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Renovating the House of the Law

Keynote Speech to Te Hūnga Rōia Māori o Aotearoa (Māori Law Society), Wellington

29 August 2019

Kei ngā tini kāmura

O te whare hou

O te ture o Aotearoa

Tēnā koutou, tēnā koutou, tēnā tātou katoa

I am honoured by this invitation to speak. I was heartened to read in the programme for this conference that it is inspired by the whakataukī: “ānei tātou nā ko te pō; anā tātou he rā ki tua”. I see also that you have come together to discuss how to build strong careers in the law and to discuss the future shape of the law. You are ambitious for yourselves and for the law, and so you should be.

I congratulate you on your choice of career. If I were to reflect on my thirty-five years in the law, I would say that it has given me a challenging but rewarding career. I would also say that it has given me many opportunities to work toward the ideals I believe in: of a fair and just society. You are right to set yourself challenges, and you are right to dream of a better society and to seek that society through the calling of your profession.

This conference takes place at a time when there is anxiety about our justice system: whether it is broken, whether it is sufficiently reflective of our society, and whether it is sufficiently dynamic to meet the challenges that present. It takes place following the receipt of reports into the justice system which are critical of how the whole system operates in the areas of criminal law and family law.

I have given this speech the title “Renovating the House of the Law”. What I wish to outline is the ability of the law and of the courts to respond to challenge and change within our society. My thesis is that we, the profession, the judiciary and Parliament, have begun renovations to the house of the law in New Zealand to make it fit as a law for this place and time. There are many projects underway, and we can be sure, more to come. I will describe how, in the past, the development of the law has depended on lawyers of ability, imagination and courage. In my mihi, I referred to you as carpenters of the house of law, because I believe that in this room lies the ability, imagination and courage to build our house strong.

I begin by acknowledging the issues and problems that exist in our society and the questions they raise about our present way of administering justice. It is necessary to be well informed and realistic about these challenges but, I suggest, it is also necessary to be optimistic about our ability to meet them. I will outline the way that changes are already afoot in how the system works. These are small changes, but they show the potential of our law and our court system to evolve to meet its society. I will also sketch out some areas in which the substantive law is developing, and I will suggest that more change is on the horizon.

There are many issues to which the law must respond. Identifying and addressing all of those issues is beyond the scope of this speech. I would like to focus on three challenges presently facing our society and our system of justice. Two of those challenges lie in the criminal justice sphere: our high rates of family violence and our high rates of imprisonment, particularly amongst Māori. The third challenge is that of climate change and environmental degradation. I am going to touch on these issues only briefly as much of what I say will be generally familiar to you. Nevertheless, it is grim material.

It is not news to anyone that levels of family violence in our communities are creating great harm. In one year, there were 119,000 family violence investigations by New Zealand Police.¹ There is a family violence call out for Police every four and a half minutes.² In 80 per cent of those call outs, a child is present.³ These figures only reveal the reported instances of family

¹ Judge Walker, Acting Chief District Court Judge and Principal Youth Court Judge *Proposal for a Trial of Youth Adult List in Porirua District Court* (District Court of New Zealand, 2019) at 8.

² Professor Juliet Gerrard, Chief Science Advisor *Every 4 minutes: A discussion paper on preventing family violence in New Zealand* (Kaitohutohu Mātanga Pūtaiao Matua ki te Pirimia | Office of the Prime Minister’s Chief Science Advisor, 6 November 2018) at [4].

³ Judge Walker, above n 1, at 8.

violence. It is difficult to overstate the damage done by this, with thousands of children in New Zealand growing up in a climate of violence.

It will also not be news to you that we have high rates of imprisonment in New Zealand. It is important to understand the characteristics of those we imprison. There is information available to us that shows there are high levels of illiteracy and cognitive or learning disability of some kind in the prison population.⁴ More than two thirds of serving prisoners have mental health or addiction problems, nearly two thirds have suffered traumatic brain injury, and 52% of women and 22% of men in prison have a lifetime diagnosis of post-traumatic stress disorder.⁵

Māori are grossly over represented in every negative step in our criminal justice system. Over the last century (since 1918), the percentage of the prison population who identify as Māori has grown from less than 5% to over 50%.⁶ Māori men make up over half of the male prison population, while Māori women make up 63% of the female prison population.⁷

These figures reveal troubling societal issues. Where these societal issues interact with the criminal justice system however, that system itself becomes part of the problem. And the problem created is inter-generational. Having a parent in prison dramatically increases the likelihood that a child will go on to offend. The Department of Corrections estimates that a child with a parent in prison is 7 times more likely to end up in prison.⁸ Other estimates are higher.

We also know that time in prison seldom addresses the cause of offending. In an article published in last month's New Zealand Law Journal, Dr Ian Lambie cites research showing that even a brief time in custody harms an individual and increases the risk of offending.⁹ Time in prison leads to job loss, residential instability, loss of social support and exacerbation of mental health and substance abuse problems. It also connects the defendant to offender

⁴ See Te Uepū Hāpai i te Ora – Safe and Effective Justice Advisory Group *He Waka Roimata: Transforming Our Criminal Justice System* (9 June 2019) at 54.

⁵ At 66.

⁶ At 23.

⁷ At 23.

⁸ Ara Poutama Aotearoa | Department of Corrections *Creating Lasting Change: Strategy 2011 – 2015 Year Three* at 11.

⁹ Ian Lambie “The opportunity of a lifetime” [2019] NZLJ 220 at 220.

networks. I acknowledge that the law does not hold all of the answers to these problems. Most of the answers surely lie in better housing, educational and health solutions.

But this does not mean that there is no work to be done to improve how the criminal justice system operates. Clearly, we should work to reduce any harm created by the system itself. But we should be more ambitious than that. Based on what we know of the defendant cohort, a person who appears in court charged with offending has a constellation of health and social issues which require intervention if further offending is to be avoided. An appearance in court can be conceptualised as an opportunity to intervene in the life of the defendant to address those issues and thereby reduce the likelihood of re-offending. This is an idea I return to shortly.

Beyond criminal justice there are other challenges we face in society, in which the law must play a role in finding the solutions. Climate change, and more broadly, environmental degradation is for many seen as the most pressing issue of this age. In 2016, over 24 million people were newly displaced by natural disasters.¹⁰

That number is three times more than the number of people displaced by conflict. New Zealand courts have already dealt with a claim to refugee status based on climate change impacts.¹¹ Climate change litigation is growing in volume throughout the western world, but it presents unique problems for the legal system. Climate change crosses jurisdictional boundaries, creates intergenerational issues, and raises difficult problems of causation and loss when everyone is a polluter and everyone a victim. There is a growing demand, particularly amongst the young, for environmental justice. To the extent that our institutions, including our courts, are seen to fail to deliver that justice, they may lose public confidence and thus legitimacy.

I acknowledge that our institutions and law need to evolve to meet the new circumstances in which we find ourselves and in light of new knowledge available to us. But the law has always needed to evolve. At times in the past both our institutions and our substantive law have

¹⁰ Internal Displacement Monitoring Centre *Global Report on Internal Displacement* (May 2017) at 10.

¹¹ See *Teitiota v Chief Executive of Ministry of Business, Innovation and Employment* [2013] NZHC 3125, [2014] NZAR 162; *Teitiota v Chief Executive of Ministry of Business, Innovation and Employment* [2014] NZCA 173, [2014] NZAR 688; and *Teitiota v Chief Executive of Ministry of Business, Innovation and Employment* [2015] NZSC 107.

evolved. This does not happen spontaneously, but with the assistance of human actors: lawyers, judges and politicians. Today there are signs that the law, and the institutions of the law, are responding with vigour to the needs of our community.

I want to map out for you what really is the beginning of the development of an indigenous law of New Zealand and an indigenous way of doing justice to meet the very particular needs of our society. There are three forces at work in this regard. First, there is the ever-increasing recognition in statute that there is a place in our law for the principles of the Treaty of Waitangi and for tikanga. Secondly, there is the work the common law does interpreting those statutes, breathing life into what would otherwise just be words on the page. And, thirdly, there is the work judges are doing, to come up with new ways of administering justice. The judiciary is resource constrained and legislation bound. But, even so, the judiciary can innovate and find new ways of operating if it has the support of the profession and the community.

Each of these areas interact. Concepts which first emerge in statutory form, create ideas and societal norms which then feed the common law and the way that the courts administer justice. And the reverse process can also be described, where the common law and the common law method produce ideas and societal norms that then are given statutory recognition.

I first want to say a little more about the importance of the common law, and the common law method, to the development of the law. I pause on this point because it is so fundamental to our law and legal system, and because it seems to me there are some popular misconceptions about the common law.

It is sometimes suggested that the common law, as a source of law, is dying, crowded out by statute. That is the first misconception I address. The common law remains an important source of law. It is an independent source of the law of judicial review, and constitutionally important for that reason.¹² The common law is capable, where appropriate, of creating new

¹² See, for example, Graham Taylor *Judicial Review: A New Zealand Perspective* (4th ed, LexisNexis, Wellington, 2018) at [1.01].

principles and new causes of action, and does so. We saw that with the birth several years ago of the new tort of intrusion into seclusion.¹³

Statutory interpretation itself is an application of the common law method. It is for the courts and not Parliament to say how legislation applies in the individual case. The importance of the common law method was demonstrated in the *Lands* case (*New Zealand Maori Council v Attorney-General*).¹⁴

The issue in that case was the meaning and effect of s 9 of the State-Owned Enterprises Act 1986, a section which provided that nothing in the Act permitted the Crown to act in a manner that was inconsistent with the principles of the Treaty of Waitangi.

By the time the case came to Court, the expression “the principles of the Treaty of Waitangi” was beginning to appear in legislation more generally, including in, of course, the Treaty of Waitangi Act 1975, but also the Environment Act 1986 and the Conservation Act 1987. The task for the Court was to decide what that phrase meant. That was no easy task when the content of the Treaty’s text was contested, and when the Treaty had been held to be unenforceable in domestic law.¹⁵ The judgment of the President of the Court of Appeal opens with the words: “This case is perhaps as important for the future of our country as any that has come before a New Zealand Court”.¹⁶

And so it proved to be, as the Court accepted arguments advanced by counsel for the New Zealand Maori Council, David Baragwanath QC and Sian Elias, that the language of the legislation should be given meaning and effect. These two had the ability, imagination and courage to construct legal arguments to carry the law in new directions. The Court accepted that the meaning of the phrase “the principles of the Treaty” could be captured in the language of partnership between Māori and Pakeha, and by importing obligations to act towards each other reasonably and in the utmost good faith.¹⁷

¹³ *C v Holland* [2012] NZHC 2155, [2013] 3 NZLR 672.

¹⁴ *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641 (CA) [*Lands*].

¹⁵ *Te Heuheu Tukino v Aotea District Maori Land Board* [1941] NZLR 590 (PC).

¹⁶ *Lands*, above n 14, at 651.

¹⁷ At 664, 667 and 715.

The common law is sometimes thought of as immutable and never changing. But that is the second misconception I mention. It is true that the common law method requires looking back to precedent in deciding how to move forward. It is a method which enables judges to resist passing storms or fads, and which brings stability. But it does not prevent evolution to meet a change in circumstance or a change in knowledge.

The law which arrived in the law reports and carried in the luggage of those early settler lawyers was itself a relatively new creation. The common law began the eighteenth century as a mediaeval body of law, drawing heavily on its ecclesiastic heritage and structured to support a feudal system economy and government. By the end of that century it was a body of law that is broadly recognisable to us today, containing most of the principles of law needed to regulate liberal democracies operating in an international trade environment. This change had come about after the Act of Union 1707 and the Act of Settlement 1700, and as a direct consequence of England's emergence as the world's foremost trading power, surpassing Holland in that regard.

One man, Lord Mansfield, is credited with developing much of the commercial law that was needed to respond to England's new status as a trading nation. He found that the law as it existed, lacked the forms of action, or even the ideas needed to respond to the legal problems created by rapid expansion of trade both within England, and between England and its trading partners. He drew on the laws of other nations – France, Holland, Germany and Italy – to assist him in developing new law.¹⁸ He also sought out evidence about the custom applying in the market place, convening special juries of businesspeople who could describe for him the most reputable practices of business people.¹⁹ He used this custom as a persuasive source for the law he then developed. He did not treat foreign law or custom as conclusive. Before it found its way into common law principle it had to square with morality, honest dealing and good faith, the values which at the time united the common law.²⁰

¹⁸ Norman S Poser *Lord Mansfield: Justice in the Age of Reason* (McGill-Queen's University Press, Montreal, Canada, 2013) at 228.

¹⁹ Allan C Hutchinson *Laughing at the Gods: Great Judges and How They Made the Common Law* (Cambridge University Press, Cambridge, 2012) at 37–38.

²⁰ Poser, above n 18, at 229.

The common law, then, can respond to challenge and change within a society. Through the methodological consideration of the law that has been applied in the past (the application of precedent) and the use of analogy, the common law method brings stability. But it also allows for the injection of new ideas and for the creation of new responses as required.

Although the use of special juries is not a procedure with which we are familiar today, there is nothing unusual about Lord Mansfield looking to custom for a source of law. Judges swear to do right to “all manner of people”, according to the “laws and usages of New Zealand”.²¹ It can be argued that the judicial oath, in its reference to “usages”, another word for customs, demands of judges that they fashion a law not just by reference to historic precedent, but one which draws also on custom within that society.

Having just made the case about the power of the common law and judicial administration to effect change, it is necessary to acknowledge that, for much of the 150 years following the introduction of English laws, the justice system in New Zealand looked and operated very much like the justice system in England or Australia or Canada. I do not propose to go into all the opportunities that were missed, or ignored, to build a different sort of legal system and a different kind of law, one which found a place for the principles of the Treaty, a place for the customs and usages of all the peoples of the new nation. What I want to focus upon is the point at which society in general, and our system of justice in particular, began to evolve. The exact point at which the winds of change began blowing can be debated. In the area of the substantive law, we can point to the protest movements of the 1970s which reminded our nation of the Treaty of Waitangi.

We can point to the creation of the Waitangi Tribunal in 1975 and to the expansion of its jurisdiction in the 1980s.²² Certainly, also to the re-emergence in the public discourse of contested views as to the meaning of the Treaty, a debate which continues today to hold the feet of our nation to the fires of racial and social justice. We can point to the inclusion in the State-Owned Enterprises Act of s 9, and to the life breathed into those statutory words by the Court of Appeal. We can highlight the decision of Justice Chilwell in the High Court in *Huakina*

²¹ Oaths and Declarations Act 1957, s 18.

²² Treaty of Waitangi Act 1975; and Treaty of Waitangi Amendment Act 1985.

Development Trust v Waikato Valley Authority,²³ in which he said that the principles of the Treaty of Waitangi are so fundamental that statutes should to be interpreted consistently with its requirements.

There are other areas of law reform which signalled a fundamental shift in our society. In 1976, the Matrimonial Property Act was enacted, which for the first time created a presumptive 50/50 property split at the end of a marriage.²⁴ In 1986, the Homosexual Law Reform Act was passed, which took the criminal law out of the bedrooms of our nation. And there was a new focus upon protecting our environment with the enactment of the Environment Act and the Conservation Act. Section 4 of the Conservation Act imposed a positive obligation on the executive and the judiciary, requiring that the Act to be interpreted and administered so as to “give effect” to the principles of the Treaty of Waitangi.

In the area of how the courts operated, significant change began in the 1980s with the Family Court Act 1980 which provided for a specialist court operating with greater informality of proceeding, and which utilised mediation.

Just as fundamental was the reform of the Youth Court in 1989. Those reforms introduced a new model of justice, responding to New Zealand’s very particular circumstances. It is interesting that one of the catalysts for the reform of the Youth Court was the sense that while many with whom the youth justice system dealt were Māori, the adversarial system then regulating youth justice was at odds with Te Ao Māori. In a 1986 report to the Minister of Justice, *Te Whaingā i Te Tika*, the Auckland Committee on Racism and Discrimination (ACORD) claimed “the present system is based wholly on the British system of law and justice, completely ignoring the cultural systems of the Māori and breaking down completely that system, completely alienating Māori, leaving them in a simple state of confusion and at the whim of the existing system”.²⁵

A key objective of the Children, Young Persons and Their Families Act 1989 was to strengthen the bonds between families and to find community support for the young offender. The new

²³ *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) (and to similar effect *Barton-Prescott v Director General of Social Welfare* [1997] 3 NZLR 179 (HC)).

²⁴ Now intitled the Property (Relationships) Act 1976.

²⁵ Advisory Committee on Legal Services *Te Whaingā i te Tika: In search of justice* (Department of Justice, Wellington, 1986) at [2.1].

model also drew on tikanga, emphasising group discussion and problem solving through the vehicle of the family group conference. This was, and is, first and foremost, a model of therapeutic justice, aiming to address the causes of offending and to prevent further offending. But it also employs restorative justice concepts, involving the victim, if they wish, in the conference process. The processes, as designed and implemented, sought to achieve a restoration of balance between the young offender and his or her victim, and within the community.

These were at the time radical innovations. And they sparked further innovation, leading to the establishment of the first Rangatahi Courts in Gisborne in 2008. Some of you will have heard about this Court earlier today. Rangatahi Courts operate within the Youth Court jurisdiction. They are a further evolution of the statutory youth justice model because they place the court in the heart of the community. Rangatahi Courts sit on the marae. Kaumatua and kuia sit alongside a judge as the young person is called before the Court to give an account of themselves in the course of monitoring of their sentence. This process creates links between youth, their whānau and the community. The creation of these courts was a judge-led innovation. Rangatahi Courts were created through an act of judicial imagination and many acts of judicial administration.

The same is true of the Matariki Court, based in Kaikohe, Northland. The Matariki Court is a pilot court, which deals with adult defendants. At around the time the first Rangatahi Court was created, the then Chief Judge of the District Court, Judge Johnson, asked Judge Davis to take charge of establishing a court in Kaikohe structured to respond to the needs of the predominantly Māori community.

The Matariki Court draws on principles of restorative justice. The Court hearing takes place in a conventional courthouse. However, where a person pleads guilty to an offence, before sentencing, the Court takes a number of steps. The Court seeks detailed information about the offender to inform an appropriate sentence. The Court also allows the offender to participate in a culturally appropriate rehabilitation programme. This is again a model which places the court within the community, drawing upon the strength of whānau, hapū and the broader community to identify and address the causes of the offending.

This therapeutic approach to justice continues to gain ground. It is being used in areas such as the Drug and Alcohol Courts and in the Courts of New Beginnings and Special Circumstances, the latter two directed to homeless people caught up within the criminal justice system. A characteristic feature of these pilots is the time that is taken to find out about the defendant.

Information is sought as to the defendant's background and to the cause of the offending. Government agencies and the community are then called upon to assist in addressing the cause of offending. This requires that judges have adequate information available to them as to the context within which offending occurred, the harm done by that offending, and also to understand, as best as he or she is able, the impact of any decision the judge will make. It also entails a model of justice which is part of its community, so that the courts can call upon the strength of the community in supporting rehabilitation of the offender, and restoration for those harmed by the offending.

The issue with these therapeutic courts however is that, with the exception of the Youth Court and Rangatahi Court, they operate as pilots. Most defendants will not have access to them. This in turn raises very serious concerns about equality of access to justice. For my part, I would like to see aspects of this therapeutic approach made mainstream in our courts, and will support the work of the Judges of the District Court and the Ministry of Justice in this regard. But I also would like to hear your views on how our courts can better reflect and respect Te Ao Māori. Judges, quite evidently, do not have all the answers.

Beyond the form of court proceedings, we continue to develop a distinctive law of New Zealand which meets the needs of this country. This was the aspiration of those who worked for the establishment of a final court of appeal located in New Zealand, rather than in Downing Street London. The change is in a sense inevitable, as New Zealand increasingly finds its feet as a Pacific nation, and not as an English outpost.

There is also impetus for change driven by the overrepresentation of Māori within the criminal justice system. This was at issue in *Solicitor-General v Heta*, a case in which the High Court addressed how the ability to receive information about an offender's personal, whānau and community background under s 27 of the Sentencing Act 2002 impacted upon the

sentence to be imposed.²⁶ Having reviewed the legislative history of s 27 of the Sentencing Act, Justice Whata said the section reflected Parliament's recognition that the needs of Māori offenders, and in particular young Māori offenders should be addressed, because they formed such a disproportionate part of the prison population. He said of this:²⁷

the effects of colonisation on Maori communities are well documented. Loss of land and other tribal resources, together with the destruction of traditional social structures, tikanga, culture and language preceded widescale migration from traditional rohe to urban areas. For every generation since, Maori have been disproportionately represented amongst the poorest, most illiterate and most criminalised in New Zealand.

(footnotes omitted)

Justice Whata observed however that section 27 did not enunciate a Māori specific response but rather enabled background information about offenders, including Māori, to be presented to a sentencing judge.²⁸ As to what was to be done with that information, he said a careful evaluation of how that background information was relevant to any of the purposes and principles of sentencing was required.²⁹

This is no doubt only the first significant decision in this area. I anticipate that it raises issues we will continue to revisit. Here is a worthy renovation project for those of you who practice in the area of the criminal law. It engages one of the most perplexing philosophical questions.

It really is not too grand to say it is a question which has confounded philosophers since the time of Aristotle: whether the law in sentencing (or, to use the language of philosophers, in setting a punishment) should recognise difference, disadvantage and disability, or whether it should sit in abstract judgment, unmoved by the particular circumstances and background of the offender. This is more than a philosophical question. It really asks us to reflect upon what we want from a criminal justice system.

Another task with which the courts are presently engaged is placing tikanga within the common law. This issue is not without its legal and academic controversy. On the

²⁶ *Solicitor-General v Heta* [2018] NZHC 2453.

²⁷ At [40].

²⁸ At [37].

²⁹ At [38].

jurisprudential front, the decision of the Supreme Court in *Takamore v Clarke* has arguably not settled the issue. I note that the then Chief Justice viewed tikanga, not as providing a determinative legal principle, but rather as providing a source of values to which the common law can have regard.³⁰ This is perhaps not so far removed from Lord Mansfield, who, as mentioned earlier, regarded custom as a possible source of law, if it accorded with the values of the common law of morality, honest dealing and good faith.

Academic commentators have identified the risk that if tikanga is codified into the common law it will deprive it of its richness, and necessary context.³¹ This is an area with which we can anticipate the courts will continue to grapple and the academics continue to debate.

It might be thought that this controversy will be left behind by developments in the legislative sphere. Just as in the 1980s, when the incorporation of the expression “the principles of the Treaty” in statutes required courts to identify and articulate the principles, a similar phenomenon is now occurring with incorporation in statutes of reference to tikanga, and tikanga principles. I take as an example, recent amendments to the Oranga Tamariki Act 1989 (also known as the Children and Young People’s Wellbeing Act 1989).³²

That Act now makes specific reference to the importance of concepts of mana tamaiti, whakapapa and whanaungatanga, and more generally to tikanga principles, when any person or entity exercises powers under the Act. The Act also has a new s 7AA which imposes on the Chief Executive several duties relating to the implementation and recognition of the principles of the Treaty of Waitangi.

Other examples of statutes importing tikanga principles abound. Such amendments reflect an explicit legislative acknowledgement that tikanga and Treaty principles must be given effect to. But there is no room for complacency that these legislative words will come to life. It is worth noting that, since the 1980s, there has been explicit reference to tikanga concepts in statute law, yet little argument advanced by counsel which has given life to those seeds

³⁰ *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [94].

³¹ See for example Natalie Coates “Challenge and Change: Tikanga and the Judiciary” (presentation to Institute of Judicial Studies Seminar, Chartered Accountants House, Wellington, 4–5 July 2019) at 13.

³² Previously the Children, Young Persons and Their Families Act 1989.

planted within the law. In the original Oranga Tamariki Act, the Act required decisionmakers to have regard to the values, culture and beliefs of Māori.³³

The Resource Management Act 1991 also made reference to kaitiakitanga, mana whenua and tikanga Māori itself.³⁴ But there has been little exploration of what these concepts mean for the development of the law. Today, there are many more such references in legislation, waiting for this generation of lawyers, with their skills of forensic argument, and their knowledge of tikanga, to give that language effect and meaning – with the commitment, imagination and courage to make the legal arguments that will move the law in a new direction.

There is also another phenomenon emerging with statutory recognition of tikanga, which can be conceptualised as a new stage in the development of a particularly New Zealand law. Most legal systems deny elements of the legal environment, animate or inanimate, the right to legal personality. But a different approach has been taken in consequence of settlement of treaty claims by Tuhoe, in respect of Te Urewera, and by Whanganui iwi, in respect of the Whanganui river.³⁵ As part of the latter settlement, the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 was enacted. Section 12 of that Act describes Te Awa Tupua as “an indivisible and living whole, comprising the Whanganui River from the mountains of the sea, incorporating all its physical and metaphysical elements”.

In substance, the Act confers upon the Whanganui River all the rights, powers, duties and liabilities of a legal person. This grants the river a status in accordance with Māori tikanga and Māori conceptions of the environment. It is an acknowledgment of its existence among humans as an entity equally worthy of protection, and as incapable of being “owned” in an absolute sense.³⁶ This follows the similar legislative approach taken in respect of Te Urewera in the earlier Te Urewera Act 2014.

³³ Children, Young Persons and Their Families Act 1989, s 7(2)(c)(ii).

³⁴ Section 2.

³⁵ Christopher Rodgers “A New Approach to Protecting Ecosystems: The Te Awa Tupua (Whanganui River Claims Settlement) Act 2017” (2017) 19 (4) ELR 266 at 267.

³⁶ Whanganui River Settlement and the Crown *Tutohu Whakatupua Record of Understanding in Relation to the Whanganui River Settlement* (30 August 2012) at [2.71].

The significance of this legislation in respect of environmental protection and climate change, will no doubt, with the fullness of time, be addressed in the courts. There may also be arguments to be made as to whether traditional Māori concepts in connection with the natural environment have a wider role to play in this area. This is work for you for the future.

I could go on. I could speak about how the growth of the Māori economy will surely have its impact in the areas of corporate and trustee governance. Companies and trusts were abstract legal concepts dreamed up in the courts of England, but they have been brought to work in our country in accordance with principles of tikanga. But I had better draw to a close with some concluding remarks.

What I have attempted to do is sketch out some of the significant challenges within our society with which the law, and the courts in particular, must grapple. I have described the tools with which the courts and the profession can respond, indeed are responding. The message I wish to leave you with is that this house of law within which we all work is itself a treasure, a taonga. But it is the nature of the law that it needs us to work to renovate it, so that it is fit for this generation and for those to come. As I said in my mihi, we are all carpenters working in the house of the law.