Speech to the New Zealand Law Students' Association

Justice Susan Glazebrook[1]

Kia ora koutou. I greet you informally because, as law students, you are all my colleagues in the law. The legal profession has many centuries of tradition. But it cannot rest on history alone. You will have the opportunity to shape the future profession and the law. Your lifetime in the law will not, however, be without major challenges, including those from technology, climate change and globalisation. The profession must also become more inclusive, diverse and flexible. There is some way to go before there is true diversity and inclusion at all levels of the judiciary and the legal profession. But it must happen. A legal profession and a judiciary that reflect the society they serve are more likely to be respected and, more importantly, are more likely to understand those needing their services.

Although change is inevitable and necessary, please make sure that you do not lose the essence of the profession. Remember that, while a lawyer must put their clients' interests first, this is subject to an overriding duty to the law. In the long run, by not compromising the fundamental values of honesty, objectivity and independence, lawyers serve their clients and the community much better. Try also in your careers to ensure that another great tradition of the legal profession is not neglected — that of service to the community.

I would, however, like you all to remember that, interesting and rewarding as the law is, time with your family and friends and outside interests make you not only more interesting people but also better lawyers. However you choose to use your law degrees, an understanding of and ability to relate to people is vital. So make sure that you keep balance in your life.

I have been given two suggestions for topics for my talk tonight. The first was to speak a bit about my Court's outreach program for students and the second was to speak on tikanga and the law. I will try, but of course it is not possible, to do full justice to both topics in the time available.

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[1] Judge of Te Kōti Mana Nui o Aotearoa | the Supreme Court of New Zealand, past President of the International Association of Women Judges and patron of the New Zealand Law Students' Association (NZLSA). This paper is based on an after-dinner speech given in August 2024 at the NZLSA Conference at the University of Canterbury | Te Whare Wānanga o Waitaha.

First, the Supreme Court student outreach program. This started two years ago and involves students sitting in on the hearing of an appeal. We try and pick cases that fit within the curriculum and which are likely to be of particular interest to students. For example, the first case we chose was the climate change strike out case, *Smith v Fonterra*, which was of obvious relevance to environmental law students.[2]

For the outreach program a short video is prepared before the hearing. In that video, one of the judges and counsel briefly explain the issues in the case. We are very grateful that counsel have been prepared to do this as, of course, they are very busy. But they, like us, see the importance of this program for future lawyers. The video provides the necessary background for the students to read the judgment appealed from and counsel's submissions (which are now usually put up on the Ngā Kōti o Aotearaoa | Courts of New Zealand website if there are no suppression issues).[3] The students then attend the hearing, which gives them the opportunity to see the law in action through hearing the oral submissions made by counsel and the interactions between counsel and the bench. The program finishes with afternoon tea, followed by a question-and-answer session with the judges and counsel. This of course does not include questions on the particular case but otherwise it is basically open slather.

In fact, the idea of a question-and-answer session came from this organisation. It was a year where Covid had meant an in-person conference was not possible and everything was taking place online. I was asked to give an online talk to the group but was at that stage totally tied up with the effort to rescue the Afghan women judges after the fall of Kabul[4] and did not have the time to write a speech. So I said that I would be happy just to answer questions from the participants. This went very well and it enabled focus on topics the students were interested in.

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2 *Smith v Fonterra* [2024] NZSC 5, [2024] 1 NZLR 134.

3 See Ngā Kōti o Aotearoa | Courts of New Zealand "Supreme Court Judgments of Public Interest" <www.courtsofnz.govt.nz/>.

4 For more information on the rescue effort and the situation of Afghanistan generally, particularly for women and girls, see Susan Glazebrook (2024) "Rescuing the Afghan Women Judges" 34 (2024) Cth Lawyer 43. We now have some 200 judges in final destination countries. These include Canada, Aotearoa New Zealand, the United Kingdom, Germany, Spain, Ireland, Australia and the United States. We still have some 15 judges and their families in transit destinations including in Pakistan. There are also around 35 judges left in Afghanistan still awaiting transfer to safety.

The question-and-answer session for the outreach program has also gone well and I think has been one of the most valuable parts of the program. The questions have all been thoughtful and sometimes quite challenging to answer.

The student outreach program is just one of the initiatives underway to make the courts more accessible. All courts are trying to ensure that their actions are fully explained and understood. This includes ensuring that everyone is treated with respect, both in the lead up to any hearing and in the hearing itself, and that the proceedings are explained in terms persons unfamiliar with the law and court processes can understand. Judges are also trying to ensure that their judgments, whether oral or written, show the parties and all others involved in the hearing that they have been listened to. We all try in our reasons to explain clearly why the result has been arrived at and why arguments made have been accepted or rejected.

These and other measures are designed to improve public understanding of the justice system and the law. In my Court, for example, there is now both pre-hearing and post-hearing public communication. Prior to the hearing, the parties' submissions are, as I said earlier, usually published, along with a case synopsis and links to the judgments below. Most hearings in my Court are live streamed and the recording, along with the transcript of the hearing, is placed on the Ngā Kōti o Aotearoa | Courts of New Zealand website.

Our judgments on substantive appeals will usually include headings, a table of contents and a summary of the decision for easy access to the issues decided. A press release summarising the judgment is sent to media outlets and placed on the website with the full text of the judgment. We try hard to achieve just one unanimous judgment and, where this is not possible, we try and ensure that dissents or concurring reasons are very clear as to why the judge is writing separately and the exact areas of agreement and disagreement with the majority reasons. All this is also reflective of the principle of open justice and the importance of retaining legitimacy in the eyes of the public.

Outreach and maintaining ties with the community can of course be wider than direct communication through court hearings and judgments. It can also be achieved through appearance and symbols. The Supreme Court, for example, was designed to feel unmistakeably distinctive to Aotearoa New Zealand, as were the ceremonial robes the senior courts judges wear on special

occasions. These robes recognise the unique features of Aotearoa New Zealand and the dual origins of our system of law, derived both from our indigenous Māori culture and English legal history. The gown itself comes from the English tradition but it has stylised kauri cones and leaves embedded in the fabric. The kauri symbolises the strength of the commitment to the rule of law in Aotearoa New Zealand and the role of the courts as a shelter for all people under the law. The stepped poutama pattern in the braid down the side is a traditional Māori motif that symbolises the growth of humanity, striving ever upwards. On the shoulder of the gown, we have three baskets which symbolise the three kete or baskets of knowledge in Māori tradition. On the judicial gown these relate to the bodies of knowledge that judges must draw on and, in particular, the knowledge of past judgments, the knowledge of the current law and the knowledge needed for the future development of the law.[5]

Our Supreme Court courtroom takes its inspiration from the kauri seed cone. There are numerous symbols, including our taonga displayed in glass cases in front of the bench, that reference the dual traditions of our law.[6] It is a place that is open for guided visits by members of the public and school tours, and of course the public can attend hearings. The courtroom also has a window that directly opens out onto the foyer so that what goes on inside is visible to those who walk past in the street. There is also a skylight so that there is natural light. One slight disadvantage though of the design is that scaffolding has to be put up to change the lights and to repair the skylight if anything goes wrong.

In terms of initiatives to improve access to justice, I would be remiss if I did not also mention a major initiative of Te Kōti-ā-Rohe | the District Court, Te Ao Mārama (meaning the world of light). This initiative involves actively engaging the community to bring better results, particularly in the criminal and family law fields. It is a very ambitious change program, designed to bring the lessons learned in specialist problem-solving courts into the mainstream. A solution-focused judging approach asks: "What has caused these people to come to court? What has happened to these

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5 See Ngā Kōti o Aotearoa | Courts of New Zealand "Judicial ceremonial robes" <www.courtsofnz.govt.nz/>.

6 See Ngā Kōti o Aotearoa | Courts of New Zealand "The Supreme Court complex" <www.courtsofnz.govt.nz/>.

people to bring them to this point in their lives?" Once those questions are answered, a response can be developed to address the causes.[7]

That is the underlying principle behind Te Ao Mārama and it builds on decades of experience with solution-focused judging in various specialist courts, like the Youth Court | Te Kōti Taiohi o Aotearoa, the Rangatahi Courts | Ngā Kōti Rangatahi, the Pasifika and Matariki Courts, and the homeless, drug and young adult courts.[8]

A very important part of Te Ao Mārama is to bring the community into the courtroom. Community-based organisations have local knowledge which can help in tailoring solutions. They also offer social services and support for those who need them most, whether they are defendants, complainants, victims or family members.[9]

Te Ao Mārama also recognises the importance of input from all those affected by the matters before the Court. It aims to ensure that all court participants, including the parties in family cases, defendants in criminal cases, complainants, victims and their family members, feel seen, heard, understood and able to participate meaningfully in matters that affect them. It is recognised that victims of sexual and family violence in particular should be treated with respect and sensitivity because of the trauma they have experienced.[10]

Te Ao Mārama is inclusive of all cultures and emphasises restoration, rehabilitation and healing, as well as ensuring community engagement.[11] Many of the procedures adopted are inspired by tikanga processes,[12] which provides the link with my second topic of tikanga and the law and the implications of the Supreme Court decision in the Peter Ellis case (*Ellis v R (Continuance)*).[13]

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7 District Court of New Zealand | Te Kōti-ā-Rohe o Aotearoa "Te Ao Mārama – Enhancing Justice for All: About Te Ao Mārama" <https://www.districtcourts.govt.nz/> [About Te Ao Mārama].

8 The homeless, drug and young adult courts refer to, respectively, the New Beginnings Court | Te Kooti o Timatangi Hou, the Alcohol and Other Drug Treatment Court | Te Whare Whakapiki Wairua and the Young Adult List Court initiative in Porirua.

9 District Court of New Zealand | Te Kōti-ā-Rohe o Aotearoa *Te Ao Mārama Best Practice Framework* (2023) [Best Practice Framework] at 6.

10 At 7–8.

11 See About Te Ao Mārama, above n 7.

12 See Best Practice Framework, above n 9, at [25].

13 *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239.

As you know tikanga is broader than "law" in the Western sense. It is a holistic system of principles that cover all aspects of life. It incorporates, as the tikanga experts said in the *Ellis* case, "all of the values, standards, principles or norms that the Māori community subscribe to, to determine the appropriate conduct".[14] It comprises both practice and principle and is essentially relational and collective.[15]

Tikanga has in fact been part of the New Zealand common law since 1840 and has never ceased to be so. Relevantly, tikanga has historically been enforced in cases involving Pākehā[16] and has applied even to disputes which did not involve Māori.[17] This is not surprising. Indigenous customary law throughout the British empire, including in parts of Africa, had long been seen as part of the common law in those colonised nations and the common law generally is based on custom after all.[18]

However, while tikanga has had a continued presence in New Zealand law (particularly in the lives of Māori) for many years, it experienced marginalisation at the hands of New Zealand's dominant English-derived legal and political institutions. This situation has changed markedly in recent times.[19] Modern legislative practice has been to incorporate tikanga principles into a wide range of statutes where it is considered relevant. This includes the Resource Management Act 1991, which also has an explicit reference to the principles of the Treaty of Waitangi.[20] The protection of tikanga is also part of New Zealand's obligations under the United Nations Declaration on the Rights of Indigenous Peoples and in particular art 34.[21] And courts have long held that

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14 Appendix: Statement of Tikanga at [26].

15 See Appendix: Statement of Tikanga.

16 Natalie Coates "The Rise of Tikanga Māori and Te Tiriti o Waitangi Jurisprudence" in John Burrows and Jeremy Finn (eds) *Challenge and Change: Judging in Aotearoa New Zealand* (LexisNexis New Zealand, Wellington, 2022) 65 at 66 citing *Public Trust v Loasby* (1908) 27 NZLR 801 (SC) and *Hineiti Rirerire Arani v Public Trustee* [1920] AC 198 (PC). The author notes, however, the "deep" irony that tikanga in these cases was enforced for the benefit of non-Māori: at 66.

17 *Baldick v Jackson* (1910) 30 NZLR 343 (HC). As to the historical recognition of tikanga in caselaw, see generally Antonia Smith and Geoff McLay "Hiding in Plain Sight: The Lost Tikanga Authorities" (2025) 56 VUWLR 79.

18 See *Ellis*, above n 13, at [92] per Glazebrook J; *Campbell v Hall* (1774) 1 Cowp 204; 98 ER 1045 (KB) at 1047–1048; and see generally *Halsbury's Laws of England* (online ed) vol 32 Custom and Usage.

19 For a summary of the development of the treatment of tikanga and the Treaty of Waitangi in caselaw, see Coates, above n 16.

20 Resource Management Act 1991, s 8.

21 *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295 (2007).

international law and the Treaty are at the least relevant to statutory interpretation and to the development of the common law.[22]

Before the *Ellis* decision, the Supreme Court had had occasion to consider the place of tikanga in the law in at least three cases but not in a comprehensive manner.[23] The opportunity to have a more in-depth look at tikanga and the law arose in a rather unusual context, when the Court was considering whether Mr Ellis' appeal could continue after his death. During the first hearing on this question, the Court inquired if tikanga might have any relevance. The parties asked for an adjournment and conducted a wānanga with tikanga experts to ascertain the relevant tikanga. The Court then heard full argument on the position of tikanga in the law of Aotearoa New Zealand, as well as its relevance to the issue before the Court.

In its judgment, the Court was unanimous that tikanga has been and will continue to be recognised in the development of the common law of Aotearoa New Zealand in cases where it is relevant.[24] The Court also recognised that tikanga forms part of New Zealand law as a result of being incorporated into statutes and regulations,[25] that it may be a relevant consideration in the exercise of discretions and that it is incorporated in the policies and processes of many public bodies.[26]

Three of the Judges (the Chief Justice, Justice Williams and I) went further. We held that the old colonial tests for the recognition of customary law, which required various conditions to be met before custom could be seen as part of the common law, were no longer helpful.[27] One of these requirements was that, to be recognised, custom must be certain and consistent. In my reasons I commented that this requirement did not accord with the nature of tikanga — one of the strengths of tikanga is its ability to adapt to new conditions and local circumstances as appropriate.[28] I also

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22 See Coates, above n 16, at 6771 citing *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 (HC), *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) and *New Zealand Māori Council v Attorney General* [1987] 1 NZLR 641 (CA); and *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573 at [249] per Glazebrook and Wild JJ.

23 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733; *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801; and *Cowan v Cowan* [2022] NZSC 43.

24 *Ellis*, above n 13, at [108]–[110] per Glazebrook J, [171]–[174] per Winkelmann CJ, [257]–[259] per Williams J and [279] per O'Regan and Arnold JJ.

25 At [98]–[102] per Glazebrook J, [175]–[176] per Winkelmann CJ, [257] per Williams J and [280] per O'Regan and Arnold JJ.

26 At [103]–[105] per Glazebrook J, [173] per Winkelmann CJ, [257] per Williams J and [280] per O'Regan and Arnold JJ.

27 At [113]–[116] per Glazebrook J, and see at [177] per Winkelmann CJ and [260] per Williams J.

28 At [114]. Indeed, that is a strength of the common law generally.

said that the old requirements for a custom to be reasonable and not repugnant to justice and morality were based on colonial attitudes that were artefacts of a different time.[29]

We did not attempt to reformulate the test for the inclusion and application of tikanga in the common law. It sufficed to say that tikanga is a part of the common law of Aotearoa New Zealand. What this means will be elucidated on a case-by-case basis in accord with the normal common law method of incremental development.[30]

An important point is that tikanga will nevertheless remain separate.[31] We warned judges to take care not to impair the operation of tikanga as a system of law and custom in its own right. The Chief Justice noted that, in te ao Māori, tikanga has continued to shape and regulate the lives of Māori to the present day and that it reflects values that are older than our nation.[32] I commented that tikanga will continue to be applied and autonomously developed by Māori, and in this sense therefore it is a separate source of law and stands apart from the common law.[33] Williams J said: "it is my view that the development of a pluralist common law of Aotearoa is both necessary and inevitable."[34]

As it stands, therefore, tikanga is recognised both as part of the common law of Aotearoa New Zealand but also an autonomous body of law in its own right. How that will all play out is something you will see in the course of your future careers.

So, to conclude, thanks again for inviting me to judge the moot finals and to speak to you this evening and thanks also for sharing with me the various initiatives you are undertaking, such as the education and wellness survey. This all makes me sure that the future of the profession is in very good hands.

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29 At [115].
30 At [116], [119] and [127] per Glazebrook J, [183] per Winkelmann CJ and [261] per Williams J.
31 At [120] and [122] per Glazebrook J, [181] per Winkelmann CJ and [270]–[272] per Williams J.
32 At [172].
33 At [111].
34 At [272].