit family and spend time with colleagues at Auckland Law School. And his decades in Australia have not dented his keen (his partner would say “fanatical”) support for the Warriors.

Julia Tolmie

## The resumption of commercial whaling?



Donald Rothwell, Professor of International Law at the Australian National University’s College of Law, delivering an address at the Law School in May, said that there had been debate over the position taken by some whaling nations, particularly Japan, Iceland and

Norway, towards the 1985 global moratorium on commercial whaling.

“Notwithstanding that moratorium, which New Zealand fully supported, a total of 33,000 whales are estimated to have since been taken, either in the name of science or via loopholes in the International Convention for the Regulation of Whaling.”

Professor Rothwell said those numbers suggested the moratorium on commercial whaling existed in name only. As a result: “The Rudd Government in Australia has vowed that if Japan continues with its so-called ‘scientific whaling’ programme then it will challenge the legitimacy of the action before the international courts by November. The Australian legal claim would not be based on enforcement of Australian law prohibiting whaling, but rather international law which applies to multiple aspects of the Japanese whaling programme, especially the 1946 International Convention for the Regulation of Whaling.”

If Australia did commence international legal action then a key legal argument would relate to whether or not Japan’s interpretation of the convention, which allowed up to 950 whales to be taken annually in the name of “science,” was an abuse of right and contrary to international law. Professor Rothwell said that Australia would probably first seek “provisional measures” (a form of international injunction) from the International Court of Justice to halt the Japanese whaling fleet in its tracks. The detailed legal argument could then take a number of years to resolve. The issues to be debated would include:

- When “scientific” whaling became commercial whaling;
- Whether the whaling convention could be interpreted in the light of developments in international environmental law; and
- Whether account could be taken of non-lethal methods of scientific research.

Soon after Professor Rothwell’s address Australia commenced proceedings in the International Court of Justice against Japan over its Southern Ocean whaling programme.

Distinguished Alumnus, Judge Andrew Becroft:

# How to turn a troubled child into a distinguished alumnus of the university of crime



Surrendering to populist pressures risks “turning a troubled child into a serious adult offender” was the message delivered by Judge Andrew Becroft, Principal Youth Court Judge, to an audience of 500 at the Distinguished Alumni Speaker Day in March 2010. He said that young people were different from adults in their thinking and behaviour and this could bring them into conflict with society, that there was no rapid growth in youth offending (although there was a core group of troubled young people who repeatedly had contact with the justice system) and that we risked turning young people into adult offenders if we mismanaged them in the justice system. Increasingly punitive community attitudes and the desire for “instant” solutions were creating real pressures to do just that, said Judge Becroft.

Inverting “conventional wisdom” and taking a deliberately “provocative” approach, he noted that young people were almost a “different species of human being”, often not maturing until their mid-20s or later. Their behaviour had always been a concern, as borne out by this inscription in a 6000-year-old Egyptian tomb: “We live in a decaying age. Young people no longer respect their parents. They are

rude and impatient. They frequently inhabit taverns and have no self-control.”

Turning to the need to “separate the facts from the fiction,” Judge Becroft said statistics did not bear out the widespread impression that youth crime was “skyrocketing out of control”. Police apprehension rates for 14 to 16-year-olds were “stable and indeed declining”. And while violent crime within this group was “showing a steady but significant increase,” the same was true of all age groups, particularly the over 50s.

Judge Becroft then outlined “how to turn a troubled child into an adult criminal in just ten steps”:

- Ignore the early risk factors. “All roads lead back to early intervention,” he said, citing such necessary steps as home visitation programmes, comprehensive assessment when starting school, assessing and treating learning difficulties, and assessing deficits in the four “domains” (home, school, friends, and community).
- Criminalise behaviour which may be rooted in welfare and child protection issues.



- Treat all young offenders the same when in fact there are two distinct groups - “desisters” (those who grow out of offending) and “persisters” (those who do not) - each requiring quite different approaches. New Zealand leads the world in dealing with the “desisters” (more than 80 percent of young offenders) in the community, usually without Youth Court intervention. The Youth Court comes up against the remainder, the “core group”, about 1,000 strong. In the Capital and Coast area over a four-year period, for example, 83 percent were male, 48 percent Māori, 70 percent faced cannabis and alcohol issues, 18 percent attended school (with 45 percent unemployed), 45 percent had been excluded or expelled from school, and only 12 percent lived with both parents (28 percent with one parent). “These figures tell their own story,” said Judge Becroft.
- Always arrest at the first offence and bring the young person to court. “Once someone is in court it is extraordinarily hard to get them out. New Zealand is leading the world in not charging young offenders, with between 70 and 75 percent not charged (our goal should be 90 percent). Their offending is shut down by firm, prompt, community-based interventions.”
- “Sideline” the young offender at the Family Group Conference and run the process badly.
- Always enter a conviction on the young offender’s record. “In cases of moderately serious offending, a conviction may not be necessary if there has been a positive response by a young offender.
- Make no allowance for youth at sentencing - “adult time for adult crime”. However “young people are not ‘junior adults’”. A qualitatively different approach is required.”
- Give all young offenders a short sharp shock. In fact, such populist interventions as boot camps and “scared straight” programmes merely made offenders fitter, faster, stronger and therefore better able to offend again.
- Segregate young offenders from their families, communities and victims.
- If all else fails, use “what works” but deliver it badly.

Whilst challenges remain, New Zealand has an enviable reputation for its youth justice system, concluded Judge Becroft. The system is characterised by the highest rates of diversion in the world, low court numbers, the Family Group Conference for serious offenders, low rates of custodial orders, and reasonably stable apprehension rates.

*In 2010 Judge Andrew Becroft was presented with a University of Auckland Distinguished Alumni Award. In 2009 he was also named as Communicator of the Year by the Public Relations Institute of New Zealand (PRINZ). PRINZ commented that he is “an active, articulate, passionate and persistent advocate for youth justice and a communicator who richly deserves the PRINZ accolade.” It said that his message “is not an easy sell especially in an age of shortening sound bites where everyone is in search of the quick and easy fix.”*




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**Turning to the need to “separate the facts from the fiction,” Judge Becroft said statistics did not bear out the widespread impression that youth crime was “skyrocketing out of control”.**

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## Tributes to Professor FM (Jock) Brookfield, CNZM (1928-2010)

In the early 1960s very few lawyers walked in public protests up Queen Street. Jock Brookfield – a practical Christian with a healthy indignation for social injustices, did that whenever necessary. Throughout his life he stayed wary of the potential insolence of power.

In 1966 Jock gave up practice in the celebrated family firm to take up a senior lectureship in the Law Faculty. Over the next 30 years he specialised in constitutional and Waitangi jurisprudence and land law and conveyancing. And he taught lots more. Had the Head of Department remembered Jock's student prize in international law he

would have been lumbered with that too!

Jock served the University and New Zealand in numerous personae. He was a rigorous scholar who achieved real distinction in research and teaching. He became a sought-after and accessible public intellectual. His work in the Christian Community was notable. As a draftsman and constitutional adviser Jock was in demand by the University and the Government. An elegant conveyancer who devised new forms and updated language, he once told me "Conveyancing is

the lawyer's poetry". (He did that with one of his quick wry grins.)

On entirely another, higher, plane was his overwhelming devotion and love for Brenda and his children and grandchildren. I know practical Christianity and social conscience was a strong base of these loving relationships.

The Faculty was led by Dean Brookfield from 1987 – 90. The preceding decade had been a difficult one for some staff who watched the University becoming increasingly democratic without comparable movement in the Law School. Jock was a vocal, sometimes stinging (yet courteous) critic. Following his immediate predecessor's ameliorative deanship, his own too worked for inclusiveness and devolution of decision-making.

Highlights of his career were his C.N.Z.M., his Auckland chair, his fellowship at Wolfson College, Oxford, and earlier the completion there of his doctorate on "The Necessity Principle in Constitutional Law". Jock's magnum opus *Waitangi and Indigenous Rights*, in the context of revolution, law and legitimation, was published in 1999 and 2005 and re-examined by him in a public University lecture the next year. It caused a buzz. There was extensive media coverage.

Jock was researching and writing up to the time of his death. He relished challenges and never ran for cover. His conversation was rarely without a quip. As well as his eminent oeuvre, he leaves us with the memory of a scholar who did not waste words and, when appropriate, did not mince them. The benign, gentle presence accompanied an ability to come directly to his point and to reason strenuously and cogently in support of it. Opposing views were not ignored. At 81 he was as strongly motivated to stride up Queen Street for worthy causes as he had been in 1962.

**Bernard Brown**

My first engagement with Professor Brookfield's scholarship and erudition was 1985, soon after his appointment as Professor, when Jock addressed (as I recall) the Thomas More Society on the subject of parliamentary supremacy and suggested limits imposed by common law fundamental rights. I see that as the moment in which my own interest in that subject, and the possibilities of an academic career, were kindled.

In 1987 I commenced as a lecturer at the Law School just as Jock began his term as Dean. Those were the days of debates about a supreme law bill of rights. In 1990 came the New Zealand Bill of Rights Act in which Jock and I shared a mutual interest. Jock was immensely generous to me in sharing his ideas and insights.

I was aware, too, of his reputation in the law of land and water. But it was his writing on revolutions and legitimacy that fascinated me most. I first taught Constitutional Law during Jock's deanship, and I recall wrestling with the case of *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645 and the question of when a usurping regime might come to be regarded as lawful and legitimate. Jock's seminal article in the *University of Toronto Law Journal*, "The Courts, Kelsen and the Rhodesian Revolution", was my guide.

Later, in July 2000, I was one of a small group asked to advise the Fiji Law Society on the constitutional responsibility of judges after the coups of May in that year. Jock was naturally the person to consult, but unhappily he was then in hospital after heart surgery. We were able to have recourse to his (then recent) book *Waitangi & Indigenous Rights: Revolution, Law and Legitimation* in which all the subjects and themes of his title were expertly intertwined.

As it happens, when I heard the sad news of Jock's death last week I was once more immersed in Jock's writings – this time to prepare my contribution to a seminar on the Rule of Law dealing with the responsibilities of judges in Fiji who take office under the revolutionary regime. I had planned to discuss my paper with Jock when next I saw him but now, sadly, that is not to be.

Jock's work will endure not only as a resource for everyone interested

in the huge and important ideas with which he dealt, but also because his work exemplifies the careful craft of the thoughtful scholar. The memory of Jock as a colleague and friend will also endure. Throughout his "emeritus professor" years, Jock was a regular participant in the Faculty's events, still writing, still presenting papers, and still enlivening our coffee room discussions with his wonderful sense of humour. We will miss Jock immensely.

**Paul Rishworth**

Jock was already a senior member of Faculty when I joined it in 1985. He became a full professor in that year. Both he and Brenda were very welcoming to the new generation of law teachers who arrived at Auckland in the 1980s. He became Dean in 1987 for a three-year term. In that role he remained the gentleman he always was, but one learned too that he had firm views, and would not shirk from difficulties where they had to be faced (for more details of Jock's period as Dean, see Brian Coote, *Learned in the Law* (2009), chapter 7).

Jock took such resolution into his scholarship too, of course. I cannot claim to be closely familiar with Jock's writing, though I did read quite a bit of it as a bystander from time to time. His work is an interesting combination of the erudite and the meticulous applied to some of the largest questions in constitutional law. He was not at all a conservative, but a visitor would have been hard-pressed to pick that a chief specialism of his was revolutions! Equally, there is no more contentious field in New Zealand legal and political life than Crown-Māori relations, to which discourse Jock made such a major contribution. On the other hand, he remained deeply versed in land (and water) law, understanding the origins and significance of its many intricacies, obscurities to the outsider. His other university training was in Latin, and he retained his enthusiasm for the language and its literature.

Jock had a great sense of humour, with a fine appreciation of human foibles. One particular skill was his delivery of a punch-line, beautifully put and placed (one could sense it coming). A favourite example for me of his humour dates back to the 1980s, when the Faculty was engaged in one of its 20-year cycles of deciding whether Jurisprudence should be compulsory in the LLB (I was Acting Dean when the next cycle hit, and debate occupied 17 hours of meeting time alone in a series of Departmental and Faculty sessions). Tensions were running high, and compromises were being mooted. One of these was "the raft" or "the cluster", where, instead of Jurisprudence proper, students would be required to choose at least one elective from such things as Legal History, Law and Policy, Comparative Law, and Legal Philosophy. A whole series of straw polls on various options had been taken. Just as the final vote on the raft-option was being put, Jock quietly and deftly said, "Well, I guess this is Cluster's last stand"; an opportunity for proportion to slip back into proceedings.

Jock can be remembered not just for his fine legacy of writing, but also for his commitment to doing the right thing, the sort of commitment that helps to give New Zealand its reputation for integrity (we needn't, perhaps mustn't, agree on what is the right thing).

**Peter Watts**

**Delia Browne:**

# Navigating the balance between copyright creators and users

Delia Browne has been the National Copyright Director of the Copyright Advisory Group of Australian Schools and Technical and Further Education Institutes since early 2005. The education sector is a huge user of copyright and also a large payer of copyright fees, yet its voice in law reform and policy is not often heard. Delia's role is to provide legal and strategic advice to this sector, advocate for necessary law reform, educate the sector on its copyright obligations, and help establish appropriate business rules and "smart copying" practices to help manage copyright compliance and costs. The job requires lateral thinking, as well as commercial and legal skills. Delia's position does not have a counterpart outside of Australia and it is one that is well suited to a person who has discovered that she is most fulfilled when involved in policy and law reform, rather than primarily individual dispute resolution.

As it is for many of us, Delia's career path has been a combination of serendipity and self-discovery rather than conscious planning. She went to Auckland Law School thinking that a law degree would be a strong basis for a career in journalism. Having a creative bent, a passion for the arts and a social circle comprised primarily of artists and film makers she became interested in copyright law quite early on - an interest that has subsequently grown into a "passion" and guided a

career which now spans 20 years as a lawyer, policy adviser and "occasional academic." She has taught at Auckland University, as well as spending time in private practice and six years at the Arts Law Centre of Australia in Sydney (where she became Executive Director of the Centre).

Career highlights for Delia include her involvement in securing copyright law reforms for the arts and education sectors in Australia. For example, whilst at the Arts Law Centre she successfully lobbied for the introduction of moral rights (those rights creators retain in their work, even when they no longer own the work, such as the right to be attributed and the right not to have the work be treated in a derogatory manner) into the Copyright Act 1968 (Aus), as well as, in her current role, the introduction of new educational exceptions. She considers herself privileged in getting the opportunity at different points in her career to work from opposite sides in the copyright debate - for both creators and users.

What Delia is currently excited about is an initiative that grew out of her involvement in the Creative Commons. The Creative Commons is a movement aimed at establishing a fair middle way between the current extremes of copyright control and the uncontrolled use of intellectual property. It provides a range of copyright licences, freely available to the public, which allow those creating intellectual property - including government bodies, authors, artists, educators and scientists - to mark their work with the freedoms they want it to carry. She was in the "original gang" that led the Open Education Track at the 2007 Creative Commons iSummit in Dubrovnik (which she describes as being like a dance party, festival and intellectual boot camp). This was where she met a group of people - academics and postgraduate students from the US, Canada and South African - who were excited by the idea of using the internet and social networking devices to deliver free education. They thought that this would enable those who cannot afford to attend university, such as those from developing nations, to access education, as well as forcing students in developed nations who were studying with them to think about global social issues. Delia is also interested in the development of alternative business models for the 21st century where the internet and associated technology have revolutionised the information economy - she says that we now live in a "freemium economy" and that it is impossible to turn back the technology that has produced this change. As a consequence of her meeting Delia was a co-founder of the Peer to Peer University (P2PU) [www.p2pu.org](http://www.p2pu.org) - a radical new form of education which is open to all. P2PU is in its third cycle and the response has been "overwhelming," particularly in Brazil where they now are now teaching six courses in Portuguese. Delia is involved in teaching the course "Copyright for Educators", which has now morphed into three courses - each targeted at either the US, South Africa or Australia and led by copyright experts in each of those jurisdictions. Importantly all P2PU course material and student contributions are licensed under a Creative Commons Attribution Share Alike Licence so P2PU can build and create more Open Educational Resources which are free to use, modify and share.

According to Delia "'Open' is the new black." She predicts radical changes ahead in Australian copyright legislation in respect of the educational use of "free and publicly available" internet material, and in education itself where traditional learning is being challenged by collaborative, open and disruptive learning.

Julia Tolmie





# Our part of town

At Number 202C, assault with a weapon nestles in its subdivided section between the vacant lot where endangering transport resided, until removed, but now, on that side stands impending rescue and, on the other, possession of offensive substances (202A) and its outbuildings at 202B and BA. Up the street we can call in at setting traps; we may visit infecting with disease or acid throwing. The next block is given over to female genital mutilation. We sit among a clutch of assaults to the person, one of eight such clutches in this discrete neighbourhood known as: the Part 8 – Crimes against the person. Sometimes strangers come seeking sexual violation or indecent assault but we direct them to Part 7 – Crimes against religion, morality and public welfare: evidently not crime against a person there. Ours is a tidy neighbourhood: we have no place here for Crimes against poetry.

By John Adams, from his soon to be published book, *Briefcase* (AUP). This poem was previewed at a poetry reading that John Adams and distinguished poet in residence, Bernard Brown, held at the Law School in June.

## Rachel Paris:

# Leadership in work/life balance

Rachel Paris (nee Carnachan) has been a partner since 2009 at Bell Gully. She is the first partner to have been promoted to partnership on a part-time basis in her firm. As well as balancing motherhood with commercial practice (she has a pre-schooler and another baby due later this year) Rachel has co-authored a feature film screenplay which is currently in development with South Pacific Pictures. Leading by example, she hopes to inspire a fundamental shift in the traditional business model for law firms and encourage young lawyers to lead a full life, which incorporates family and a fulfilling career. She says: "We can pursue our passions and contribute to the cultural fabric of society while maintaining office jobs."

Rachel graduated BA/LLB(Hons) in 2000, coming top of the Law School. She began her career at Bell Gully, leaving in 2003 to complete an LLM at Harvard. Whilst at Harvard, she was selected for admission into the Specialist International Finance LLM Programme, and topped her year in that programme. In 2007 her LLM dissertation was described as "influential" in a *Wall Street Journal* editorial. From 2003-2005 she worked for Allen & Overy's projects group in London, advising her blue chip clients on the financing and structuring of major infrastructure and acquisition projects. Later she joined the leading UK media law firm, Olswang, advising companies such as Walt Disney

Company and Warner Bros on film production financing. She returned to Bell Gully in 2006. At Bell Gully she has been responsible for advising some of the firm's leading corporate clients on their funding requirements, including the Rank Group of companies and Tainui Group Holdings, as well as acting for a number of leading financial institutions such as ANZ National Bank Ltd, BNZ, Goldman Sachs JB Were and Corporate Trustee, and The New Zealand Guardian Trust Company Limited. Throughout her term at Bell Gully she has played a key role in mentoring young lawyers and, more generally, young people in the community.

In 2009 Rachel was awarded the Sir Peter Blake emerging leadership award, at 33 being the award's youngest recipient that year. She says that relevant leaders in contemporary times are no longer simply formal authority figures.

"In this knowledge age, the more relevant leaders are the innovators who challenge the way things have always been done because they are ambitious for improvement. This is a more democratic interpretation of leadership, which supports the view that we can each be leaders in our own way - we simply need to find the cause that inspires us and take action to rally others to achieve our goal. That is the type of leadership to which I aspire."

# Alumni news in brief

## The Judiciary

**Jonathan Moses** (LLB/BCom 1985) has been appointed a District Court Judge to sit in Manukau. He was a founding solicitor at the Mangere Law Centre, before becoming a barrister sole in South Auckland from 1990 to 2000. He is a former member of the Refugee Status Appeals Authority and the Crown Prosecution Panel. Between 2001 and 2009, Judge Moses was employed in Tanzania by the United Nations International Criminal Tribunal for Rwanda (UNICTR). He led the prosecution of two high-profile genocide trials. He is also a former Trustee and Chair of the Mangere Community Law Office Trust.

**Justice Lyn Stevens** (LLB(Hons) 1970) has been appointed a Judge of the Court of Appeal. After graduating from Auckland he went on to obtain a Bachelor of Civil Law from Oxford University in 1972. He was a Crown prosecutor and partner in the firm of Meredith Connell & Co from 1975, leaving to join Russell McVeagh McKenzie Bartleet & Co in 1980. Justice Stevens went to the Bar in 1992 and was appointed Queen's Counsel in 1997. He was appointed to the Serious Fraud Office Panel of Prosecutors in 1990. He has also lectured throughout his career at a number of New Zealand and overseas universities. He was admitted as a barrister and solicitor in both the Australian Capital Territory and in New South Wales, and as a barrister in Samoa. Justice Stevens was appointed a High Court Judge in 2006 sitting in Auckland. He is a graduate representative on the University of Auckland Council and has chaired its Audit Committee.

## Postgraduate study

Auckland graduates will be pursuing postgraduate study at prestigious institutions all over the world in 2010. Aditya Basrur and Mathew Windsor (recipient of an FWW Rhodes Memorial Scholarship and a Spencer Mason Travelling Scholarship in Law) will be undertaking LLMs at the University of Columbia. Laura Giddens and Kitaj Woodward (both recipients of a Spencer Mason Travelling Scholarship in Law) will be each pursuing an LLM at the University of Cambridge. Alexander Ho (Spencer Mason Travelling Scholarship in Law) and Peter Marshall (Vanderbilt Scholarship) will pursue the LLM at New York University. An LLM will be taken by Adrienne Anderson (Ethel Benjamin Scholarship, Michigan Grotius Fellowship and Spencer Mason Travelling Scholarship in Law) at the University of Michigan, Zoe Hamill (Spencer Mason Travelling Scholarship in Law) at the London School of Economics and Political Science, Krishneel Maharaj (Spencer Mason Travelling Scholarship in Law) at the University of British Columbia and Sehj Vather (FWW Rhodes Memorial Scholarship, Spencer Mason Travelling Scholarship in Law) at Stanford University. Hyung Bang will be studying for an LLM/Wharton Business and Law Certificate at the University of Pennsylvania and Greg Simms will be embarking on a BCL at Oxford University.

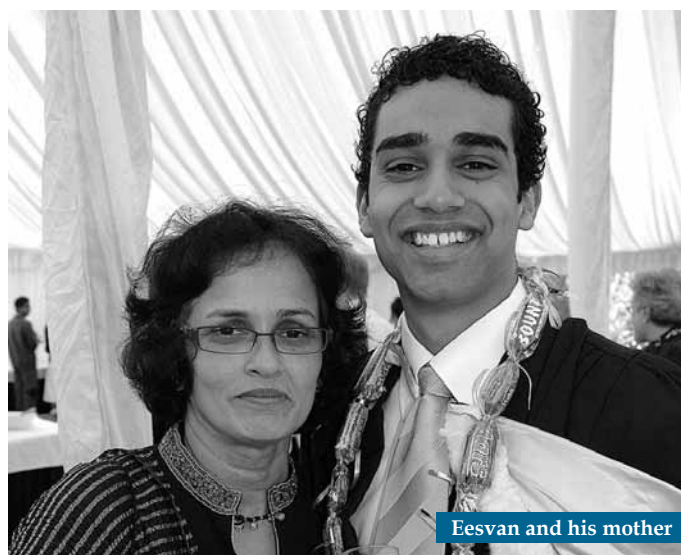
**Claire Achmad** (LLB/BA 2007) won the CLANZ-Bell Gully Young Corporate Lawyer of the Year Award and was selected for the coveted Master of Laws course in Advanced Studies in Public International Law at Leiden University, Holland. Entry is highly competitive with a maximum of 35 students, drawn from throughout the world, selected each year. "Leiden is one of the oldest universities in Europe, and it is ideally located close to The Hague, the



international law capital of the world, hosting the International Court of Justice, and other international criminal tribunals." Since 2007 Claire has worked as a solicitor with the Ministry of Social Development in Wellington. Claire has also been a volunteer at the Wellington Community Law Centre in the Refugee and Immigration Legal Service for the last two years. While at the Auckland Law School she was student director and a founding member of the Equal Justice Project.

**Mike Asplet**, currently working as International Criminal Law Adviser for the Crime Prevention and Criminal Justice Division of the Ministry of Justice, has been accepted into the Sciences Po Paris, Masters in International Affairs - International Security (taught entirely in French). The following year he will complete an LLM (in international law) at Georgetown Law School in Washington D.C. The programme he has been accepted into is unusual in combining two degrees in this way. He is the first New Zealander to be admitted to the programme and only the second to be admitted to a masters degree at Sciences Po. He has been awarded a scholarship from the French Embassy to help finance this endeavour. He credits Treasa Dunworth's international law course with leading him "onto this journey", and Martha Minow's book, *Between Vengeance and Forgiveness* (which Treasa lent him in 2004) with spurring his interest in this particular area.

**Eesvan Krishnan** (BCom/LLB(Hons)) is "studying what happened in *The Castle*, but in India". Experience has taught him that referencing the iconic Australian film is the best way to explain the subject of his doctoral research: an Indian law which permits the compulsory acquisition of land for companies. The law has a long and controversial legal history of which Eesvan is studying a part, hoping to bring another perspective to contemporary debates on the use of eminent domain for economic development. Though now living in Delhi, Eesvan is entering his fourth year of graduate studies at the University of Oxford. After clerking for Chief Justice Elias in 2006-2007, he won a Rhodes scholarship and read for the BCL and MPhil in Law. While at Oxford, he helped to launch Oxford Legal Assistance, the first pro bono legal clinic at the University. In early 2011, Eesvan will be returning to New Zealand where, after writing-up his thesis, he plans to practise.



Eesvan and his mother

## Academia

**Dr Julie Maxton** has been appointed as the new Executive Director of the Royal Society, the UK's national academy of science. Dr Maxton, who will take up the post in early 2011, will be the first woman to hold the position. Dr Maxton, who was previously Professor of Law, Dean of the Law Faculty and Acting Deputy Vice-Chancellor of the University of Auckland, is currently Registrar of the University of Oxford. Martin Rees, President of the Royal Society is reported as saying that Dr Maxton "will be joining us at an exciting but also challenging time. We will have just celebrated our 350th anniversary, which has raised the profile of the Society significantly. Science's place in society has never been more important as we face challenges such as climate and environmental change, possible energy shortages, pandemics and an ageing population."

**Chye-Ching Huang** (BCom/LLB(Hons) 2005) has been appointed by the Department of Commercial Law as a senior lecturer. After graduating from the Law School Chye-Ching practised as a tax solicitor at Chapman Tripp, before attending Columbia University as a Fulbright and Sir Wallace Rowling Memorial Scholar, and graduating with an LLM in 2008. She worked in Washington DC as a Research Fellow at the Center on Budget and Policy Priorities, where she had responsibility for the Center's federal tax policy program. In that role she advised Capitol Hill policymakers on US federal tax and economic policy issues (including issues arising from the 2008 Congressional and Presidential elections, the US\$787 billion American Recovery and Reinvestment Act, and the President's 2010 budget). As a Research Associate at the New Zealand Institute, a privately funded, non-partisan think-tank, she also researched and developed recommendations on a variety of economic, social, and environmental policy issues.

**Dr Karen Lee** (LLB/BA 1999) has published a book on the laws governing same-sex marriage: *Equality, dignity and same-sex marriage: A rights disagreement in democratic societies*. Dr Lee has taught law at the Department of Law and Business, Hong Kong Shue Yan University, since September 2008 and was recently promoted to assistant professor. She is grateful to three Law School staff for their help and

encouragement: the late Professor Mike Taggart, "a teacher of great passion"; her "mentor" Professor Ben Richardson, now at Osgoode Hall in Canada; and Professor Jim Evans, her jurisprudence teacher. Karen is currently engaged in two collaborative projects. One will survey people's ideas on the concept of rule of law, mainly in Hong Kong and



possibly other Chinese societies. The second will investigate the possibilities of constructive cultural dialogue, on law and international affairs, between European and Asian societies.

**Katrina Winsor** (BA/LLB(Hons), LLM 2009) has become the first New Zealander to win a highly prestigious essay competition in international commercial law - the Clive M. Schmitthoff Essay Competition. The competition is organised by the Pace Law School's Institute of International Commercial Law in White Plains, New York together with the Queen Mary College, University of London's Centre for Commercial Law. Katrina's essay, "The applicability of United Nations Convention on Contracts for the International Sale of Goods (CISG) to govern sales of commodity types of goods", will be published in the *Vindobona Journal of International Commercial Law and Arbitration*. Throughout her time at university Katrina worked part-time at Russell McVeagh, and she has been a solicitor in the competition law team there since February 2009.

**Jess Day** (LLB(Hons) 2009) had her published article, "Waitangi Tribunal History: Interpretations and Counter-facts" (2009) 15 AULR 205, cited recently by the Court of Appeal (*Paki v Attorney-General* [2009] NZCA 584 at [45]).

## Practice

**Simon Mount** (LLB(Hons) 1995, LLM 1998), director of the Legal Research Foundation, has recently joined Bankside Chambers.

**Paul Paterson** (BA/LLB(Hons)), having graduated from Harvard, is currently working at Paul Weiss, attorneys in New York.

**Peter Williams** (BA/LLB(Hons) 2006) has been working with his wife, Tammy, as a volunteer with the International Justice Mission (IJM) in Chennai, India. IJM has fourteen field offices worldwide, where it combats various forms of injustice with teams of law enforcement professionals, lawyers, social workers and communications specialists. In Chennai Peter was a Legal Fellow, providing assistance to a team of Indian lawyers in bringing the perpetrators of bonded labour slavery to justice.

Peter has recently been appointed Interim Field Office Director of IJM Bangalore, where he will lead an office continuing the fight against bonded labour in that region.



# ‘Law, like love’:

## Why ‘guardians of the law’s rationality’ fail to satisfy: The Chief Justice, the Rt Hon Sian Elias



essential to law. A loss of appetite for achieving right according to law. A failure to understand that value-neutral lawyering is bad lawyering.”

Judges, who are under heavy case management pressures, need also to rely on academic scholarship: “Judges respond to particular cases. That is the principal virtue in a common law system. They work with Blake’s ‘grain of sand’. As confident judges have always acknowledged, the principle they look for is the one that will give the desired result in the particular case. Analogy is the preferred method of dealing with novel cases, but they are open to top-down reasoning especially when provided with organising principles by legislation. The legal academic has the more ambitious task of looking to the whole. That perspective is extremely influential, if not always followed. Just as legal academics face incentives which may compromise their function if care is not taken, so too judges face pressures of what has been described as managerial justice. Those who are the guardians of the law’s rationality need to be vigilant to criticise any compromise of essential judicial function in this way. Again, it is often

Opening the Australasian Law Teachers’ Association (ALTA) conference in Auckland on 5 July 2010, Chief Justice Sian Elias gave a wide-ranging address. Reflecting upon her observations from 40 years in practice, she spoke of the necessary “interconnectedness of three branches of the profession - teachers, judges and law practitioners,” but expressed concern that there may, instead, be an increasing disconnect. A parallel theme, woven through her talk and reflected in the title chosen for her address, is the need for the practice of law to be more than a technical or rational exercise (“pragmatic, unintellectual habits of judicial reasoning or legal argument are no longer good enough”) - if the law is to inspire those that occupy it, respond to the lives of the real people it impacts upon, operate informally through community understanding and compliance, and meet the challenges posed by recent cultural and legal revolutions in the way in which “power is exercised and checked,” and the increasing centrality of a “human rights” approach to social problems.

Elaborating on her central theme, she described the pressures producing a “possible disconnect in the preoccupations and focus of both the practising profession, or large and influential parts of it, on the one hand, and the law schools and courts on the other.” Of legal practitioners she said: “My sense is that there is not much fun anymore. I know that Lord Justice Frog said ‘[w]e are not here for fun’. Why would anyone throw themselves heart and soul into any occupation if it is not engrossing, stimulating, worthwhile, and fun? ... The excitement in the movement of ideas, the sense of the bigger picture and a willingness to engage in it; these excitements seem far from the consciousness of the practitioner of today.”

One pressure on practitioners to disengage from academic thinking was the drive for specialisation: “That may be efficient and sensible, but only if the specialist retains the sense of law as a whole. Otherwise the practitioner drops out from the current of ideas and professional competence will inevitably be blunted. I see at times a lack of hard thinking. A failure to appreciate that deliberative imagination is

not obvious to those trying to respond to heavy caseloads when they cross the line. Providing a reality check is a responsibility of academics and the profession.”

Changes took place in law schools at the end of the 1960s, which meant that they were “transformed from centres staffed by practitioners” into “academic institutions devoted to the advancement of learning about law.” At this point law schools became places concerned with “the methodical discovery and the teaching of truths about serious and important things”. What was new in this “was the development of the excitement of law” and “the transformative impact of modern scholarship.”

“If the common law is properly to be seen as a method of change, the health of our law schools as producers of legal literature is now critical to the common law as a system. The advantages of academic input are also captured in statute law reform processes, where also the ‘remorseless treadmill’ impacts on the ability of practitioners to contribute as effectively as formerly.”

Unfortunately there are also pressures on academics, such as those produced by “performance-based research funding.” Speaking of these Chief Justice Elias said: “I do not think it fanciful to have the impression that serious academic commentary on matters of New Zealand interest has declined in recent years in New Zealand... If this impression is correct and the trend continues, the law schools may become increasingly aloof from legal practice and the work of the New Zealand courts. There is little room for complacency here. Opportunities for contact and scholarly dispute between academics, the profession, and the judiciary are not extensive. Such lack of engagement is not only impoverishing in thought. There is a potential vicious circle being set up if the profession loses confidence in the teachers of law. If so the conditions are set for a profession which is not intellectually curious. Law can only be the loser.”

**Julia Tolmie**



# 2010 Australasian Law Teachers' Association conference



Persistent rain failed to dampen the enjoyment of the 65th Annual ALTA Conference, hosted by the Faculty of Law and the Department of Commercial Law from 4 to 7 July 2010. The ALTA Conference last came to Auckland in 1983.

Monday, the first business day of the conference, began with a traditional Māori powhiri on the University's Waipapa Marae. The powhiri was conducted by Te Rakau Ture, Māori students from the Faculty of Law. The day reflected the multicultural nature of New Zealand society by ending with a Pacific Island themed dinner in the University's Fale Pasifika. The highlight of the evening was a bracket of vibrant drumming and colourful dancing from the University's Pacific Tamure Polynesian Entertainers.

Between the powhiri and the dinner the business sessions of the day were built around the conference theme: "Power, regulation and responsibility; lawyers in times of transition". The Chief Justice of New Zealand, Dame Sian Elias, and Professor Jeremy Waldron of New York University Law School and Chichele Professor-Elect of Social and Political Theory, Oxford University, presented papers at the first plenary session. Both papers (see above and below) built off the principle of the rule of law. The Publishers' Plenary on the Monday afternoon saw a trans-Tasman panel chaired by Professor Brian Opeskin (Macquarie Law School) address the issues around the interface between the legal academy and law reform bodies.

The responsibilities of legal advisers to government, and how law teachers may best train such advisers, was picked up again at the Tuesday Plenary by Robert Orr QC, Chief General Counsel, Australian Government Solicitor and Dr David Collins QC, the Solicitor-General of New Zealand. Both men, as the respective heads in Australia and New Zealand of the large teams of lawyers providing advice to government, were in a good position to identify the expertise and skills they expected in their colleagues.

The LexisNexis Conference Dinner was held on the Tuesday evening at the Royal New Zealand Yacht Squadron Club Rooms on the harbour edge. Auckland Crown Solicitor, Simon Moore SC, delivered an entertaining after dinner speech.

At the final plenary session on the Wednesday, Professor Mary Keyes of Griffiths Law School addressed "Globalisation's challenge to legal education and private law" and Dr Robert Joseph of Waikato Law School spoke to "Power, regulation and responsibility in a 21st Century Māori governance context". The perspectives of the private lawyer and the Māori lawyer brought a complementary balance to the strong traditional public law orientation of the plenary sessions of the previous two days.

An extensive interest group programme was at the heart of the conference. Twenty-eight different interest groups met in 49 sessions to hear the presentation of 142 papers. The Legal Education Interest Group led with 21 papers. Across the substantive law papers presented, 58 fell within private law and 60 within public law. Engaging paper titles included: "Wherever you hang your hat may be home, but is it 'residential accommodation' for GST purposes?"; "It's just a game? Law's reach in the virtual worlds" and "Skulls full of mush: reflections upon 'thinking like a lawyer' as a threshold concept".

In all the conference was a vigorous three days of intellectual stimulation, learning, friend-making and fun for the 224 law teachers (from 47 law schools in Australia, England, Hong Kong, New Zealand, South Africa, Vanuatu and Wales) and others who attended. The conference was greatly helped by the generous support of ten publisher and law firm sponsors: LexisNexis; Russell McVeagh; Routledge; Thomson Reuters; CCH; The Federation Press; DLA Phillips Fox; Palgrave Macmillan and Oxford University Press.

**Bruce Harris**

# Gangsters, statesmen and their lawyers: The rule of law on matters international: Professor Jeremy Waldron



Delivering the second plenary address at the ALTA conference, Professor Jeremy Waldron reflected on the function of the “rule of law” in informing the practice of government legal advisers. His starting point was the example of John Yoo, Deputy Assistant Attorney General in the Office of Legal Counsel in the Department of Justice in the US under the Bush administration, and “author of the most notorious torture memos, the so-called Bybee memo of 2002 ...” This: “purported to narrow the legal definition of ‘torture’ ... so that it did not cover the sort of pain that was being inflicted on detainees by American interrogators by water-boarding, sleep deprivation, mock execution, attacks with animals, and other techniques. The word ‘torture’ should be reserved, Yoo argued, only for the infliction of the sort of extreme pain that would be associated with death or organ failure.”

Although the American use of torture has hopefully ended with the demise of the Bush administration, Waldron suggested that “deeper concerns remain about the way in which we should think about legal advice given in the service of government, particularly in times of crisis, when governments are tempted to cut corners in both national and international law.”

Yoo’s supporters would say that he was not guilty of anything more than ordinary aggressive, imaginative lawyering in the service of his client, the Bush administration. In Waldron’s opinion saying that the lawyers in this example should have acted not just for the government in power at the time but for the “general good” is not the answer, because they thought that they were. In fraught situations people follow very different moral imperatives. Waldron argued instead that the idea of the “rule of law” - “the ancient focus of our vocation as lawyers,” incorporating “our allegiance to the integrity of the legal system as a whole” - is the idea that we should bring to lawyering to counter the notion that aggressive partisan lawyering is appropriate when it comes to acting for the government.

For private citizens the rule of law means that: “If the state is going to have an impact on individuals by way of penalty, obligation, loss, or incapacity, then the individuals are entitled to advance notice of this in the form of clear promulgated laws... In the absence of clearly stated constraints laid down in an enacted rule or a well-known precedent, there is a presumption in favor of individual freedom: everything is

permitted if it is not clearly forbidden. It is not inappropriate for lawyers to help their clients -gangsters or otherwise - to navigate the legal system with this in mind, looking for ambiguities and loopholes, taking advantage of them where they exist..."

However, the government is different from the individual because it "does not have an interest in being unconstrained by law in the way that the individual does. Its freedom of action is in the service of our interests and our freedom of action; it is not something valued for its own sake." What this means is that governments are not entitled to the same freedom of action expectations as individuals are, and the rule of law "goes in the opposite direction than it does for the individual. Freedom to impose sanctions without proper guidelines is a defect when it comes to government." The responsibility of advising government is therefore different from that of advising a private client: "Lawyers acting for government should proceed on the basis that the government is to act in accordance with law in all its operations, bearing in mind all the time that this general sense of constraint is not applied gratuitously, but applied precisely to foster the sort of environment in which individuals can enjoy their liberty."

In the international sphere some have argued that governments are like individuals and entitled to the same freedoms that individuals would enjoy in the national sphere. "On this theory, any unclarity should be resolved in favour ... of the freedom of action of the individual sovereign state." In Waldron's opinion, however, this is misconceived because: "States are not like individual subjects of international law; they are law-makers in the international order... and they are also like officials of the international order. International law has few executive resources of its own." Furthermore, the "administration of international law often requires a process of 'dual positivation,' whereby international law norms are mirrored in the provisions of national legislation or regulations." As a consequence, advising "a government in the realm of international law is therefore more like advising an executive official in the national arena than like advising a private individual or business." Thus government lawyers "should remember that they are acting for and advising an entity which is not just limited by law but law-governed in its very essence - a nation of laws, not men in all its operations. Their advice should be given with the integrity of the international legal order in mind."

The rule of law is often associated with the need for "clear rules rather than vague standards" but "rules-based conceptions may be particularly inappropriate when we are talking about law that constrains states (or state entities) as opposed to law that constrains individuals." In Waldron's opinion, "It is a mistake to make a fetish of certainty under the auspices of the rule of law." He concluded his address by pointing out that "many of the most important bodies of modern law work with deep and sometimes difficult-to-pin-down concepts like dignity and due process, or set their faces against evils which are equally difficult to pin down in operationalised terms like degradation or cruel or inhuman treatment."

"Often what we value in regard to individual self-application (and any subsequent adjudication) of an evaluative standard as opposed to a rule is that its presence in a legal system occasions, frames, and facilitates a certain process of reflection and argument, rather than just the mechanical conformity of behaviour to an empirically or even numerically defined requirement.... The point of invoking the rule of law in legal ethics is to make us think about our obligations not just send us scurrying to the dictionary. As with all essentially contested concepts, our thinking is enhanced, not diminished, by the ferment of rival formulations, by the overlapping laundry lists of rule of law requirements from Dicey to Lon Fuller, and by the well-known disputes over the balance of formal, procedural, and substantive elements in our rule of law thinking."

A graduate of Otago and Oxford Universities, Jeremy held positions at both those universities and then the University of Edinburgh, the University of California, Berkeley, Princeton University and Columbia

University before joining NYU in 2006. Shortly he will take up the Chichele Professorship in Social and Political Theory at Oxford on a half-time basis. His book *Torture, terror, and trade-Offs: Philosophy for the White House* was recently published by Oxford University Press.

## LexisNexis 2010 Award for Excellence and Innovation in the Teaching of Law; Mohsen Al Attar



Mohsen Al Attar

The LexisNexis-ALTA Award for Excellence and Innovation in the Teaching of Law for 2010 has gone to Mohsen al Attar. The award recognises the workshops Mohsen initiated for Pacific students at the Law School, intended to increase enrolment of an under-represented group by helping them develop the academic skills needed to excel in their first-year papers. Under his supervision, Pacific students partook in a series of academic exercises that encouraged the application of critical thinking and problem-solving skills. "Based on the admissions figures - we have witnessed a dramatic rise in the GPAs of admitted Pasifika Academic Support Strategies students - the workshops are achieving their objectives," says Mohsen.



## Helen Clark's achievements saluted

An honorary Doctor of Laws degree was bestowed on the Right Honorable Helen Clark in February 2010 at a ceremony in the Fale Pasifika. In attendance were nearly 200 family, friends, political colleagues and University staff. Earlier in the day she had been invested with her country's highest honour, membership of the Order of New Zealand, at Government House in Epsom.

In his welcome the Chancellor, Roger France, described Helen Clark as one of the University's most illustrious graduates who had had a huge impact on New Zealand life and continued to contribute in a major way on the world stage as Head of the United Nations Development Programme. "The University takes enormous pride in acknowledging Helen Clark's achievements as a graduate, as a politician, a stateswoman of international stature and as a great New Zealander."

Praising Helen Clark's political achievements, the Public Orator, Professor Vivienne Gray, noted that she was the first woman elected to the office of Prime Minister in New Zealand.

"This puts her in the company of other distinguished women leaders who were the first in their own countries, such as Indira Gandhi, Mrs Bandaranaike and Benazir Bhutto, Margaret Thatcher, Mary Robinson and Gro Brundtland, Dame Eugenia Charles, Corazon Aquino and

Violeta Chamorro. She punched a clear hole in the glass ceiling. It may still have sharp edges that can cut, but the sky has not yet fallen in, and we salute the struggle that we know it was for her to shatter it. She represents a generation in which qualified and talented women reached high office in New Zealand as Chief Justice, Governor-General, and Speaker of the House, as well as Prime Minister."

The University also honoured Helen Clark for her personal contribution to its success and that of her government too, said Professor Gray.

In response Helen Clark said it was "a signal honour to be recognised in this way by one's own university." She looked back on her 14 years as a student and a teacher at Auckland University "as certainly among the happiest of my life." A university education had, for her, been "a transformational experience", and a "major motivation for me in public life was to strive to make that experience available to everyone with the potential to benefit from it. Opportunity denied because of cost of access is a tragedy for the individual and for our country." Helen Clark concluded by remarking, "It is an honour for me to accept this honorary degree tonight, particularly in Laws, given the responsibility I had for passing so many of them."



## Visit of Professor Graham Zellick QC

Professor Graham Zellick QC, the Law Foundation Distinguished Visiting Fellow for 2010, visited the Auckland Law School in late August 2010. He is currently President of the Valuation Tribunal for England and was formerly Chairman of the Criminal Cases Review Commission, an Electoral Commissioner, Vice-Chancellor of the University of London, and Principal of Queen Mary and Westfield College of that University. He was Professor of Public Law for twenty years at Queen Mary College. He served as Chairman of the Committee of Heads of the UK law schools and was a member of the Lord Chancellor's Committee on legal education. He is a past editor of Public Law and founding editor of European Human Rights Reports. He has held a number of other distinguished positions.

During his time at the Law School, Professor Zellick gave a public address titled "The creation of a unified coherent tribunal system". This address assessed the existence and procedures of the many different tribunals in the UK. It considered the reforms to harmonise procedures and improve the quality of services. His address was well attended by the law school community.

Professor Zellick was also the keynote speaker at the "Miscarriages of Justice" conference (see below). Professor Zellick gave an address titled "The Criminal Cases Review Commission in England and Wales". He recounted the establishment of the Review Commission and its function in receiving applications from persons convicted of crimes for review of convictions and sentences. The procedure involves an initial assessment by members of the Commission, with a determination as to whether the complaint should be rejected or taken to a further stage. Although a majority of applications are declined, the cases where a miscarriage of

justice is suspected are then the subject of an application to the Court of Appeal for reconsideration of the verdict or sentence. The number of complaints received is significantly greater than the number formerly processed through the office of the Solicitor-General. The message postulated by Professor Zellick was that the Criminal Cases Review Commission performs an important impartial constitutional role, in safeguarding the interests of the minority who may suffer from a miscarriage of justice.

**Kenneth Palmer**



# Miscarriages of justice

In August the Legal Research Foundation presented an international conference on miscarriages of justice. The conference attracted a wide audience from the profession and community, and focused, in particular, on Sir Thomas Thorp's proposal that New Zealand create an independent body to investigate cases of alleged miscarriages of justice. Speakers included the former chair of the Criminal Cases Review Commission in England, Graham Zellick, Stewart Campbell from the Scottish Criminal Cases Review Commission, Sir William Young, a judge of the Supreme Court of New Zealand, and Professor Tony Smith.

Cases of alleged wrongful conviction have a particularly corrosive effect on the justice system, and the conference began by acknowledging the key points to emerge from Sir Thomas's research. These are that New Zealand's current arrangements almost certainly leave significant numbers of miscarriages uncorrected; that there is particularly low use of the current system by Māori and Pacific Island people; and that an independent body would be the best way to address these problems. The two United Kingdom representatives confirmed from their experience that independent bodies are able to strengthen the justice system by providing timely, independent and

cost-effective investigation into miscarriages. Key features of the United Kingdom Commissions include genuine independence from the political process; the power and expertise to investigate factual issues; face-to-face meetings with applicants; a combination of legal and non-legal expertise, and appropriate respect for the separation of powers.

Sir Thomas's proposals, first published by the Legal Research Foundation in 2005, have met with widespread support in the New Zealand legal community. This conference added high-level international support to the ideas, and confirmation that reform in this important area is achievable and desirable.

Simon Mount

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**New Zealand's current arrangements almost certainly leave significant numbers of miscarriages uncorrected.**

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# TriNations symposium

Just over a month before the TriNations Rugby season kicked off this year, Auckland Law School's public lawyers had their own TriNations event. The public law in three nations symposium held in June 2010 was somewhat less physical, and rather more co-operative than its longer-standing big cousin; but it is also planned to become a regular fixture (biennial), and was nearly as thrilling for its participants.

The event grew out of links with South African public lawyers established by Professor Paul Rishworth and our dear late Professor Mike Taggart over the past decade or two. Professor Cora Hoexter of Witwatersrand University in Johannesburg was keen to develop those contacts further and came up with the idea of the TriNations public law symposium, to be attended by public lawyers from her university and the best two universities in Australia and New Zealand: the Universities of Melbourne and Auckland. Melbourne's Professor Adrienne Stone (granddaughter of our most famous former Dean, Professor Julius Stone) and Paul Rishworth needed little convincing to endorse the idea, and Auckland got the honour of hosting the very first symposium.

The day took the format of a round-table discussion, with numbers kept low to facilitate this. Nine public law academics from the three universities presented papers, and nine further Auckland and Melbourne colleagues attended. Papers were circulated and read by all participants in advance, which meant that presenters only needed to summarise the main points in their papers for some ten minutes each, leaving the remainder of each session for discussion. The result was a day filled with truly in-depth and wide-ranging exchanges chaired by the Honourable Justice David Baragwanath.

Topics ranged widely across the different areas of public law. Four Auckland colleagues shared work from their particular corners of public law: the law underpinning executive government action (Professor Bruce Harris); the Bill of Rights and the right to protest in New Zealand (John Ip); and two papers on the nature of the judicial task in statutory interpretation (Dr Richard Ekins and Hanna Wilberg). Other papers included one outlining the way in which the South African courts have

circumvented the limited conception of administrative law in their Constitution and statute law, by building an entire new administrative law on the foundations of the rule of law (Professor Cora Hoexter, Witwatersrand); and one on the fraught role of legal adoption in indigenous tribal membership (Dr Kirsty Gover, an expat Kiwi currently at Melbourne).

But the most instantly eye-catching topics were two from South Africa and one from Melbourne. Dr Jeremy Gans (Melbourne) presented on the "Denial of non-human rights in Australia" - no, this was not about animal rights (at least not primarily). Unlike in New Zealand and most other jurisdictions, the Australians (in the ACT and Victoria) have excluded corporations from the protection of their rights legislation. Interestingly, Jeremy thought they had most likely got that wrong - a point on which there was a fair bit of heated debate - and that there were certainly great difficulties with the way in which the decision was made, and the way in which it was implemented in the legislation.

Professor Raelene Keightley (Witwatersrand) outlined and evaluated the South African Constitutional Court's performance to date in dealing with one of the great experiments of the South African Constitution: justiciable socio-economic rights. Her verdict was that the Court had struck an admirable balance between the conflicting demands of giving real effect to these rights (so crucial in the South African context) on the one hand, and leaving it to government to run the country and allocate scarce resources on the other.

Last but not least, Professor Elsje Bonthuys (Witwatersrand) tackled regulatory theory in its application to a subject towards the taboo end of the spectrum → causing discussion to take on a careful tip-toeing tone at times: the 2010 Football World Cup and the regulation of sex work in South Africa.

The *New Zealand Law Review* will devote Part 2 next year to a selection of papers from the symposium.

Hanna Wilberg



W.A. Collis, "Committee of Management - Parihaka"; circa 1880s. Collection of Puke Ariki New Plymouth

## Winter lecture series

The Law Faculty was responsible for four lectures as part of the Centre for Continuing Education's "Winter Week on Campus" in July 2010. Professor David Williams spoke about the "infamous" case of *Wi Parata* (1877) in which the judges said that the Treaty of Waitangi was "a simple nullity". Professor Williams related his talk to the *Whitireia* block of land at Porirua - the focus of that court case. As he said: "Whitireia is one block of land with many stories to tell about judges, clerics, politicians and rangatira in recriminations over the failure to establish Trinity College on that land in the 1850s." A large and lively audience asked a number of questions that showed how relevant legal history can be to contemporary issues.

In his lecture "Sun, wind and tide: the keys to a sustainable energy future", Associate Professor David Grinlinton examined current developments and the exciting potential for greater use of renewable energy, such as wind, solar and tidal power in New Zealand. He discussed the ways in which the law can help (or hinder) such developments, and the use of economic tools such as "feed-in tariffs" to promote greater uptake of renewable energy.

Speaking on "Rights in the criminal justice system - prisoners and victims," Kris Gledhill explored the extent to which the framework provided by international human rights law provides an approach that might satisfy the concerns of bodies that are often thought to be in conflict; namely victims' rights proponents, such as the Sensible Sentencing Trust, and prisoners' rights bodies, such as the Howard League. The key components of the international human rights framework were identified, namely the state duty to protect and the consequent need for both an effective criminal law and specific action taken against individuals known to present a danger - but also the need to avoid arbitrary detention or interference with the autonomy rights of individuals and the importance of ensuring fair trials. Kris suggested that an international human rights framework therefore allows a proper

balance between the legitimate claims of victims of crime and the legitimate rights of those alleged to be perpetrators. He also explored the fundamental rights retained by prisoners, and made a critical assessment of the proposals to remove the right to vote from all serving prisoners in the Electoral (Disqualification of Convicted Prisoners) Amendment Bill.

In May 2010 Parliament enacted the Sentencing and Parole Reform Act, introducing a "three strikes" sentencing regime. When someone is convicted of a qualifying offence - strike one - the judge issues a first warning. If the person later commits another qualifying offence - strike two - the judge issues a final warning and orders that the sentence be served without parole. If the person then commits another qualifying offence - strike three - the judge has to sentence him or her to the maximum sentence for that offence and order that the sentence be served without parole. The legislation makes the maximum mandatory; the only discretion left to judges is to decline to make the offender ineligible for parole if this would be manifestly unjust.

Professor Warren Brookbanks, in his address, argued that this law imposes punishment without adequately considering the gravity of the wrong the offender has done. For example, two men who commit a street robbery, which is not carefully planned and doesn't involve violence or the use of weapons, would ordinarily receive a sentence of 18 months to three years - less if the offenders plead guilty. If one of the men has two strikes, even if relatively minor and dating from 30 years ago, he has to be sentenced to 14 years in prison - the maximum penalty for aggravated robbery - while his partner in crime may be sentenced to just one year. Warren argued that this is an inconsistency and is unjust. Furthermore, the sentence is perverse in another way. This relatively minor robbery is sentenced in the same way as a carefully planned, violent armed robbery. That is grossly unfair to the victims of this second, more serious crime.

# London QC thriving on insurance work

Graham Eklund QC, an Auckland law graduate from the Northey era, is now a prominent Queen's Counsel in London who has made his name in insurance work. Back in New Zealand on holiday in August he took time out to talk to *Eden Crescent* about his Law School memories and his professional career starting in Lower Hutt.

Graham embarked on his BA/LLB(Hons) in 1969, graduating 1974. Back then the Law School was based in the top two floors of the General Library with Professor Jack Northey as its all-powerful Dean. "It was a good place to study. One person to whom I really owe a debt is Bernard Brown. He supervised my dissertation on 'Henry Fielding and the Law,' which enabled me to mix my English studies with studies relevant to the law. Bernard was both encouraging and typically amusing." Now Graham sees parallels between Fielding and Bernard, since both have used literature for comment and acerbic analysis of the law.

Another teacher whom Graham recalls with respect and affection was David Lange, then in sole criminal practice and a part-time tutor, in Graham's case, in a medico-legal paper. He recalls an occasion in 1977 (after he had left university) when he had arranged for David Lange to speak to a branch of the Labour Party in Lower Hutt. Graham had agreed to collect David from his office in Wellington. Graham duly drove from Lower Hutt to David's office where they met. It was only as they approached Graham's car, that he realised the enormity of his mistake. He had driven his Mini to collect David. After David had wrestled himself into the Mini, finally pulling his head in under the roof rail, he commented: "It's okay, no whiplash". Graham describes there

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**He finds insurance law interesting and challenging, since insurance is ubiquitous and gives rise to a wide variety of claims. "Insurance is everywhere in life: we insure buildings, businesses, cars, farms, ourselves... Law is the same. It is everywhere in life. The combination leads to a great variety in the circumstances I get involved in."**

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being "relief all round."

After admission, Graham worked for Tony Keesing of Agar Keesing McLeod & Co for three and a half years before heading, in 1978, for London. In those three and a half years, the importance of preparation was drummed in and learned.

Employment in the trademarks department of Distillers, owners of Johnnie Walker and other famous whiskies, led to a developing taste in whisky, followed by 12 months learning procedural law at a small firm undertaking provincial agency work. Graham then went to Herbert Smith, a leading litigation firm in the City, doing mainly insurance litigation. After three years, he got itchy feet to be back at the bar.

His eventual call to the bar in 1984 had almost serendipitous origins. At Herbert Smith, he had been instructing a senior silk - "quite a difficult man" - in a fraud matter, which involved allegations of theft of Hitler's paintings. After the successful outcome on behalf of the insurers, the senior silk invited Graham to undertake pupillage at his chambers (Two Temple Gardens, at the bottom of Middle Temple Lane). Then followed "the worst year of my life", half of it unpaid. As well as being extremely arduous "it was such an anxious period, not knowing whether I was going to be offered a tenancy or not". Graham took silk in 2002 and in 2003 moved to chambers at Four New Square in Lincoln's Inn which specialises in commercial and civil work. There he is one of 70 barristers, 19 of them Queen's Counsel.

Graham represents major insurers, in the company and Lloyd's markets, advising on policy and coverage issues. He does "a reasonable amount of fraud work" for insurers, for example in cases of fire where arson is suspected, where the extent of financial loss has been exaggerated or where there has been non-disclosure of material facts. He finds insurance law interesting and challenging, since insurance is ubiquitous and gives rise to a wide variety of claims. "Insurance is everywhere in life: we insure buildings, businesses, cars, farms, ourselves... Law is the same. It is everywhere in life. The combination leads to a great variety in the circumstances I get involved in."

These days disputes over insurance, as in other spheres, are increasingly settled without going to court. In fact, says Graham, settlement is often achieved without the intervention of a mediator or adjudicator. Such settlement meetings, typically held six months before a prospective trial, have "replaced the meetings we used to have on the doorstep of the court."

Various British legal directories testify to Graham's effectiveness as an advocate and specialist in his field. According to Chambers UK 2010, Product Liability, he is touted as a "solid, reliable and tenacious silk". Chambers UK 2009, Professional Negligence, singled out his "willingness to go beyond the call of duty". Legal 500 2010, in its Insurance and Reinsurance section, says Graham "is an insurance policy coverage specialist at the top of his game", who has "fine legal and forensic skills, but at the same time he's down to earth, practical, responsive and client focused".

Without fanfare Graham is giving back to the alma mater which laid the academic foundation for his impressive accomplishments in the law. A member of the UK Friends of The University of Auckland board, Graham has become "leader or focal point for the Law School component" in the UK. In this capacity he is helping to seek funding for a NZ\$300,000 scholarship fund which will support two postgraduate students, ideally to undertake masters study in healthcare law or South Pacific law at the Auckland Law School. Individual scholarships will be worth \$7,500 a year.

Other Auckland alumni practising as barristers in London include David Hislop QC and Craig Ulyatt who gained his tenancy at Fountain Court in 2009.

**Bill Williams**



## Directors' Powers and Duties wins book award



From left: Chief Justice Sian Elias, Susanna Watts and Peter Watts

Professor Peter Watts won the J.F. Northey Memorial Book Award for the best legal book published in 2009 by a New Zealand-based author for his book *Directors' Powers and Duties*. The book has been hailed by the Chief Justice as "a consummate work of scholarship" and "just cause for celebration". Speaking at the book's launch at the Law School, Dame Sian Elias called it "a readable and illuminating work. It is thoughtful and passionate. It is deeply satisfying. It is a book we have lacked in New Zealand. It illustrates common law method, as refreshed from time to time by statutory restatements. It is a book to jolt thinking. It pays close attention to the actual controversies which generate the statements of principle over which Professor Watts has such mastery."

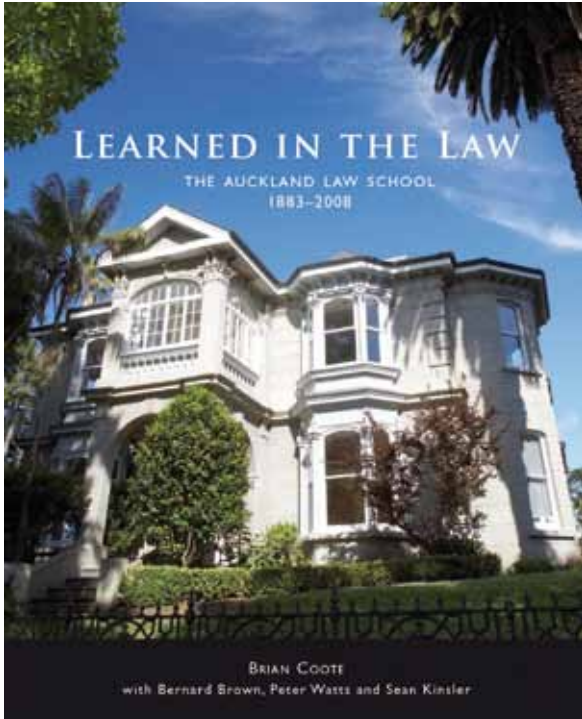
Thanking the Chief Justice for her remarks, Peter Watts said it was not her office which had made her the appropriate person to launch the book. Back in the 1980s he had worked with her in her role as Commissioner on the Law Commission's review of company law - "one of the most ambitious and successful projects that the Commission has taken on". Peter thanked a number of people, starting with Professor John Farrar, his mentor at Canterbury University in the 1970s, his former colleague Neil Campbell, his publisher LexisNexis, and his two research assistants, Katy Millington and Joanne Dickson (whom the University had funded). Peter also paid tribute to his wife Stephanie and his daughter Susanna.

## Law School at Expo 2010 in Shanghai



Law Deans from Auckland (Dean Paul Rishworth and Associate Dean, International, David Grinlinton), travelled with the Deans from the other New Zealand law schools to Shanghai to host a number of functions and seminars at the New Zealand Pavilion at EXPO in 2010. Invited guests included representatives of local and national government agencies, leading law firms and other Chinese Law Deans and academics. The events were coordinated in Shanghai by China Edge (a company founded by Paul Rothville, previously the New Zealand Consul-General in Shanghai). The events commenced on the evening of the 17 July with a welcome from Mr Philip Gibson, New Zealand's Commissioner to EXPO. The alumni dinner was attended, and addressed by, New Zealand's Consul-General to China, Mr Michael Swain. The proceedings were assisted immeasurably by the efforts of Jenny Chu - one of Auckland's law students who is currently taking leave from her studies to work at the New Zealand Pavilion at EXPO. Jenny was able to contribute to the preparatory organisation of the events, and did great service as an interpreter during the various presentations. The events at EXPO were a great success at many levels - showcasing New Zealand itself, showing the opportunities for legal education in New Zealand generally, and highlighting the particular advantages of postgraduate law study at the Auckland Law School.

# “An enjoyable read” says Bruce Slane



*Learned in the Law, The Auckland Law School 1883-2008* by Brian Coote with contributions from Bernard Brown, Peter Watts and Sean Kinsler, Legal Research Foundation (2009) (price \$50 at the Law School office).

I read *Learned in the Law* as a former student who took longer than he should have to complete the 19-unit LLB degree part-time in the 1950s. The course required students to pass Latin I before they could progress far into the law subjects. Although ostensibly justified as necessary for the educated lawyer it was in fact a filter to keep out the weaker students. It kept bright students away as well. In 1951 only eight new students enrolled for law. The Council of Legal Education dropped the requirement and Professor Davis sought another “discipline” to reduce the “tail” of slow students. Some of us did not seem in a hurry but we were already working in the law and really wanted to be lawyers. As Emeritus Professor Coote comments, the problem was better dealt with later by openly restricting entry.

The book records the periodic debates about the degree course, the need to provide optional subjects and the placement of Law and Society. Most important was the battle to establish that law is best taught by full-time teachers to full-time students. My first attempt at the Law of Evidence had not been assisted by the practitioner lecturer reading out loud Garrow and Willis over the first two terms and then, again, faster in the third term as revision. What a contrast when a new fulltime teacher, PBA Sim, took over the next year. I remember sitting near the redoubtable Professor Jack Northey at the back of the College hall when the Law Society held a meeting there to discuss the prospect of a full-time course because law students would no longer be available as apprentices and a cheap source of labour. (My starting salary had been 27/6 per week.) His muttered interjections were funny and cutting.

Professor Northey’s “permanent” deanship is well-covered. Clearly his regime was hard on staff in a growing law school who wished to participate in the decisions of the Faculty and the Department. The subsequent rotation of the role of Dean has proved successful. The problems of growth featured throughout Northey’s and later years, and the difficulty of maintaining collegiality must have applied also to the

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**The book also records the concerns of female staff, the failure to appoint professors in socio-legal fields, and traditionalist attitudes among black letter law teachers on these and other issues.**

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students themselves. Up to the fifties, students knew one another well as they nearly all worked in law offices or Government departments. They not only organised stein evenings but also a successful law reform conference, the genesis of the Legal Research Foundation. The personalities are well recorded in Bernard Brown’s impressionistic monograph of the Foundation in an appendix.

The book also records the concerns of female staff, the failure to appoint professors in socio-legal fields, and traditionalist attitudes among black letter law teachers on these and other issues. Less known externally is the promotion of Māori legal writing. The challenge to the Law School from the commercial law teachers in the Commerce Faculty was hard fought, and a forced merger was successfully repulsed. Brian Coote maintains the narrative until his retirement in 1994 when Professor Peter Watts and researcher Sean Kinsler continue the development story until 2008, providing a concise account of the increased activity and some statistics about the enrolled students. Earlier, for the Law Society, I had encouraged secondary school girls to take law as a career. I am pleased to read that by 2006 women made up 62% of the enrolled students. As Coote points out Professor Algie lectured to almost all Caucasian males. By 2006 that category comprised little more than one in five of the undergraduate enrolment.

Brian Coote was asked to write an institutional history of the Law School; it is not an official one. He has done much more than that. It is a personal account where personalities count. There are unexpected gems: the choice of photographs with apt captions that bring a smile, for instance. (Bernard Brown generously made himself available for photographs on so many social occasions.) I liked the inserts about the early professors and some of the characters the Law School nurtured, including both Byron O’Keefe and Bernard. There is a vivid account of a student prank involving a hearse and a coffin blocking traffic in Queen Street. This history is not just for other academics. It is an easy, enjoyable and informative read for the rest of us.

Bruce Slane

Sir Bruce Slane KNZM, CBE, LLB (’57). Positions held have included President, Auckland District and NZ Law Societies, Chairman, the Broadcasting Tribunal, and Privacy Commissioner (1992 - 2003).

# New books

## Joanna Manning (ed), *The Cartwright Papers: Essays on the Cervical Cancer Inquiry 1987-88*, 2009, Bridget Williams Books

The publication of the Cartwright Report twenty years ago was a momentous event in New Zealand history. After seven months considering evidence, Judge Silvia Cartwright, assisted by expert medical and legal teams and drawing on specialist opinion from all over the world, concluded that Dr Herbert Green had been conducting research at National Women's Hospital without the consent of the patients, which entailed withholding adequate treatment, and that many women had been harmed.

In 2009, I edited the *The Cartwright Papers*, a collection of essays which recounts some of this history. Several of the contributors were participants: Clare Matheson writes as one of the patients ("Ruth"); Professor Charlotte Paul was a medical adviser to the Inquiry; Sandra Coney (with Phillida Bunkle) wrote the "whistleblowing" *Metro* article leading to the Inquiry; Dr Ron Jones was one of the three authors of the 1984 article, using data from Green's own patients, that demonstrated that carcinoma of the cervix had a significant invasive potential. Experts from other disciplines are contributors: Professor Alastair Campbell (medical ethics), former Health and Disability Commissioner Ron Paterson and I (medical law), Jan Crosthwaite (philosopher with expertise in medical ethics), and Barbara Brookes (history of medicine).

The essays review the history and also document how the *Cartwright Report* changed the whole landscape of medical practice and biomedical research in this country, leading to far better protections for both patients and research participants. Yet despite all the regulatory changes, the most significant change to which the *Cartwright Report* contributed was attitudinal - a rejection of medical paternalism and a new expectation that patients would be treated as partners in their care.

Critical issues were at stake in the Inquiry: matters of life and death; the life's work of leaders within the medical profession; professional reputations; public trust in the profession. And so, it is perhaps unsurprising that the findings of the *Cartwright Report* remain controversial and continue to be debated to this day. 2009 saw publication of another book about the "unfortunate experiment" and the Cartwright Report. Professor Linda Bryder, a social historian from the University of Auckland's History Department, released *A History of The Unfortunate Experiment at National Women's Hospital* (2009, AUP). Bryder's "revisionist" history argues that Green's programme was not an experiment, nor was it unfortunate. It was not a case of medical wrong-doing at all, but a programme of "conservative treatment". And, as a New Zealand *Listener* "advertorial" on publication of Bryder's book stated, Coney and Bunkle, and Judge Cartwright "got it wrong"; the Inquiry and *Cartwright Report* amounted to a miscarriage of justice.

Bryder's position cannot be reconciled with new research in 2010 from the University of Otago which provides more detail than in the *Cartwright Report* to show that the women in Green's study had worse outcomes than they would have had if conventionally treated. Women diagnosed in the main period of recruitment into Green's study were three times more likely to have developed cancer of the cervix or vaginal vault over the next thirty years than women diagnosed in the earlier or later periods. In a subset of 127 women who had only a limited biopsy at six months after diagnosis with carcinoma in situ, the risk both of dying and of developing invasive cancer was ten times higher compared to women who were conventionally treated, either by cone biopsy or hysterectomy. The Otago study concluded that the rate of progression of CIN3 (the modern equivalent diagnosis for CIS) to invasive cancer with minimal disturbance of the lesion is about 30

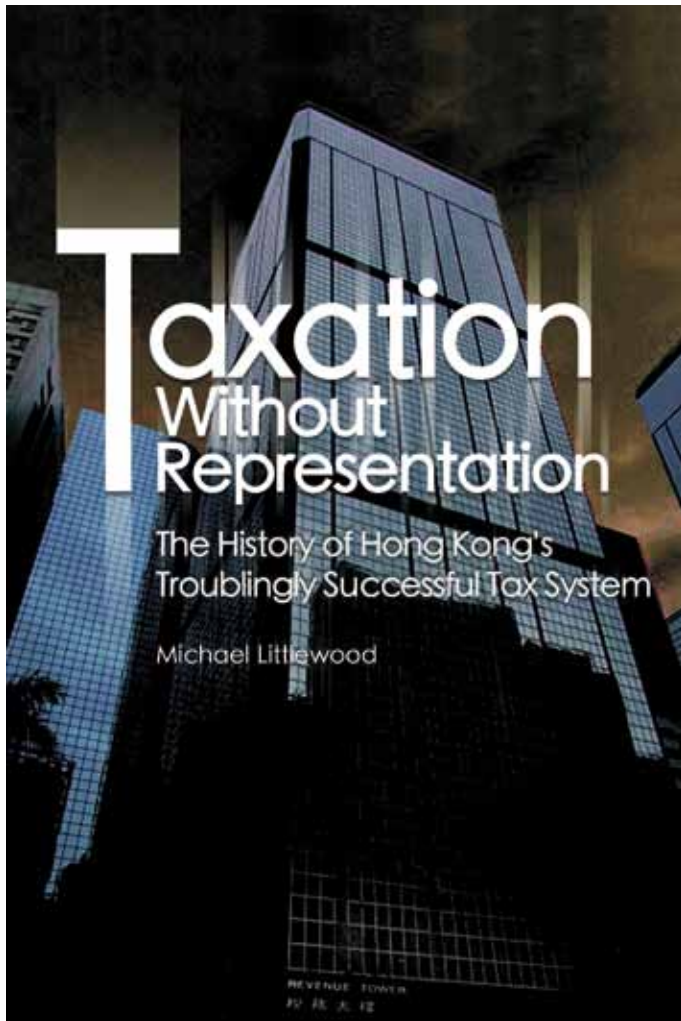
percent, whereas it is low (less than 2 %) after adequate treatment.

It is testimony to the University's commitment to academic freedom and the societal "critic and conscience" role of university academics that these books, which take diametrically opposed positions on these matters, should emanate from the same University. They have re-awakened the controversy and provoked considerable and ongoing debate in the popular and medical academic press. The *Cartwright Papers* comprises a strong rebuttal of Bryder's history, critically appraising her methodology, exposing her lack of objectivity, and compiling an extensive inventory of the many errors and omissions, especially on key issues of medical science. The *Cartwright Papers* concludes that the *Cartwright Report* reached correct and just findings which can be safely relied on, and that it is necessary to reiterate and reinforce this and the lessons learned from the events for this and successive generations, lest our collective memory in relation to this important episode in our medical, legal and social history become distorted. As Professor Sir David Skegg writes in the foreword to the collection, "trying to paper over past errors can only detract from good health care as well as from the truth."

Jo Manning



**Michael Littlewood, *Taxation Without Representation: The History of Hong Kong's Troublingly Successful Tax System*, 2010, HKU Press**



Dr Littlewood lived and worked in Hong Kong from 1989 to 2003. His latest book, *Taxation Without Representation: The History of Hong Kong's Troublingly Successful Tax System*, explains how the territory's tax system developed from 1940, when taxes on income were introduced, to the present day. The Hong Kong tax system was not designed by the government at all, but by local businessmen. Its successful operation demonstrates that it is possible for a combination of light taxes and low public spending to enjoy broad public support, says Dr Littlewood. "For this to happen, it is necessary for the burden to be heavily concentrated on high incomes and for there to be no PAYE. It is notable, too, that Hong Kong's tax system, although generally regarded as a system of income tax, can also be seen as a personal consumption tax. The reason is that it is extremely generous in its treatment of savings (there being no tax on interest, dividends, or capital gains); and an income tax that exempts savings from tax is effectively a tax on consumption (because consumption equals income minus savings). Hong Kong's tax system is exemplary also in its simplicity (the legislation comprising only about 200 pages), its neutrality and its stability (there having been no basic tax reform since 1947)." In fact Hong Kong's return to Chinese rule in 1997 brought no basic change to the territory's tax system. The government has tried, but so far failed, to introduce a goods and services-style tax.

The book has been well received. John Tiley, Professor of Tax Law at the University of Cambridge calls it "an excellent read - partly a matter of 'who done it?' but, even more so, of 'how did they get away with it?'"

It will, he says, "prove indispensable for anyone wanting to use the Hong Kong precedent to argue for a flat rate tax system in their own country". Reuven Avi-Yonah, Irwin I Kohn Professor of Law at the University of Michigan, says *Taxation Without Representation* is a fascinating case study of a seemingly successful tax system operating in a non-democratic context which raises troubling questions about the necessity of linking taxes and democratic choice. The book also "raises intriguing doubts about whether low taxes and low services may be an acceptable alternative model to the prevalent high-tax, high services Western welfare state". The following extract (minus footnotes) is from pages 1-3 of the book:

*This book tells the story of Hong Kong's tax system. This is worth doing for several reasons. The first of these is simply that it is impossible to understand why a tax system is as it is, except by understanding how it got to be that way. Secondly, and more importantly, tax history is not merely the history of the tax system but also the history of society generally, cut at a new angle. This way of looking at history was clearly stated by the great Austrian economist Joseph Schumpeter, who put it in these words:*

*The spirit of a people, its cultural level, its social structure, the deeds its policy may prepare - all this and more is written in its fiscal history... He who knows how to listen to its message here discerns the thunder of world history more clearly than anywhere else.*

*More specifically, the development of modern methods of taxation is obviously one of the most important aspects of twentieth-century history. According to one leading tax historian, it is the essential feature of twentieth-century history:*

*If the eighteenth century was the age of enlightenment and the nineteenth the age of industrialisation, the twentieth may well go down in history as the age of taxation.*

*This claim may seem extravagant, but it is actually readily defensible. Without income tax, modern methods of warfare would not exist. Similarly, it is only income tax which has made possible the scale and role of the modern state. The centrality of taxation is perhaps most graphically illustrated by the fact (or, at least, the alleged fact, for it has not been officially acknowledged) that the United States government has formulated plans aimed at ensuring the survival of the country's tax system in the event of nuclear holocaust - for without taxes, the state itself cannot survive. Over the last few years, tax history has become something of a growth industry... The story of Hong Kong's tax system is one which has not previously been told.*

*Thirdly, while useful research could be carried out into the history of taxation in almost any jurisdiction, Hong Kong is a singularly deserving case, because of the spectacular successes of its tax system. Most strikingly, the burden of taxation in Hong Kong is exceptionally light and yet the government has generally operated at a substantial surplus. As a result, it has accumulated enormous reserves, often standing at more than twelve months' total government spending. This, in turn, has meant that the interest which the government receives on its reserves is itself an important source of revenue. Moreover, since 1945 Hong Kong has experienced spectacular economic growth; and it is widely supposed that its tax system has been a factor in, or even crucial to, its economic success.*

*That a government that levies only exceptionally light taxes is able to operate at a surplus is, of course, largely due to the fact that its spending has been relatively very low, yet the Hong Kong people seem more content than other peoples not only with the lightness of the burden, as one would expect, but also, more intriguingly, with the combination of very light taxes and very low public spending. The key to this success seems to be that small and medium incomes are hardly*



taxed at all and that almost the whole of the burden has always been borne by the relatively affluent. It seems to be for this reason that those with small or middlingsized incomes are tolerant of the very low level of public spending. This is not to say that Hong Kong has achieved perfection. Clearly it has not. In particular, the degree of poverty which persists in the territory is deplorable and the conditions in which a substantial part of the populace lives would be regarded as unacceptable in most other comparably affluent societies. Nonetheless, the broad popular support for the overall state of the public finances is extraordinary, as is the scale of the accumulated reserves.

But these successes are troubling on at least two counts. First, judged by criteria widely regarded as axiomatic, Hong Kong's tax system is grossly flawed: it is inherently inequitable and it permits avoidance and evasion of kinds and on a scale which in other developed jurisdictions would be considered scandalous. Its successes therefore suggest that there may be something wrong with these criteria and the theory surrounding them. Moreover, the peculiar structure of Hong Kong's tax system makes it impossible for the government to effect substantial increases in the territory's famously low rates of tax, even if the people wanted it to do so (or so, at least, the government has maintained). But whether this is a shortcoming is debatable: depending on one's perspective, it might be seen as either an appalling obstruction to the realization of the popular will, or the Holy Grail of tax system design.

Secondly, the Hong Kong government is, and always has been, undemocratic; and it is troubling that an undemocratic political system should have produced a system of taxation and public spending that seems to enjoy more public support than can be claimed by most democracies. More particularly, Hong Kong's tax history seems to support both the Leviathan hypothesis (advanced, most famously, by the American economist James Buchanan) and the theory of fiscal constitutionalism (likewise advanced by Buchanan). The Leviathan hypothesis that democracy has tended to lead to heavier taxation than voters really want. In other words, some lighter mix of taxation and public spending would have come closer to satisfying voters' preferences than the mix in fact achieved by the democratic process. The fact that Hong Kong's approaches to taxation and public spending appear to enjoy greater popular support than those in most democracies seems to lend weight to the hypothesis.

The theory of fiscal constitutionalism is the theory that, if democracy leads to heavier taxation than voters really want, something ought to be done about it. Whilst the theory as to how Leviathan might be tamed is substantial, most countries have put very little, if any, of it into practice.

In this respect too, however, Hong Kong is exceptional: the system of government, the constitution and the tax system itself were all designed with the basic objective of making it difficult for the government to increase taxes, to increase the tax system's progressivity, to increase public spending as a percentage of GDP or to operate at a deficit. Yet many people in Hong Kong appear unaware of this. Equally, advocates of fiscal constitutionalism elsewhere have made little use of what would appear to be an especially useful case study.

A fourth reason for studying the history of Hong Kong's tax system is that it is a "flat tax" system (or, to be strictly accurate, it is, as will be seen, both proportional and progressive). Its successes (and its failures) therefore bear directly on the debate over the respective merits of proportional and progressive taxation. More specifically, one of the more important proposals for basic tax reform advanced in the United States in recent years - that of Robert Hall and Alvin Rabushka - is largely based on the Hong Kong tax system. The actual operation of the Hong Kong system is therefore instructive as to the merits of flat-tax proposals generally and the Hall/Rabushka scheme in particular. Given its remarkable successes, Hong Kong's tax system tends to support the case for a flat tax. More particularly, Hong Kong's tax history suggests that it is possible to design a flat tax in such a way that it enjoys very broad popular support; but that a flat tax might be feasible only at a very low level of public spending. It also suggests, however, that a very low level of public spending might be politically acceptable if paid for by a flat tax which has very generous allowances and which therefore concentrates the burden on the affluent.

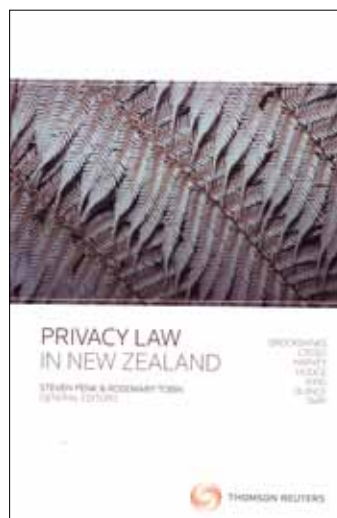
Dr Michael Littlewood has been elected as the eighth fellow of the Law and Economics Association of New Zealand.

## Stephen Penk and Rosemary Tobin (eds), *Privacy Law in New Zealand, 2010*, Thomson Reuters

*Privacy Law in New Zealand*, jointly edited by Stephen Penk and Rosemary Tobin, is the first text to deal comprehensively with privacy law in New Zealand. The treatise considers the concepts that underpin privacy law, Māori concepts of privacy, traces the development of the common law tort of invasion of privacy by wrongful disclosure of private material, compares the development of privacy law in other jurisdictions, examines the statutory protection under the Privacy

Act 1993, the Broadcasting Standards Authority and the New Zealand Bill of Rights Act 1990, advocates reforms and extension of existing privacy law and applies the law in a variety of contexts.

The book reflects one of the strengths of the Faculty, drawing on the contributions and knowledge of teachers and graduates of the Auckland Law School. Authors that contributed to the book, together with Stephen and Rosemary, were Warren Brookbanks, Donna-Maree Cross, Judge David Harvey, Bill Hodge, Natalya King, Khylee Quince and Pauline Tapp.



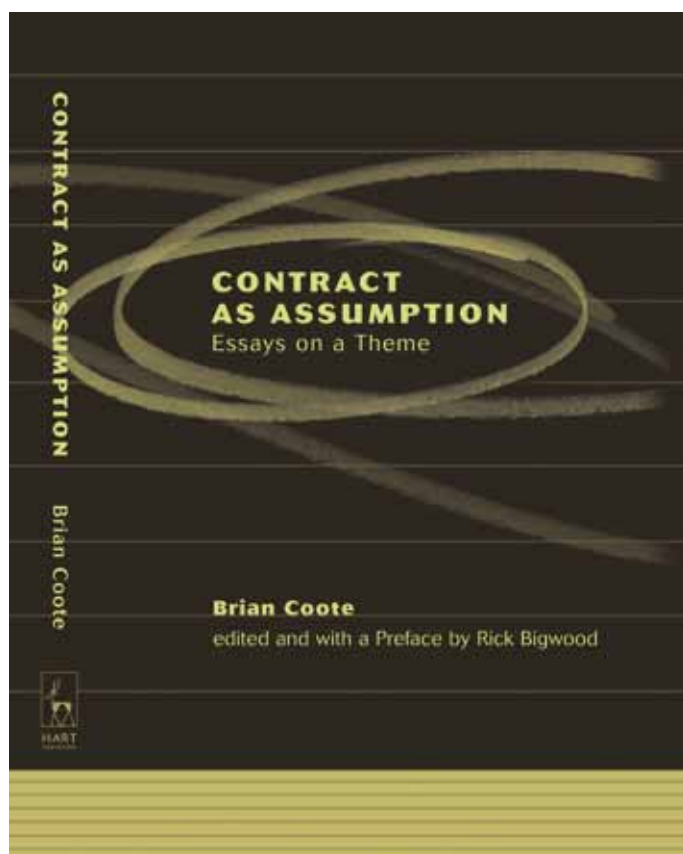
**Rick Bigwood (ed) *Contract as Assumption*, 2010, Hart Publishing**

Contract as Assumption comprises ten essays on contract law, gathering together Emeritus Professor Brian Coote's major writings in the field over five decades. Edited and with a preface by Professor Rick Bigwood, it was launched at the Auckland Law School in May by Justice Robert Chambers of the Court of Appeal.

Brian Coote's style had "always been the incisive essay, sometimes prompted by a leading recent case, but always so much more than a case note", said Justice Chambers. Many of these articles had been highly influential and cited in the highest courts of the common law world. *Contract as Assumption* was "a marvellous work" which would have "lasting significance". The author's influence as law teacher in Auckland since the early 1960s had also been profound, said Justice Chambers. "By my reckoning, he has taught and educated not only countless top academics and practitioners, but no fewer than 15 members of the current High Court Bench, four of us on the Court of Appeal, and two on the Supreme Court."

Rick Bigwood said his concern that there was "no systematic, lasting embodiment" of Professor Coote's major writings had led to him proposing the project. He hoped it would influence new scholars in the field of contract who, but for this collection, "might otherwise have overlooked Brian's writings". Apart from his *Exception Clauses* book, these had until now been "mainly scattered around the British Commonwealth in various scholarly journals".

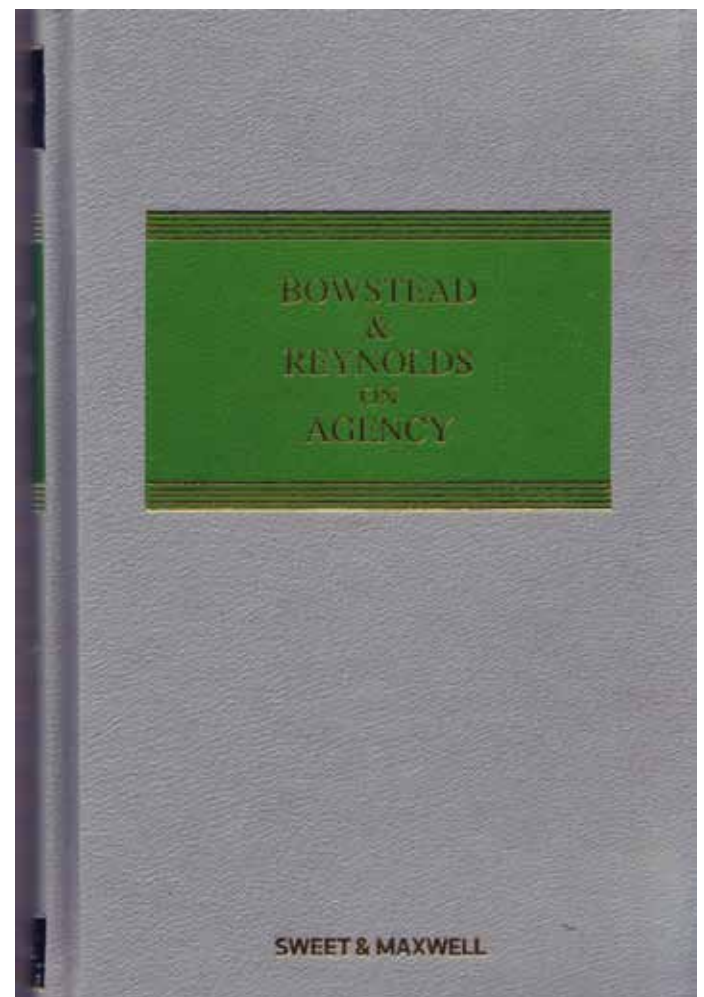
The Deputy Dean of Law, Associate Professor Jo Manning, told the launch function that Professor Coote had been "hugely influential" in putting New Zealand and the Auckland Law Faculty on the world map, "very probably ahead of any other New Zealand legal scholar in the twentieth century". It was particularly fitting that some of his most important and influential work had been collected and published "in this very elegant and beautifully produced book".



**Peter Watts (ed), *Bowstead & Reynolds on Agency*, (19th edn), 2010, Sweet & Maxwell**

*Bowstead & Reynolds*, currently edited by Peter Watts, is in the prestigious English "Common Law Library" series, which series is held by most quality law libraries in the Commonwealth, and in many European libraries. This is the first time that the general editorship of any of the books in the series has left England. The first edition was written by Mr Bowstead in 1896. Since the 13th edition in 1968, the book has been written by Professor FMB Reynolds, now emeritus professor of Oxford University, who continues his involvement in the new edition with particular responsibility for its last two chapters.

The Common Law Library series attempts to state authoritatively, and to provide learned commentary on, the relevant law of England on each topic. However, in *Bowstead & Reynolds* extensive reference is also made to significant cases from most of the leading Commonwealth jurisdictions, including Australia, Canada, Hong Kong, New Zealand, and Singapore. This means that the work is widely resorted to not just by English lawyers, but by academics, practising lawyers, and judges throughout the Commonwealth. Some indication of the use that is made of the book is the fact that a computer search of "bowstead w/2 reynolds" in the Commonwealth library of the LEXIS database shows that from January 2008 to August 2010 the current edition is referred to in the judgments of some 112 cases at higher court level. That database is by no means exhaustive of superior court decisions, and, for instance, captures only a small proportion of New Zealand cases.





# Raymond John Kendall

(1926-2010)

Raymond Kendall passed away on 12 June 2010. Until ill health no longer allowed him to work, he was a Consultant of Brookfields Lawyers at the firm's Manukau office. Ray's work was an important, indeed essential, part of his life. He often commented that he would have found retirement frustrating in the extreme and felt it would have hastened his demise. He wanted to continue to work and it is fitting that he did so until so recently.

Ray was educated at Auckland Grammar School during World War II. After school he joined the Royal New Zealand Air Force. As he was about to be mobilised in the Pacific, the war was ended by the Hiroshima and Nagasaki bombs. Following VJ Day, Ray completed a commerce degree at Auckland University and worked as an accountant. His father, Leslie Kendall, was a partner in the law firm Armstead & Kendall and prevailed upon Ray and his friend Bill Wilson (a fellow accountant) to complete law degrees. He then employed them both with Armstead & Kendall, which subsequently became Kendall &

Wilson. Over the years, Les and Ray Kendall and Bill Wilson were joined in partnership by Rod Sturm, Martin Strong, Alan Galbraith, Alastair Wright, and Brian Hough, who comprised the Kendall & Wilson partners.

In 1960, Ray decamped from Queen Street to establish a branch office in Papatoetoe. The Kendall family were Papatoetoe identities. Ray's father, Les, was a councillor and former Mayor. Ray's brother, Eric, who established the major industrial enterprise Temperzone, established his business and resided there. It was not long before Ray was joined in Papatoetoe by Martin Strong. With the expansion of housing development in the Mangere, Otara, and Takanini areas and industry and commercial development in the Manukau, Wiri, and East Tāmaki areas, and the Kendall family connections, the practice prospered.

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**His quest for knowledge was irresistible and infectious, often exciting his colleagues to learn more. His capacity for work was legendary. He was an early riser and always in the office by 6am. In his days at Brookfields, a competition arose to beat Ray into the office, but try as they might, other early risers never made it in before him.**

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In 2005, Brookfields approached Kendall, Abraham & Lipman, as it had then become, with a view to merging and relocating to Brookfields' Manukau office. Ray enthusiastically embraced life as a Consultant with Brookfields. The larger office and staff seemed to give him a new lease of life and he formed close ties with the Brookfields' staff.

Throughout his professional life, Ray was dedicated to his clients and to the practice of law. He was meticulous in his attention to detail. He was unfailingly patient with his clients and, no matter how demanding their requirements might have been, was prepared to put in as much time as it took to understand their needs and help resolve their issues. He always delivered sound advice, including at times advice that his clients may not have wanted to hear. Ray had a shrewd business sense and always looked to structure his clients' affairs in the manner most advantageous to them, but never at the risk of compromising his professional and moral standards. He was always well prepared and well-read in the law. His quest for knowledge was irresistible and infectious, often exciting his colleagues to learn more. His capacity for work was legendary. He was an early riser and always in the office by 6am. In his days at Brookfields, a competition arose to beat Ray into the office, but try as they might, other early risers never made it in before him.

Ray represented the best of his generation of lawyers. He gave sound advice and dedicated service. He was trustworthy. His word was his bond. He recognised that the practice of law was more than a business, that the privileges afforded to the profession also required a higher level of ethics and behaviour than that required of the general public. He was generous, courteous, and kind, and we are all the poorer for his passing.

*Brookfields Lawyers (reprinted in part with permission from NZ Lawyer).*



## Mary-Rose Russell:

### Davis Law Library Manager (1999-2009)

Mary-Rose Russell was the Davis Law Library Manager from 1999 to 2009 during which she undertook the formidable task of moving the library into the 21st Century.

Mary-Rose has had a varied career, beginning as a barrister and solicitor in New Zealand before going to Southern Africa, where she served as a legal officer in the Rhodesian (later Zimbabwean) army. She requalified in Roman Dutch law and was admitted as an Advocate of the High Court of Zimbabwe. She met her husband John there and they moved to South Africa where they spent the next 17 years. In South Africa Mary-Rose decided against requalifying as an Attorney and retrained as a librarian. She worked in various law librarian roles prior to her appointment as the law library manager at the University of Pretoria - then making her way to the University of Auckland and becoming the Manager of the Davis Law Library.

During her time at the University of Auckland Mary-Rose got the Library and the Faculty working in partnership to have a world-class law library. Her achievements were many. She developed and implemented the Legal Research classes, which are now an integral component of the undergraduate law degree. She was a formidable and innovative teacher. Her great patience and fortitude assisted many students with their research skills and writing for research trail assessments and academic papers. She also provided unwavering support to academic staff - nothing was too much trouble for her in ferreting out materials. Mary-Rose graduated with her Masters in Law (first class honours) in 2006. Her thesis was titled *Mainstreaming legal*

*research skills into a New Zealand law school curriculum.* Other achievements during her time as Manager include: the establishment of the Bell Gully Computer Laboratory, opening of the Marylyn Mayo Rare Books Room, creation of the LCA NZ website, and her assistance with the creation of Mike Taggart's Index to Common Law Festschriften database. Mary-Rose gave an immense amount of her time to the Library, Faculty and University community. She was involved in many committees and interested in many activities outside of the law; from needle-point to ukulele playing.

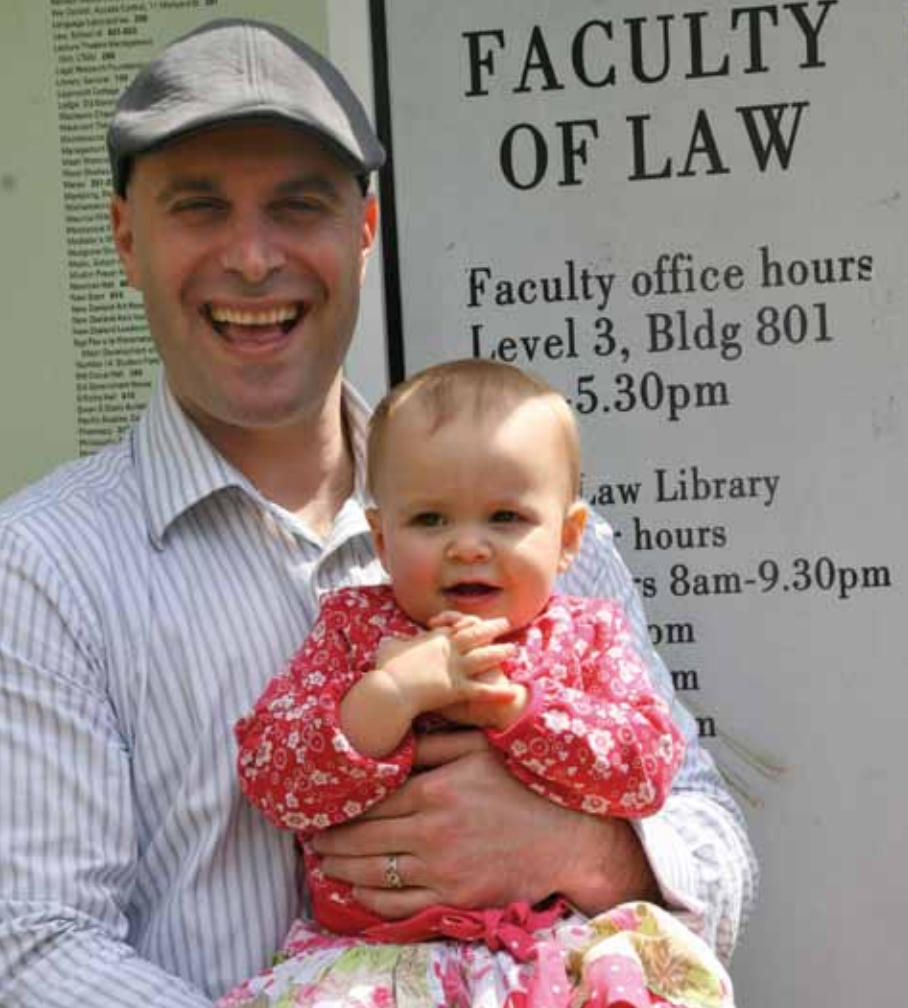
Mary-Rose has taken on her next adventure, lecturing at AUT's Law School. We wish her well and gratefully thank her for the great contribution she made to the Faculty of Law and the Davis Law Library. Stephanie Carr, Davis Law Library Manager 2010

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**Peter's intelligence, energy, humour and commitment have made him a greatly admired academic and beloved teacher - someone held in the highest esteem by his students and colleagues alike.**

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## Peter Sankoff departs

Senior Lecturer Peter Sankoff - who joined the Faculty of Law in 2001 - is leaving the Law School at the end of 2010 to return to his native Canada. Accompanied by his wife, Gesa, and their year-and-a-half old daughter, Penny, Peter will pursue interests in law teaching and research, together with new and innovative ventures in computer-based legal publishing.

Peter earned his JD degree from the University of Toronto in 1996 and his LLM from Osgoode Hall Law School (Toronto) in 2005. Prior to arriving in Auckland, he clerked for Madame Justice Claire L'Heureux-Dube at the Supreme Court of Canada and subsequently worked as legal counsel for the Canadian Department of Justice, advising on criminal law and human rights issues. Since arriving at Auckland University, he has authored, co-authored or edited four books: *Portable Guide to Witnesses*; the looseleaf text *Witnesses* (co-authored with Professor Alan Mewett of Toronto), a treatise on the Canadian substantive, evidentiary and procedural law relating to witnesses; *Manning, Mewett, Sankoff on Criminal Law* (co-authored with Morris Manning), a treatise on Canadian Criminal Law; and *Animal Law in Australasia: A New Dialogue* (co-edited with Steven White of Griffith Law School). Peter has also written numerous articles and book chapters in his areas of interest: animal law; criminal law; evidence and criminal procedure. He has taught courses in all of those areas at the Faculty of Law, in addition to visiting at numerous institutions abroad, including: the University of Ottawa (2004-2005); Haifa University (2008); the University of Melbourne (2009); and Lewis and Clark University (Oregon) (2010). Peter has also given numerous presentations on his research interests in New Zealand and overseas, and has been an invited presenter for the Canadian Bar Association,

the New Zealand Law Society, the Auckland District Law Society, and the Auckland Criminal Bar Association.

In addition to his teaching and research activities at Auckland University, Peter was the co-director of the Animal Rights Legal Action Network (ARLAN) (2001-2006). He is also the founder of SolVe - the Society of Legal Vegans and Vegetarians - a public interest group based at the Faculty of Law. Peter also served as the Pacific Islands Students Academic Counselor at the Law School from 2005-2007. In 2006, he won an Auckland University Early Career Research Award. Peter was also the recipient of the 2008 Assisi Award - given by the New Zealand Companion Animal Council - for his outstanding service to animal law reform in New Zealand.

Laudable as it is, the description of Peter's prodigious activities above does not begin to capture the inestimable contribution he has made to the Faculty of Law during his 10 years in New Zealand. Peter's intelligence, energy, humour and commitment have made him a greatly admired academic and beloved teacher - someone held in the highest esteem by his students and colleagues alike. Indeed, having taught, written and travelled with Peter - not to mention sharing the ups and downs of life over the last decade - I can barely imagine the Law School without him. Simply put, he has been my dearest friend and closest intellectual companion on the Faculty from the day he arrived.

Like everyone else at Auckland University, I wish him, Gesa and Penny all the best for their return to Canada and for the future. They will be greatly missed. However, if we're lucky, Peter and his family will come back to visit us often and soon. Where else could we find a vegan-Canadian-criminal and animal law teacher who became a New Zealand citizen? They don't exactly grow on trees...

Scott Optican

# Rick Bigwood leaves the Law Faculty after 16 years of service

Professor Rick Bigwood, who has been with the Faculty since the beginning of 1995, leaves at the end of the year to take up a chair at Bond University in Queensland. This is a major loss for the Faculty, not only because Rick has been a mainstay of our private law teaching and scholarship over the last 16 years, but because he has been a great contributor to the collegial life of the Faculty. His genius for the deflationary one-liner at morning tea - we all bear the scars he has inflicted - has become almost as legendary as Bernard Brown's puns. He is credited with no malice, and hence gets to live another day. His strong powers of human observation are complemented by his skill as a caricaturist.

Rick was a student of this Faculty, winning a number of prizes and graduating LLB(Hons) in 1988. After a year and a half as Judges' Clerk at the High Court in Auckland, he went to the Australian National University in Canberra, to study for a doctorate in contract law under Professor Paul Finn, now Justice Finn of the Federal Court of Australia. The doctoral thesis that resulted combined a strongly theoretical perspective with a detailed analysis of the very large body of case law dealing with vitiating factors in the formation of contracts, including bad faith, unilateral mistake, misrepresentation, undue influence, unconscionable dealing, and duress.

Rick was subsequently to write a major book, *Exploitative Contracts*, published by Oxford University Press, England, in 2003. That book was honoured with a book symposium at the Australian Society of Legal Philosophy conference in 2006. The international reputation he has developed in the field, and in contract law more generally, has led to a number of prominent conference presentations, and to articles in a wide range of leading Commonwealth law journals. In addition to the premier New Zealand journals, these include the *Cambridge Law Journal*, the *Oxford Journal of Legal Studies*, the *Law Quarterly Review*, the *Canadian Bar Review*, the *Canadian Business Law Journal*, the *Journal of Contract Law*, the *Melbourne University Law Review*, the *Modern Law Review*, the *University of Queensland Law Journal*, and the *University of Toronto Law Journal*.

Another outstanding feature of Rick's research career is his work as an editor. Being a good editor requires, amongst other things, tenacity and fastidiousness, attributes that are in scarce supply. Such talents have helped to make Rick New Zealand's most prominent legal editor, being called on time and again, both as journal editor (*New Zealand Law Review*, six years, *New Zealand Universities Law Review*), and book editor (*Legal Method in New Zealand* (2001); *The Statute: Making and Meaning* (2004); *Public Interest Litigation* (2006); *The Permanent Court of Appeal* (2009); and *The Law of Remedies: New Directions in the Common Law* (with Jeff Berryman, 2010)). He was also the promoter,

and editor, of a project to republish as a book a collection of the articles of Emeritus Professor Brian Coote: *Brian Coote: Contract as Assumption* (Hart Publishing, Oxford, 2010). In addition to this work as editor, Rick has since 2004 been the Director of the Research Centre for Business Law.

Rick has also been one of the Faculty's outstanding teachers, twice winning a University of Auckland Teaching Award, and a highly prized national Tertiary Teaching Excellence Award in 2006. He has been something of a pioneer within the Faculty of a more scientific approach to the teaching role, and in making the case to the rest of us to lift our game! His teaching has been primarily to large classes in Contract Law, and to some of the Faculty's brightest students each year in his Contract Honours class.

Lesser known things about Rick are that he is a trained pilot, but long ago given up owing to the penury of academia, and that he has a notably low golf handicap, maintained despite said penury. He is also a gifted caricaturist and cartoonist.

Rick will be very sorely missed here at Auckland. The fact is that life across the ditch has attracted him ever since his Canberra days, assisted by his having an Australian partner. He, Anne-Marie, and his two children, Jonathan and Isla, go with our heartfelt thanks for all his years of service with us and with our best wishes for the future in Australia.

Peter Watts

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