The New Zealand Law Foundation Ethel Benjamin Commemorative Address 2019

Imagining the Future Lawyer

Solicitor-General, Una Jagose QC*

"The heart must be developed as well as the brain" – Ethel Benjamin.[1]

In this year's Ethel Benjamin address, Una Jagose takes a hard look at the legal profession and wonders: "What would Ethel say?"

E ngā mana, e ngā reo, e rau rangatira mā

Tēnā, koutou katoa

E ngā mate, haere, haere, haere atu rā

E ngā iwi i huihui nei, tēnā koutou

E ngā kaiwhakawā o nga koti katoa o te motu, tēnā koutou

Ko au rōia matāmua o te kaurauna

Ko Una Jagose toko ingoa

Tēnā koutou, tēnā koutou, tēnā koutou katoa

Thanks to OWLS. It is always lovely to be back here, where I studied law in the 1980s. It didn't really occur to me then, fresh from high school and pretty sure that I didn't want to be a lawyer, that I was taking for granted something that Ethel Benjamin had to fight for. So I am grateful to Ethel, and also to the many other women since who have continued in her path, and who have continued down the years feeling "the chill that buffeted Ethel" (to borrow a phrase from Dame Sian Elias

* Solicitor-General of New Zealand. With thanks and acknowledgement of the valuable input from my colleagues Monique van Alphen Fyfe, Elizabeth Underhill and Lisa Wallbank.

[1] Ethel Benjamin (Graduation speech, University of Otago, Dunedin, 1897), printed in *Otago Daily Times* (Dunedin, 10 July 1897) at 6, as cited in Janet November *In the Footsteps of Ethel Benjamin: New Zealand's First Woman Lawyer* (Victoria University Press, Wellington, 2009) at 37.

CJ when she gave an address in 2008).[2] The chill continues to buffet, the fight goes on some 120 years since Ethel first faced the chill southerly wind in the profession and right here in Otepōti.

We know of course that Ethel Benjamin was the first woman admitted to the bar to practise law in Aotearoa in the late 1890s – in her own words, "the first lady lawyer south of the line".[3]

An early pioneer, we see her familiar portrait often; she is held up as a champion of women's rights and for social equality. She had a vision, more than a century ago, that women are equal to men and able to develop in the legal profession to equal status.

Ethel needed not only her own grit and determination but also legislative reform – the Women Practitioners Act 1896 – to practise as a lawyer. But, 122 years on, let's muse on what Ethel would say if she could see us now.

She knew it wouldn't be easy, continuing her fight for equality; as she said in an interview with *The Evening Star* here in Dunedin, rather prophetically:[4]

> *For many years the fight against prejudice will be hard and severe, and the woman lawyer must show herself more than ordinarily gifted before her ability will be recognised … For her own sake, and for the sake of all women who would follow in her footsteps, she must acquit herself well.*

And, even though in 1897 she had already identified that the legal profession was overcrowded,[5] Ethel would be interested to know that as at July this year just over half (6,661 out of 12,923) of practising lawyers in Aotearoa are women.[6]

With these numbers we know that Ethel's wish has certainly been met that "women should be able to consult members of their own sex regarding the many delicate questions on which they daily have to be advised".[7] Today women can brief and seek

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[2] Sian Elias, Chief Justice of New Zealand "Address to the Australian Women Lawyers' Conference" (Sofitel Hotel, Melbourne, Australia, 13 June 2008) at 4.

[3] Ethel Benjamin as quoted in an interview for *The White Ribbon*: Penelope "New Zealand's First Lady Lawyer" *The White Ribbon* (Christchurch, 1 August 1897) at 1. Penelope was a pseudonym used by Kate Sheppard.

[4] Ethel Benjamin "Women as Lawyers" *The Evening Star* (Dunedin, 18 September 1897) at 6.

[5] At 6.

[6] Geoff Adlam "Diversity in the New Zealand legal profession: At a glance" (2019) 932 LawTalk 61 at 61.

[7] Benjamin, above n 4, at 6.

advice from lawyers who are women in every town and city across this country, and on all ranges of work types, not just "delicate questions".

And I venture she would be delighted to know that it only took 92 years after she had been the first that women began graduating from our law schools in equal or greater numbers than men (in 1989).[8]

"[S]ooner or later", predicted Ethel, success would crown the efforts of women "determined to succeed" – women who are "diligent and pushing", women who "make the most of every opportunity".[9]

On a pure numbers basis, women have achieved gender equality in the profession[10] – we are entering the profession in equal or greater numbers and, since 2018, more women than men hold practising certificates.[11]

We cannot say the same for Māori lawyers. Just a few months before Ethel was admitted to practise, Aotearoa had another first – Āpirana Turupa Ngata (later Sir Āpirana) was the first Māori lawyer to be admitted.[12] Despite this, the first admission of a wahine Māori was not till 1972 – Dame Georgina te Heuheu.[13]

Leaping forward to the present day, unlike women generally, Māori and Pasifika have not achieved parity in numbers in the profession. The proportion of Māori and Pasifika law students does not reflect that of the national population.[14] Those numbers drop again at graduation, completing professionals courses and entering the profession.[15] In terms of practising lawyers, 85 per cent of lawyers identify as European or other (as compared to 74 per cent of the working age population) but only 6.1 per cent of lawyers are Māori (as compared to the national working age population of 12.8 per cent).[16]

Returning my focus for now to women, I acknowledge there is a lot to be proud of, a lot of "firsts" as records keep coming – to mention just those in our constitutional

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[8] Gill Gatfield *Without Prejudice: Women in the Law* (Brooker's, Wellington, 1996) at 129.

[9] Benjamin, above n 4, at 6.

[10] Adlam, above n 6, at 61.

[11] Geoff Adlam and Sophie Melligan "Snapshot of the Profession: At 1 February 2018" (2018) 215 LawTalk 43 at 49.

[12] Geoff Adlam "Lawyer ethnicity differs from New Zealand population" (2018) 920 LawTalk 70 at 74.

[13] At 74.

[14] At 73.

[15] At 73.

[16] At 71.

roles, the first woman Chief Justice the Rt Hon Dame Sian Elias (and now the second – tēnā koe Dame Helen Winkelmann CJ), the first woman Attorney-General Margaret Wilson, and not one but three women Prime Ministers and Governors-General.

A small anecdote, about the role of Solicitor-General, a role which I am the first woman to hold – in 2000 the office of the Solicitor-General was vacant, following Sir John McGrath's appointment to the bench. The Prime Minister was Helen Clark, and the Attorney-General, Margaret Wilson. The Governor-General, who appoints the Solicitor-General, had just been announced – Silvia Cartwright. The 8 September announcement of Terence Arnold as the next Solicitor-General was headlined in Wellington newspaper, *The Dominion*: "it's a boy".[17]

So we hail these apparently "glass ceiling breaking" moments with some jubilation.

Those women who first graduated in 1989 in greater numbers than men (I was one of those graduating women, by the way) are now in their 50s – potentially peak career time. If equality in numbers was the answer, we should now be seeing equal numbers of women lawyers in senior professional roles – for example amongst ranks of QCs, partners and directors, and judges. And yet women remain materially underrepresented at all senior levels across public and private sector legal workplaces, with Māori, Pacific and other ethnic minority women even further under-represented. (I do recognise my own privilege here, and take that responsibility seriously, to use the voice I have to speak out about things that matter).

In the profession only 21 per cent of our senior ranks, Queen's Counsel, are women.[18] Just under 35 per cent of partners and directors in multi-partner firms are women.[19] While the Supreme Court has three women judges (out of six), the Court of Appeal has just two (out of 10) and the High Court, better but only 17 of 40.[20] And ethnic diversity in these senior ranks and on the senior courts is woeful.

What's going on? It's quite evident that we have all the things in place that we've always said, and been told, are the precursors to gender equality – we've got the supply pipeline, we've got the role models, and we've certainly got the determination. The absence of equity of outcome and shared seats in the institutional power roles

[17] Victoria Main "Solicitor-general announced … it's a boy" *The Dominion* (Wellington, 8 September 2000) at 2.
[18] Adlam, above n 6, at 63.
[19] At 63.
[20] The District Court has 54 permanent women judges, out of 159.

shows us these precursors are not enough – so again I ask, what on earth is going on?

The answer lies in something deeper – it lies in the culture of our legal profession. I am confident this is so because the promise of equality, the oft-stated commitment to diversity, the burgeoning pipeline of women in our profession simply haven't delivered meaningful inclusion or equity of outcome for women.

Many of you will know that we have been on a public, painful journey as a profession over the last couple of years. What is now out in the open and evident to all is that that bullying, sexual misconduct and harassment, assault, discrimination and a culture of exploiting junior staff are significant problems in the legal profession.

Many of you will remember when news broke of five young women's horrific experiences of sexual misconduct and harassment in one law firm. It was clearly not an isolated incident and the widespread nature of the same issues were soon revealed – through Zoë Lawton's blog,[21] media outlets giving brave women a voice to tell their stories and also through surveys of the profession.

Dame Silvia Cartwright (the first woman Chief District Court Judge and the first woman to be appointed to the High Court) chaired the NZLS Working Group which published its report last year, proposing regulatory change to address sexual violence and harassment, bullying and discrimination in the legal profession.[22] The Executive Summary begins that report:[23]

> *2018 is a watershed moment in the culture of the New Zealand legal profession. The experiences of five young women and media reports drawing on the #MeToo movement exposed sexual violence and harassment in the legal profession. The outpouring of shared experiences that followed confirm that unacceptable behaviour – in the form of sexual violence, harassment, discrimination and bullying – is part of the fabric of the legal profession. This conduct has remained unchecked in the profession for far too long.*
>
> *The elimination of this type of behaviour is imperative for the reputation of the profession and to secure its future. The legal community must be a safe place for all.*

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[21] Zoë Lawton "#Metoo Blog" <www.zoelawton.com/metoo-blog.html>.

[22] *Report of the The New Zealand Law Society Working Group: To enable better reporting, prevention, detection, and support in respect of sexual harassment, bullying, discrimination and other inappropriate workplace behaviour within the legal profession* (December 2018), available at New Zealand Law Society "Bullying and harassment in the legal profession" <www.lawsociety.org.nz>.

[23] At 10.

In early 2018 the NZLS had commissioned Colmar Brunton to assess the legal workplace environment.[24] The objectives of the survey were to provide a measure of legal workplace well-being, and to establish the prevalence and characteristics of sexual harassment and bullying in legal workplaces.[25]

The results of the NZLS survey are publicly available so I will not detail it all here. Some overall findings are that just over 30 per cent of women and 5 per cent of men reported having been sexually harassed in their work.[26] A majority of lawyers reported experiencing bullying in their jobs.[27] The groups reporting the lowest levels of job satisfaction are women, lawyers under 30, lawyers in law firms and employed barristers.[28] Complaints are not made because of fear of missing out on promotion, fear nothing would change, fear harassment would get worse and not being able to find a confidential or trusted complaint service.[29]

Some in the profession said they were surprised. Most women lawyers were not surprised. Most women have known for too long that sexual misconduct, unwanted sexual attention or comment, offensive or crude behaviour based on gender or sex characteristics and bullying (repeated and unreasonable behaviour) have all been features of practising law in New Zealand.

I want to draw out three particular matters from the survey. First, the last comparable survey of sexual misconduct and harassment in the profession was undertaken in 1992.[30] The levels then were similar to the levels reported in the recent study. So for nearly three decades, we have known about but have not shifted this blot on our profession.

The second point is that the NZLS survey did not survey administrative professionals – those, mostly, women who also work in legal workplaces in secretarial and other support roles. Given that abuse of power is at the heart of sexual misconduct and harassment, and that administrative professionals who support lawyers are low in

[24] Colmar Brunton *Workplace Environment Survey: Prepared for the New Zealand Law Society* (28 May 2018), available at New Zealand Law Society, above n 22.

[25] At 3.

[26] At 16.

[27] At 33.

[28] At 11.

[29] At 29.

[30] Gill Gatfield and Alison Gray *Women Lawyers in New Zealand: A Survey of the Legal Profession* (Equity Works and Gray Matter Research, February 1993) at ch 8.

the legal workforce hierarchy, this is a significant omission. The real results, once all women who work in legal workplaces are considered, are likely to be worse.

Third, the survey made a distinction between "behavioural" and "legal" definitions of sexual harassment and reported on these separately. Behavioural harassment is defined as one or more behaviours that fall into broad categories of unwanted sexual attention or crude and offensive behaviour, for example unwelcome touching or inappropriate and repeated invitations to go on a date,[31] whereas the legal sexual harassment definition requires repeated incidents or a high, serious threshold, or behaviour that is used as a threat (or promise) of detrimental treatment.[32] I accept that there are differences between behavioural and legal conduct, though one is just a subset of the other. I urge the use of the "behavioural" data because to do otherwise risks underreporting on this serious cultural problem. When we use that data, we see a much more sobering, modern picture – using the behavioural definition, and considering only the last five years, the 17 per cent of women lawyers who have experienced "legal" sexual harassment in the last five years skyrockets to 40 per cent.[33]

We can take no comfort from being able to come to a different, better sounding results through legal interpretation and semantics.

The data was mined further with a particular lens on Māori lawyers – showing that the five-year prevalence figure for sexual harassment of Māori lawyers is higher than the average. Forty per cent of Māori lawyers (of all genders) have been sexually harassed in the last five years compared with the average 27 per cent.[34] Twenty-nine per cent of Māori men reported "behavioural" harassment compared with 14 per cent of all men lawyers[35] and 46 per cent of Māori women lawyers compared with 40 per cent of all women lawyers.[36]

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[31] Colmar Brunton, above n 24, at 15.

[32] Human Rights Act 1993, s 62. Note that the survey refers to this legal definition as the "Human Rights Commission definition": at 15.

[33] Colmar Brunton, above n 24, at 18.

[34] President of the NZLS, Tiana Epati, speech to the Wellington Women Lawyers Association "Issues facing Māori and Pasifika women lawyers", 6 May 2019.

[35] At 18.

[36] Sixty-two per cent of Māori lawyers have been bullied compared with the average of 52 per cent for all lawyers, with 34 per cent reporting such conduct in the last six months compared with the average of 21 per cent. As above n 34.

Is it any wonder then that women struggle to practise law on an equal footing with men? And that the profession struggles to recruit and retain Māori, Pacific and other ethnic minority lawyers? Returning to my earlier theme, we have made considerable progress in enhancing gender diversity in the profession, we celebrate "firsts" and glass ceilings cracked or smashed and yet – hiding in plain sight – this insidious discrimination against women (and other minority groups) has flourished.

Returning to Ethel, could she see this coming? She cautioned, more than a century ago:[37]

> *But here I sound a warning note … let us see to it that we go not to the other extreme – that our women do not become mere thinking machines; or worse even still, that over-cultivation does not lose that individuality that every man and woman should prize above all else. The heart must be developed as well as the brain.*

The lesson we need to take from Ethel here is not to simply pursue diversity for its own sake, not to simply pursue a numeric or statistical equivalence basis. That risks us losing something critical – the heart (to use Ethel's word) or the *culture* of who we are and who we want to be as lawyers.

By "over-cultivating" the brain, Ethel warned, we would lose our individuality. In today's language, she's speaking right into what we now call diversity and inclusion. It is *inclusivity* that allows workplaces to grow fully realised lawyers, to leverage off people's differences to innovate and to solve problems. It's through working for *inclusivity* that we can achieve equity of outcome and not just diversity by the numbers.

Once we delve deeper into diversity and start to think about *inclusivity*, the challenge becomes not how do we increase numbers of certain groups of lawyers but rather how we open ourselves to new ideas that really mean we can think differently about things, rather than just treat new ideas as stuff to bat away and/or to firm up what we always thought. And working on inclusivity with its challenge to the status quo raises another issue – equality might feel unfair to those who are accustomed to enjoying the lion's share of privilege due to falling into the default category that feels neutral to them – those for whom the status quo affords advantage and benefits

[37] Benjamin, above n 1, as cited in November, above n 1, at 36–37 (emphasis added).

assumed to be the product of merit. The challenge is adapting to a new standard – an inclusive one.

Inclusivity is the real diversity prize. It is through inclusivity that we can create the culture of legal workplaces where we each bring our real and full selves to our jobs and we have a profession that reflects the community we serve.

I used to think that we had gotten to the point that we all agreed diversity is important and justification was no longer required. But now I think that is wrong. There has been a tonne of analysis that tells us that diversity is good for all sorts of reasons. But, lately, I hear more often – in a new phrase that I don't like very much – that people pursue diversity because "it's the right thing to do".

My worry is that if we just start there – diversity is valuable because it's the right thing to do – we actually miss the critical aspect of why diversity is important. And if we don't really know why it's important, substantively, we will focus on the wrong things. Simply valuing diversity for its own sake risks us making a buzz phrase that is effectively meaningless and for which we build a set of measures – or, horror, quotas – so we can prove we are doing "the right thing". If all we do is blindly accept that diversity is a good idea, a worthy notion, and then set about measuring how well we are doing, we risk only ever paying lip service to the concept.

There are a multitude of studies that show us that inclusive organisations are successful. Deloitte tells us they are three times more likely to be high-performing, six times more likely to be innovative and agile and eight times more likely to deliver better outcomes.[38] So the business case is there, not just on some moral imperative but at the hard bottom line – better problem solving and creativity leading to increased delivery and better outcomes. But the business case is just one component. The broader point is inclusive organisations and institutions ensure the legal profession as a whole can better interpret, apply and create the law to serve the diversity of Aotearoa's communities.

Unless we actually harness the differences that diversity brings, unless we don't simply pick colleagues and employees for the different characteristics (sexuality and gender diversity, ethnicity and so on) but actually welcome the different perspectives

[38] Deloitte Review, (Deloitte Insights) Issue 22, January 2018 citing Juliet Bourke *Which Two Heads Are Better Than One? How Diverse Teams Create Breakthrough Ideas and Make Smarter Decisions* (Australian Institute of Company Directors, Sydney, 2016), at page 85.

and ways of doing things that diverse groups of people can bring, we will fail to shift the status quo. There is little point in counting up the quantitative ways in which we have diverse workforces if the cultural reality is that "the way we've always done things" is what drives what people expect and how we behave. And I reckon this is the big challenge for us as the drive for diversity becomes *de rigueur*. We must make sure that the inclusion part of diversity is what we concentrate on. And that's actually hard because it's culture change – as in organisational or professional culture change – that we really need to achieve. As I've already mentioned, the shift will feel harder for those who benefit from the status quo, but imagine how it might feel for those who currently do not.

I worry that as lawyers we are actually trained against being able to embrace true diversity. We are trained right from the start to follow precedent. Precedent, principle, order and the way things have always been done feature large in the way we work. So how do we modify the way we think about the scope and nature of law and train ourselves and new lawyers differently? Can we introduce symptomology of diverse thinking into workplaces, into professional standards or performance expectations? What would that look like?

Currently (continuing with tradition), we train for hierarchy and so enforce compliance and conformity. This accords with the very nature of the common law – following precedent, conforming with authority, and absorbing change in small increments. It is not, however, sustainable for workplaces and institutions that need to recognise different models of respect and authority, and different models of responsibility amongst and between members of the community. So we need to build into the teaching of the law critical thinking that embraces differences, along with the disciplines of precedent and our common law tradition.

In our organisations, we measure diversity – how many women are in the senior tiers, and what ethnic diversity do you have? And then we publish these results. This is the stuff that's easy to count – the number of women, Māori, Pasifika, minority genders and sexualities, and people with disabilities. But that actually doesn't tell us anything, really, about equity of *outcome*.

Einstein is said to have given us the maxim: "Not everything that counts can be counted, and not everything that can be counted counts." And Peter Drucker – management consultant guru – tells us, "What gets measured, gets managed." So, what then – measure, or don't measure? Anyone here who has to contribute to their

organisation's annual performance reporting will understand the challenge of making meaningful measures that can be counted!

We need to find meaningful goals that actually advance progress on inclusivity/equity of *outcome* and find ways to measure *that*. This, I reckon, will help us develop the heart that Ethel referred to – the underpinning culture – *the heart* of our profession – that will deliver the true benefits of diverse workforces, leadership, and a diverse profession. Rather than strangling diversity into substantive uniformity with slightly different packaging, we have to develop the *heart* so the *diversity* can thrive.

What Now?

No reira, ara te korero (there is a saying):[39]

> *Tungia te ururua, kia tupu whakaritorito te tupu o te harakeke.*
>
> Set fire to the scrub that the flax plants may shoot forth young evergreen shoots.

There are parts of our legal institutions we should burn down, metaphorically of course, in order to let new ideas and new ways flourish. Let's not keep spending our energies demanding places in institutions that maintain the status quo, that refuse to share power, that continue to discriminate against women, and Māori and Pasifika people.

There is good news here. From the NZLS workplace survey, we know that nearly 30 per cent of lawyers (and 40 per cent of lawyers under 30 years old) believe major change is required in our workplaces and our culture.[40] A large number of us see the need for change. And, in further good news, the Law Society's Culture Change Taskforce has been working hard since mid-2018 on its "strategy to support the creation and maintenance of diverse, healthy, safe, respectful and inclusive legal workplaces".[41] Their recommendations are on track to be announced next month.

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[39] W Colenso "Contributions towards a better knowledge of the Maori Race" (1879) 12 Transactions and Proceedings of the New Zealand Institute 108 at 119.

[40] Colmar Brunton, above n 24, at 10 and 13.

[41] New Zealand Law Society "Law Society Culture Change Taskforce on track to deliver strategy" (19 September 2019) <www.lawsociety.org.nz>.

Yesterday's announcement[42] by the NZLS President Tiana Epati that the NZLS and its legislative framework will be reviewed to enable it to respond to these issues is very welcome.

For my part, I have reached the inevitable conclusion that the traditional model of today's lawyer needs significant re-evaluation. Not just about how we deliver our services but also about who we are and why we are here. And while I don't just promote a talkfest without action, I do say that dialogue to continue uncovering the uncomfortable truths about ourselves as a profession is critical to sustained cultural change. Otherwise we risk keeping trying to place in races we don't want to run in, to measure ourselves against the wrong things – and that in another decade or two or three I will be echoing Dame Silvia's dismayed comment (in the HRC suffrage video in 2018 on equality) that she cannot believe we are still talking about feminism.[43]

So here is what I reckon. And – disclaimer – these ideas are not government policy! They are my own views, but they are the basis to who I am as a person, a lawyer, and a leader in our profession.

The first thing I would say is we lawyers need to lose any ego we have about having all the answers. Now, I have always worked in in-house legal teams, and for government. When I was first at the Ministry of Fisheries, I was early warned that a policy advisor X was a "bush lawyer" – what an insult! – and I should look out for his "from the hip" and risky approach to legal matters. Sure enough he was pretty gung-ho about the "law as a guide" but actually it taught me early that the much maligned bush lawyer can be incredibly valuable to the lawyer. They often know the policy and the purpose behind legislation. They frequently can point out pitfalls or how things have been done before. They have a wealth of knowledge that the lawyer can mine – to get up to speed with the business, to make connections and to add value, rather than reinvent the wheel.

And then I learned the strength of working with others, listening to other perspectives, in multi-disciplinary teams, teams that allowed for integration of specialist knowledge sets and multiple perspectives to deliver a solution/set of

[42] New Zealand Law Society "NZ Law Society to commission comprehensive review" (23 October 2019) <www.lawsociety.org.nz>.

[43] Human Rights Commission "Still Striving for Equality (Extended Edition)" (podcast, 19 September 2018) YouTube <www.youtube.com> at 31:13.

options for decision makers. Collaboration, another much maligned concept, is not about everybody talking endlessly about everything! (If you think collaboration is time consuming and you haven't got time, and it's better just to get on with it yourself, you are doing it wrong!)

The second thing is that we need to rethink the product that we lawyers are peddling. The "legal opinion" has a lot to answer for as a long held belief that this is what you get from a lawyer – a long, well-articulated and reasoned dispassionate assessment of what the law says the answer is. The time has long passed when lawyers could sit in isolation in offices and divine the one true answer based on what the law means in a certain situation.

If that is how we think of our role as lawyers, or if that is how we are perceived or used by our clients, we will be overtaken by a robot very soon. And we would deserve to be. But if we develop the heart as well as the brain, if we make sure we maintain our individuality and humanity, we can build the "lawyer" that Ethel was imagining all those years ago. We can outperform artificial intelligence lawyering by having well-developed humanity at the centre of our professional culture.

We have to move away from the lawyer-as-"800-pound gorilla" mode of operating, where value is measured by hourly billing, quantity of work delivered, a closed shop of legal talk which only other lawyers can understand, to a model where the advice offered is innovative and solution-focused, and the result of a collaborative work process.

The traditional law firm model – where the prize is to make partner, to draw from the profits of the firm – doesn't sit well with this collaborative and innovative model. Time-based billing to clients remains the firm's main mode of measuring value (though this is changing), but measuring six minute units of time disincentives innovation and downgrades those non-billable but critical functions of research, productivity, and culture development. We are starting to see here in Aotearoa a slow change in how law firms practice and what they offer, including the highly flexible law firm which uses different billing arrangements, secondments and project-based offerings of lawyers, which uses online, self-help models, in order to provide a range of different services and a flexible workforce. And it is no surprise to me that these

are the workplaces that suit women and a more ethnically diverse workforce – in 2019 nearly two-thirds of lawyers working in-house are women.[44]

The in-house model of lawyering – where corporates and others employ lawyers in order to ensure they have access in a flexible way to focused legal advice from lawyers who understand the business, its risks and opportunities, and which see themselves as part of a broader team – values the lawyer differently. What this model allows is a focus on the "client" and the business needs, rather than hours worked and billing targets. The lawyer's value is what they bring to the table, to the solutions and options.

This culture change requires much of leadership. So how can we achieve change at the higher echelons, those that continue to be associated with power and influence of the profession? The criteria for conferring the rank of Queen's Council (senior lawyers, a quality mark) have been based around the senior lawyer who is recognised for a rather hard-to-identify overarching standard of "excellence", primarily as litigators (the 800 pound gorilla!). We have tended to shy away from unpacking what is contained by "excellence" although there are guidelines that unpack some of that. The Attorney-General and Chief Justice this year changed the criteria for appointment as Queen's Counsel by adding a criterion – a proven "[c]ommitment to advancing access to justice".[45] It is too soon to say what result such a change will have to the pool of senior lawyers who make the coveted rank, but it has not gone without comment – one response to the proposed new criterion noting:

> *… it might suggest that the QC rank can be achieved through good works. This would reduce the importance of the overarching requirement for excellence ... what is more important, excellent and leadership as an advocate/litigator or "good works"?*

Now that's just one comment, and I don't want to overreact – but my point in raising it is that if we unconsciously or otherwise hold on to the way we view concepts (or values if you like) so tight that the status quo cannot change, we waste a lot of time working on the wrong thing to achieve cultural change. In this particular example, is it so hard to hold both these things in equal esteem – and to view the overarching requirement for excellence as being multi-faceted – so that so-called "good works" (the phrase itself is disparaging of the concept) and "excellence" are not seen as

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[44] Adlam, above n 6, at 63.

[45] *Queen's Counsel – Guidelines for Candidates 2019* (2019) at 2, available at Crown Law "Guidelines, Protocols & Articles" <www.crownlaw.govt.nz>.

binary opposites? Until we unearth these difficult questions buried deep in our culture and courageously face them, we will not be able to undo the hierarchies, the power shops, and the carefully guarded influential roles that hold true inclusivity back.

Ultimately, we need to redefine the values of the profession and who we serve. What does it mean to be a lawyer? It cannot be only that we provide a quality service to a series of clients who seek us out.[46] Our profession has a higher purpose – ensuring access to justice, maintaining the quality of justice and its relevance to the community, and upholding the rule of law. The law is important – it makes free and democratic society work. And lawyering cannot be just about us lawyers. It's about the service we give to society, to justice, to the bedrock rule of law. We can only do these things if our numbers reflect and include the diversity of the communities we represent. We lawyers occupy an extremely privileged place in society – let's not pretend otherwise. With that comes a responsibility – for each other, for our communities, for the law itself.

What if we move to hold ourselves to values that explicitly support this ambition? What if we show respect for each other as people, not based on hierarchy of role; consider the impact on the wider profession of our conduct (not just immediate client or ourselves); and hold each other to the higher standard we claim of ourselves? What then might we say about the "fit and proper person"[47] to whom entrance to our profession is reserved?

There are critical junctions in legal careers already in existence that we can use as opportunities to shape both current and future lawyers – ethics courses at university, the professionals courses by which those newly minted lawyers are launched into practise, admissions processes and ceremonies, stepping up courses for barristers, courses for those going into partnership, appointments to disciplinary bodies, appointment of Queen's Councils and appointments to the judiciary. We can use these junctions to set expectations and to remind us what a "fit and proper person" is and who lawyers serve at key stages of a legal career.

Leaders set the tone. Listening and speaking out about these issues, role modelling the behaviours we want, and taking action when required all go to moving cultures

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[46] John Gardner "The Twilight of Legality" (2018) 43 Austl J Leg Phil 1 at 25–26.

[47] Lawyers and Conveyancers Act 2006, s 55.

and resetting what is acceptable. New and younger lawyers will no longer tolerate the workplaces that some of our profession have grown up in; nor should they.

But alone this will not be enough. The regulatory model has to change. One of the findings of the NZLS Working Group's Report is that the Law Society was not viewed as the place for (and was not ready for) complaints about lawyers in relation to harassment or bullying behaviour in workplaces.[48] We need to match culture change leadership with the firm hand of the Law Society as regulator to set the base line, and enforce it. Together, we can and will deliver real and sustainable change.

On this point, congratulations are due to the Law Society for accepting the Working Group's recommendations on the changes needed to regulatory processes so they are designed to deal with complaints about sexual violence, harassment, discrimination and bullying.[49] It is another opportunity for culture reset – to drive the profession forward in redefining the personal and professional standards that we should hold ourselves to so that sexual harassment, bullying, discrimination and other unacceptable behaviour is not tolerated, so that people who see it or suffer it know what to do, with processes that support them to speak out.

The framework for how these expectations are delivered in legal workplaces is also a role for the regulator – who in legal workplaces is responsible for the expectation setting, an audited compliance framework around certain known practices that we need to unearth. For example, a requirement that workplaces have clear, easy-to-follow policies and practices on appropriate behaviour along with how to raise concerns for resolution, a behaviour champion (or more than one!) in every senior team, a prohibition on confidentiality agreements that prevent complainants from taking external legal or other regulatory action, and clear policies on alcohol in the work environment.[50]

It is not surprising that there is a significant intersection here with another discussion we've been having lately in the profession – mental health and well-being. We work

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[48] New Zealand Law Society Working Group, above n 22, at 30–31.

[49] New Zealand Law Society "Law Society plans changes to regulatory process for lawyers accused of inappropriate behaviour" (17 December 2018) <www.lawsociety.org.nz>.

[50] The Deans of the Law Schools of Aotearoa have agreed on a series of standards for student internships: *Best practice standards for a safe and appropriate culture and environment for law students employed in firms* (October 2018), available at New Zealand Law Society "Best practice developed for safety of law students in law firms" (11 December 2018) <www.lawsociety.org.nz>.

in fast-paced and stressful environments, often with distressing content. Positive workplace cultures can either enhance or degrade our mental well-being. Ethel was early onto this too when she said: "I believe if students would give themselves a more liberal allowance of resting time they would do better work".[51]

The reset tools here are actually quite simple – encouraging well-being practices, having policies and access to mental health services, normalising flexible and part-time hours (and not creating barriers to advancement where these working styles are used), breastfeeding-friendly workspaces, and gender neutral and accessible toilets. These are not new ideas – but consciousness is required to bring together all aspects of a workplace that can drive positive culture and inclusivity – where everyone can bring their whole selves to work, do their best and maintain their well-being.

I mentioned earlier legislative change was also required for Ethel to practise law.

It's interesting to observe the fashion at work here of legislative reform leading a burst of social change – from the Electoral Act 1893 that allowed women to vote,[52] to the Women Practitioners Act previously mentioned, the Women's Parliamentary Rights Act 1919 that allowed women to stand for Parliament, through equal pay legislation of the 60s[53] and 70s[54] (an issue that is sounding more loudly than ever today),[55] to the Domestic Violence Act 1995 and the recent Family Violence Act 2018, to enactments permitting Civil Unions,[56] then marriage equality.[57]

What preceded those legislative changes was, frequently, significant protest action to pave the way.

Those in leadership positions need to make space for other voices, including rebel voices, to speak without fear, take action on issues when they are raised, and be seen to be taking that action. It is difficult for minority voices to speak with confidence

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[51] Penelope, above n 3, at 1.

[52] Electoral Act 1893, s 3 definition of "person" and s 6.

[53] Government Service Equal Pay Act 1960.

[54] Equal Pay Act 1972.

[55] Human Rights Act, s 21(1)(a); Employment Relations Act 2000, s 105(1)(a); State Sector Act 1988, ss 58 and 77D; and Crown Entities Act 2004, s 118(2)(b).

[56] Civil Union Act 2004.

[57] Marriage (Definition of Marriage) Amendment Act 2013.

when leaders are seen to promote and revere those who do not honour diversity or respect the humanity of others.

So I say we need to listen to rebels and I think Ethel would agree. After all she quoted Sarah Grand's similar sentiment about rebels to her graduating class: "It is the rebels who extend the boundary of right little by little, narrowing the confines of wrong, and crowding it out of existence."[58] I found the fuller quote though and think its worth delivering in full today. In Sarah Grand's 1893 feminist novel *The Heavenly Twins*, the heroine Evadne is speaking to her aunt about why she refuses to marry:[59]

> *"You mean submit," Evadne answered, and shook her head. "No, that word is of no use to me. Mine is rebel. It seems to me that those who dare to rebel in every age are they who make life possible for those whom temperament compels to submit. It is the rebels who extend the boundary of right little by little, narrowing the confines of wrong, and crowding it out of existence."*

As a leader, of an organisation and in the profession, I believe that people who are free to speak into difficult issues should be treasured. For leaders to be a bit uncomfortable, not to know the answers and be open about that, to welcome constructive disagreement and criticism allows those same leaders to build positive workplaces and a working culture in which diversity – and its indispensable sidekick inclusion – can flourish.

Conclusion

This is my call to action then – we are at a culture reset moment for the profession. Let's not waste the opportunity. Those of us in privileged positions need to open our eyes to what is happening around us and use our positions to call for change, to insist on cultural change. I hope the NZLS Working Group was right to say this is a watershed moment[60] because change must come.

Progress will not be easy and courageous dialogue will need to be had all around the motu, supported by the leaders in the profession, until we can talk to these cultural

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[58] From the Irish feminist's best-selling novel: Sarah Grand *The Heavenly Twins* (Cassell Publishing, New York, 1893) at 95. See Stephanie Forward "Attitudes to Marriage and Prostitution in the Writings of Olive Schreiner, Mona Caird, Sarah Grand and George Egerton" (1993) 8 Women's History Review 53; and November, above n 1, at 60.

[59] Grand, above n 58, at 95.

[60] New Zealand Law Society Working Group, above n 22, at 10.

issues honestly and build in to educative and regulatory frameworks the processes to really shift the dial.

Unsurprisingly, I have found Ethel Benjamin here well ahead of me. While here she is talking about women becoming lawyers, I find the sentiment today speaking to all of us, men and women, about the path ahead:[61]

> *… [do] not expect to encounter no obstacles on [the] road to success, and when [you] find them blocking progress [do not] not get disheartened, but cheerfully set to work to overcome them one by one. The man or woman with indomitable will, with unswerving purpose, with a courage which never falters, with a concentration which directs all forces to the one goal – the man or woman, I say, with these qualities will sooner or later achieve success in whatever sphere of life he or she may be placed. … Circumstances may do much to retard our progress, but sooner or later they must yield to the man or woman with will of iron.*

No reira, tenei taku mihi atu ki a koutou,

tēnā koutou, tēnā koutou, tēnā tātou katoa

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[61] Ethel Benjamin as cited in Janet November In the Footsteps of Ethel Benjamin: New Zealand's First Woman Lawyer (Victoria University Press, Wellington, 2009) at 70.