

Articles

Māori underrepresentation in the legal profession

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As a kid, it did not occur to me that I might be part of a “minority” group. I grew up in Rotorua and attended Western Heights High School. Māori comprise 40.1 per cent of Rotorua’s population; by comparison, Māori make up 16.5 percent of Aotearoa’s population overall.² More than half of the Western Heights school roll is made up of Māori students. In my childhood community, Māori excellence was encouraged and celebrated. My school worked hard to incorporate and accommodate a range of learning styles and values. Throughout my school, I saw Māori in positions of leadership, both at the staff and student level.

The picture changed drastically as my peers and I completed year 13 and made decisions about our lives after high school. I finished high school with 308 classmates, of which 164 were Māori. I was one of 59 students from my school who went on to university, but only 13 of us were Māori.³ Of that group of 13 Māori students, three of us intended to study, and eventually practice, law.⁴ Several years later, writing this piece in my penultimate year of university, I am the only member of that small cohort who made it to the end, and who is set to become a practising lawyer after graduation.⁵

While those numbers are stark, they do not surprise me. The majority of my Māori high school peers never saw university, let alone law school, as a viable option. And why would they? Since Aotearoa was first colonised, the legal system has been, and remains, an incredible site of power, and tool of oppression. Before they had even finished school, many of my Māori peers would have had negative interactions with the justice system. These negative interactions are not limited to just the criminal law but reach all

aspects of law and life; land law, health funding, welfare, Oranga Tamariki — the list is endless. You could pick at random any period of my life and it will be true that, during that time, I had more family members in prison than I had family members with university degrees. In fact, I am the first in my family to receive a tertiary education. Certainly, I will be the first lawyer.

Tuakana/Teina

Unfortunately, the lack of role models is only exacerbated in the legal profession. I am never surprised when I have to scroll through five, six, or even 10 pages of any given law firm’s website until I find someone who is unapologetically Māori. If I find more than one, it is a safe bet I will be able to count them all on one hand. Those numbers dwindle even further up the food chain — partnerships tend to be dominated by older white men.

Data from the 2006 census showed that Māori were estimated to make up just 5.5 per cent of all legal professionals; that is, barristers, solicitors, judges, tribunal members and magistrates.⁶ The Law Society keeps records of the ethnicity of lawyers who choose to disclose that information. Around 62 per cent of all lawyers chose to provide their ethnicity and of those 3.5 per cent said that they are Māori.⁷

It is hard to aspire to be something that you cannot see. With such low rates of representation, for me and my high school cohort, Māori legal professionals just were not something many of us could picture. Several years later, not much has changed. There is still disproportionately little

1. Te Whānau-ā-Apanui and Ngāti Tūwharetoa. Final year LLB/BA student at Victoria University of Wellington.
2. Statistics New Zealand “Rotorua District” <www.stats.govt.nz>; Statistics New Zealand “New Zealand’s population reflects growing diversity” (23 September 2019) <www.stats.govt.nz>.
3. Information relating to breakdown of ethnicities and tertiary education provided by Education Counts New Zealand.
4. This information is given to the best of my knowledge and excludes any of my school cohort who may have, since leaving school, decided to pursue law.
5. A version of this article was originally written for an Ethics and Professional Responsibility course assignment in 2019. We were asked to write about an ethical issue facing the legal community in New Zealand, and I knew I needed to write about this.
6. New Zealand Law Society “Māori under-represented in legal profession” (23 September 2011) <www.lawsociety.org.nz>.
7. New Zealand Law Society, above.

representation for our people. For the minority of Māori who manage to overcome these barriers, and do break into the legal profession, the challenges are not over there. Even once within the profession, there is a lack of Māori mentors. I attended a panel discussion on equity in law and saw four incredible wāhine toa speak of their challenges in the legal profession.⁸ Arti Chand was one of the speakers; she is an extremely accomplished practitioner with over 15 years' experience in the legal profession. Arti expressed one of the biggest barriers was the lack of mentorship: in her entire career she has never worked for a female partner let alone an Asian, Māori or Pasifika partner. For any new graduate, joining the legal profession is nerve-wracking, but this is even more so as a young Māori person. Many of my Pākehā peers have to look no further than their own family to find someone they can share experiences with, ask advice of, and gain institutional knowledge and connections from. They know someone who was, at some point, in their exact position.

It is an isolating feeling to know before you have even entered the workforce that, statistically speaking, the chances of working with, or for, someone *like you* are extremely low. Underrepresentation can cause anxiety for many Māori in the legal profession. Think of the headspace taken up by questions as simple as: "will my colleagues be able to pronounce my name?"; "will my employer understand that a tangi can happen over more than one day?"; or "will my workplace support Te Matatini as much as they support the Melbourne Cup races?".⁹ The legal profession is a high stress environment already but the added layer of isolation due to underrepresentation can weigh heavily on Māori.

Te ao Māori

The Māori economy is estimated to be worth over \$42 billion¹⁰, and Māori make up over half of the entire New Zealand prison population.¹¹ There is a strong demand and need for legal professionals with experience and knowledge of te ao Māori. The legal sector has not been blind to this unique and emerging industry and has responded accordingly.

The same firms that make you feel like you are searching for a needle in the haystack to find a single brown face or a

hanging pounamu or a proud declaration of whakapapa, also boast specialist Māori teams. How can a team specialise in Māori affairs and business with such a clear lack of Māori staff?

This is not to say that Pākehā cannot understand tikanga Māori or that the traditional Pākehā values engrained in the legal profession are not useful, because they are useful. However, te ao Māori offers another lens through which to view the world. It is another tool in the kete. Te ao Māori is about the interconnectedness of all living and non-living things. By definition, tangata whenua are an integral aspect of te ao Māori. The history and origins of New Zealand's common law system is that of New Zealand's Pākehā colonisers. To recognise that is not to diminish the positives of that system. But neither is it true that tikanga Māori is any lesser in value or coherence than the Eurocentric values that are baked into the very foundations of New Zealand's legal profession. New Zealand's legal system may have its roots in England, but its trunk, leaves and branches grow and fruit in contemporary Aotearoa. Today, Aotearoa's legal system needs to accommodate all members of Aotearoa's diverse population. For many Māori clients navigating their personal and business legal rights and obligations, effective legal representation depends on the availability of Māori practitioners conversant in tikanga.

Māori overrepresentation in the prison system is a pressing issue in New Zealand. The legal profession plays a central role in the operation of the criminal justice system. Our current criminal justice system is far removed from traditional Māori justice systems. Traditionally, Māori take a community-based approach to justice, focusing on restoring the mana of all parties, rather than stigmatising the offender.¹² An immediate overhaul of the criminal justice system or two parallel systems for Māori and Pākehā is unrealistic, but increased Māori representation and understanding of tikanga Māori in the legal profession could lead to better outcomes and rehabilitation of Māori offenders.

Lawyers have an ethical and legal obligation to act in the best interest of their clients, whether criminal or commercial.¹³ More could be done for Māori interacting with the legal profession. Greater representation of Māori within the profession is a good place to start. Being able to relate to

8. Marcia Rohario Murray, Willow-Jean Prime, Arti Chand, and Horiana Irwin-Easthope "Equity and Diversity Panel" (Victoria University Law Student's Society and The College of Law, held at Old Government Buildings, Victoria University of Wellington Panel speakers, 23 July 2019).
9. Te Matatini is the national Kapa Haka competition held every three years, and more broadly speaking it is a Māori performing arts festival. It's hard to encapsulate quite what Matatini means into a single footnote but I know I feel an immense amount of pride every time I watch Te Whānau-ā-Apanui perform. I make the comparison to the Melbourne Cup because many workplaces partake in sweepstakes, dress up and stream some of the races for the occasion while Te Matatini goes unnoticed. For more information, the following links are provided: Te Matatini, Kapa Haka Aotearoa <www.tematatini.co.nz>; and Manatū Taonga, Ministry for Culture & Heritage "Te Matatini Society Inc" <www.mch.govt.nz>.
10. Berl, "Māori economy 2020" (29 June 2020) <www.berl.co.nz>.
11. To reiterate, Māori make up 16.5 per cent of the entire population. Department of Corrections "Prison facts and statistics – March 2019" <www.corrections.govt.nz>.
12. Carwyn Jones *New treaty, new tradition: reconciling New Zealand and Māori law* (UBC Press, Vancouver, 2016) at 76.
13. Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 13.

your client and understand their background and view means you are better equipped to represent them and fulfill your obligations as a lawyer.

Ethic of care

Carol Gilligan's work on ethic of care focused on gender bias but resonates with Māori underrepresentation in many ways.¹⁴ The ethic of care theory rests on the premise that though the law has traditionally tended to value and embody one dominant set of perspectives and assumptions, other voices, values and approaches can also be of tremendous value.¹⁵ Gilligan drew on the work of social psychologist Lawrence Kohlberg, in which he had studied gender differences in the moral reasoning and moral development of male and female children. On the basis of his empirical study, Kohlberg concluded that boys were more morally sophisticated than girls.¹⁶ Gilligan argued that his conclusion was based on gender-biased assumptions.

Reconceptualising Kohlberg's empirical studies, Gilligan observed that the boys studied had tended to analyse moral dilemmas using an "ethic of justice" approach, whereas the girls had been more likely to apply an "ethic of care" approach.¹⁷ For Kohlberg, the ethic of justice lens was the archetypal indicator of moral reasoning; ethic of care reasoning, to him, simply looked like a failure to engage "properly" in ethic of justice problem solving. That is, ethic of care reasoning was invisible to him as a form of reasoning at all. Gilligan argued that, on the contrary, the girls approached the moral dilemmas posed to them in the study with no less moral sophistication than the boys had; they were applying a different lens.¹⁸ One need not deny the value of ethic of justice reasoning in order to recognise the independent, but complementary, value of ethic of justice analysis. However, if one's concept of moral reasoning and value simply is ethic of justice, then it is all too easy to write off ethic of care reasoning as worthless or unsophisticated.

Ethic of justice is deeply entrenched in both legal education and scholarship and the legal profession. Ethic of justice involves deductive reasoning: taking abstract rules and principles and applying them to specific facts. What could be more fundamental to Western legal reasoning? This traditional mode of legal problem solving is individualistic by nature and encourages competition between individuals. Though Gilligan's focus was gender, ethic of care also resonates powerfully with te ao Māori concepts and values. Māori place a huge emphasis on relationships and how individuals may impact their wider communities.

Gilligan noted that ethic of care approaches focus on a dispute or problems' wider context and emphasise the ongoing network of relationships.¹⁹ Similar observations can be made from the te ao Māori worldview. Ethic of care, interpersonal skills and "soft skills" like listening to understand a client's perspective and needs can be valuable tools in the kete. Clients are humans. Meeting their legal needs involves not just logical reasoning, but may also involve acknowledging their emotions, recognising and fostering their relationships, and communicating effectively.

Core te ao Māori values such as manaakitanga and kaitiakitanga dovetail with Gilligan's ethic of care. These concepts and practices are also powerful tools in the kete of effective lawyers. Manaakitanga is about caring for and supporting others. Kaitiakitanga is about guardianship and protection. These aspects of te ao Māori complement traditional legal ideas about the role, duties and obligations of the legal practitioners. As lawyers, we must act in our clients' best interest. Whanaungatanga and whakapapa are also central to te ao Māori, they are about the relationships and each person's role in their whānau or wider community. It is the idea that people build connections through shared experiences and every person's action has an impact on those in their network.

Writing this article has given me an opportunity to reflect on the values my whānau and community has instilled in me. During this process of reflection, I have also thought about a criminal defence file I assisted with as a summer law clerk. The lawyer I was assisting was Pākehā and male. He is an extremely effective lawyer, and I liked working with him. He was a good supervisor and mentor. He was fact-focused and knew how the specific facts of a real case fit within the framework of the law. Our client had pleaded guilty and we were assisting with sentencing. I remember one conversation with this lawyer in which he told me:

"We'll do our best, but he really deserves to go to jail anyway and that's not our fault."

My reply was:

"But it's not just about him, he has a young family and his partner is about to have another baby, they all need him, both financially and emotionally."

Looking back now, I can see both the ethic of care and ethic of justice models at play, or a Pākehā and Māori worldview coming through in our opinions and focus. My supervising lawyer was taking an unimpeachably legal approach: his

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14. Carol Gilligan *In a different voice: psychological theory and women's development* (Harvard University Press, Cambridge, 1993).
 15. Leslie Bender "Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law Symposium – A Fair Hearing" (1990) 15 *Vt L Rev* 1 at 37.
 16. Lawrence Kohlberg "The Development of Modes of thinking and Choices in Years 10 to 16" (PhD Thesis, University of Chicago, 1958); and Lawrence Kohlberg *The Psychology of Moral Development: The Nature and Validity of Moral Stages (Essays on Moral Development, Vol 2)* (Harper & Rowe, San Francisco, 1984).
 17. Gilligan, above n 14.
 18. Bender, above n 15, at 37.
 19. Bender, above n 15, at 38.

focus was on the individual's actions and mental state at a particular point in time, and the legal consequences that flowed from that. My perspective was not so focused on just that one point in time in the past. I was looking into the future too and could see the ripple effects a custodial sentence would have on the client's whānau. Our different perspectives did not put us at odds but made us a better team. The strength of our team, and complementary skills, were reflected in our submissions, which were squarely situated within the traditional legal framework, while also incorporating social and contextual factors. Our submissions struck a balance between acknowledging our client needed to take responsibility for his crime, and considering the wider negative ramifications of any custodial sentence on his family and community. Any person's perspective is inevitably informed by their cumulative life experiences and history. My own perspective is informed by my set of experiences as a young Māori wahine; my colleague's perspective is informed by his life and experiences as a male Pākehā and a highly experienced and competent lawyer of longstanding. We comprised a relatively unusually diverse legal team for our client that day. And, this part is important: though as a senior and experienced lawyer, my colleague could easily have done otherwise, he really listened to me that day. In the course of writing this, I have spoken to him about this client and this interaction. He agreed with me that our distinct but complementary perspectives resulted in a better outcome for the client. I was not a token Māori that day, but I was an early-career practitioner with insights and perspectives that helped my team to give our client the best possible legal representation. Diversity is not about tokenism; it is about better outcomes for clients and practitioners alike.

Tokenism

Diversity has become a buzzword in not only the legal profession but also all workplaces and industries. It can be hard to differentiate between a genuine desire for inclusion and something more like shallow tokenism.

As a "minority hire", it can be hard not to question whether you have been genuinely selected for your talents and ability or if you just tick a box for the firm's image. I often find it hard to differentiate between tokenism and genuine inclusion myself. Despite not even finishing university yet I have already experienced that feeling of tokenism.

In a law firm photoshoot I was asked to remove my necklace because the top of the cord was just visible above my shirt. I was happy to oblige and went to take it off. As I moved to remove it, the pounamu that had been hidden underneath my shirt became visible, and they asked me to leave it, but leave it visible. This might strike a Pākehā reader as an innocuous, neutral, or even welcoming gesture: "don't be afraid to show your Māoriness!", but that was not how it felt to me. I immediately felt like I was the token Māori; what had been messy detail in a corporate photo when it was just a cord had, once comprehended as a pounamu, transformed into a handy symbol of workplace diversity. The more I thought about this seemingly insignificant interaction the more I thought about the role I had to

play. Regardless of how it had come to be, I feel like I do have an obligation to show other Māori that there are so many career options available to them — law being one, even if it is something as small and simple as a necklace.

I have been sat down by mentors to discuss my future and been told that with my potential I could become a partner one day. There is really not much more you could want to hear as a young beginning lawyer. However, comments like these have quickly soured when followed by a "joke" about needing to replace the last Māori and female partner to ensure the partnership is sufficiently diverse. I understand that these kind of "jokes" are likely intended light-heartedly, rather than to undercut or negate any of the positive words that preceded them. However, that is the effect. I feel my sails puff up with the initial compliment — I feel seen, and valued, and can picture my promising career, and possible future as a partner one day. And then, the joke, which sucks the air right back out of those sails. To make a joke of the need for diversity does exactly that: it makes diversity seem like a joke. It makes "diverse" employees feel like a joke. And it is not a joke that we are in on.

I do not want to be held to a lower standard because I tick boxes or am good for a firm's image. I want to achieve because my Māoritanga is recognised as a legitimate form of decision-making and moral reasoning. I want to achieve because my Māoritanga enhances my capabilities as a legal professional.

Despite the self-doubt that tokenism, or suspected tokenism, can invoke, I try to think "hei aha!" if I get my foot in the door because of tokenism then I will show them why we need more Māori in the legal profession. I will stand tall and proud to show other Māori that there is a place for us in the legal profession if they choose it. I will keep the door open for others until my Māori peers are sought not out of tokenism but out of recognition of their true merit. This is merit they have right now.

And to Pākehā employers and colleagues, educate yourselves and be interested in your people simply because you are interested. Listen to who your staff are as whole people, with fully formed histories, perspectives and experiences. These perspectives are more than just diverse in some superficial or decorative sense. A team with a wide range of points of view will have fewer blind spots. It will be a stronger team. All of that is something that can bring meaningful value for clients, practitioners and firms alike.

Reflections and conclusion

While I do think the legal industry and law schools have a long way to go in terms of Māori representation, they have both played enormous roles in my personal journey of understanding my identity. Growing up in a predominately Māori community, I never noticed that our values or skills were dominant in Māori culture, and in fact, as I got older, I felt more connected to my Pākehā roots because I did not have Māori role models on the path I knew I wanted to take. Coming to university and moving into a very Eurocentric profession has reconnected me to my culture and identity, particularly through affirmative action programs.

In writing this piece, I reached out to fellow Māori law students and lawyers in an attempt to do such an important issue justice. Talking with them made me realise that we shared so many experiences. I know that my comparatively fair skin has afforded me many privileges and likely at times protected me from racist assumptions and stereotypes. Nonetheless, my fair skin has not shielded me from all racism. If someone like me can experience racism in the workplace, I am conscious of how much harder it must be for those of my friends who "look Māori".

I am extremely proud that I will not only be the first lawyer in my family, but I will be the first to graduate from tertiary education. I am encouraged by my Māori peers who have not only given me the mana to (just about) make it to the end of my degree but who have also encouraged me to embrace my whakapapa and my Māoritanga. Māoritanga is not lesser, it is a different way of thinking and it has a legitimate place in the legal profession with real benefits for those working both within and with the legal profession.

Acknowledgment

This article was originally written as an essay set by Dr Zoë Prebble for her 300-level ethics and professional respon-

sibility course at Victoria University of Wellington in 2019. I have found that often there is not much scope at Law School to share, and be rewarded for, lived experiences. Zoë took the time to give me thoughtful and encouraging feedback. It may sound like an exaggeration but the opportunity to write this kind of piece and receive thoughtful feedback, where I really felt heard by a lecturer, transformed my Law School experience. Almost a full year later Zoë suggested my essay would be a good fit for this special issue of the Employment Law Bulletin, putting the editors and me in contact. I am grateful to her for her comments on my draft as I revised it for this publication.

I would also like to acknowledge my peers – from school through to university and Māori and Pākehā alike. For listening, for discussing, and for inspiring me. I am excited for what the future can be with you all at the helm.

Lastly, I would like to acknowledge and thank my own whānau and wider hapū for always supporting me in all my endeavours.

Gender identity issues in employment law

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Transgender and non-binary people face significant levels of discrimination in the workplace. This article explores some of the human rights issues faced by trans and non-binary employees and suggests ways in which employment law practitioners can guide clients towards creating safer and more inclusive workplaces.

Some terminology might assist. "Transgender" (or "trans") refers to someone with a gender identity that does not accord with their sex or gender assigned at birth. Someone who is "non-binary" may (in addition) have a gender identity that does not accord with either male or female. These are two of the most common terms used by trans and non-binary people themselves, but many others exist.¹

The authors are not trans or non-binary. We write from the perspective of human rights practitioners and cis-gendered allies. Although this article sheds light on relevant employment law issues, there is no substitute for practitioners listening to the voices of trans and non-binary employees, clients and the community and learning from their lived experiences.

What are the issues?

The 2019 *Counting Ourselves: The health and wellbeing of trans and non-binary people in Aotearoa New Zealand* report² (*Counting Ourselves*) examined the experiences of 1,178 trans and non-binary people living in New Zealand.

1. Other terms include whakawahine, tāhine, takatāpui, fa'afafine, gender diverse, genderqueer or agender. None of these terms should displace the identity used by the person themselves.
2. Jaimie Veale and others *Counting Ourselves: The health and wellbeing of trans and non-binary people in Aotearoa New Zealand* (Transgender Health Research Lab, University of Waikato: Hamilton NZ, 2019). See especially 86–92.