New Zealand Association of Women Judges

REPORT FROM
ASIA PACIFIC REGIONAL CONFERENCE
OF THE INTERNATIONAL ASSOCIATION OF WOMEN JUDGES (IAWJ)
SYDNEY 27-30 APRIL 2017

A group of 12 New Zealand Judges were fortunate to attend the Asia Pacific Regional Conference of the IAWJ held in Sydney from 27 to 30 April 2017. The theme of the Conference was "**Impacts of Judging: an Asia Pacific Perspective**". The Conference was attended by over 200 delegates from 14 countries in the Asia Pacific region as well as judicial delegates from Buenos Aires and Mexico. The Conference was described as an opportunity for women Judges working in all levels of Courts in the Asia Pacific region to explore some of the challenges for law and legal systems in the countries of this particular region, to explore how legal systems and Courts are addressing those challenges, so that we can learn from each other and make progress.

The New Zealand delegation included Justices Susan Glazebrook and Ellen France from the Supreme Court, from the District Court Nicki Mathers, Jenny Binns, Belinda Pidwell, Claire Ryan, Mary O'Dwyer, and from the Environment Court, Melanie Harland. Caren Fox represented the Māori Land Court and Carrie Wainwright, the Waitangi Tribunal. Completing the group were Carolyn Henwood and Heather Simpson, who have a long association with NZAWJ and IAWJ.

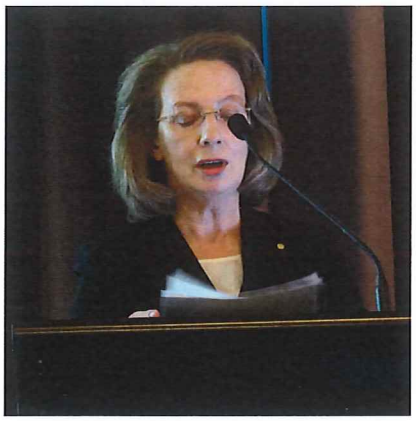
An overview of the Conference was provided by Judge Heather Simpson.

> *The programme included sessions on gender violence as well as a consideration of taxation, work and childcare issues. A topic that I had not heard covered at earlier conferences was titled "Delivering Environmental Justice in the Age of Climate Change". There was also a most challenging session about the impact of law on indigenous peoples particularly in the area of sentencing. Reference was made to recent case law in Australia and Canada, creating a keen interest amongst delegates.*
>
> *There were lively debates both on the conference floor and at social events about the ways in which gender gaps have impacted on the ability of women to care for their families on the one hand and to provide a decent standard of living on the other. It was mentioned in a number of different contexts that although policymakers have enacted laws seeking to address disadvantage, there are persistent social and cultural attitudes that delay the implementation of innovative legislation. Judges need to be aware of their own (often unconscious) biases.*

Judges from different jurisdictions shared their experiences of using specialist courts and incorporating traditional practices in dealing with antisocial behaviour. It was generally accepted that such courts are useful in addressing the underlying causes of offending.

This report highlights some of the more enlightening and lively sessions.

The Conference was opened by the Chief Justice of Australia, the Honourable Susan Kiefel AC.



Chief Justice Kiefel, who is the first woman Chief Justice in Australia, spoke on **"The Community of Courts in the Asia Pacific Region".** Justice Kiefel's presentation focused on the collaboration between Judges from different jurisdictions through conferences of this kind, noting that they had been described as a feature of an emerging global community of Courts. Learning about other jurisdictions and the experiences of Judges help Judges to recognise the common problems and learn from each other's experience. Justice Kiefel emphasised that the Courts in the Asia Pacific region could be regarded as amongst the most collaborative in the world.

In her paper she traced the history of judicial collaboration in the Asia Pacific region. She argued that "legal borrowing" is part of the Asia Pacific's unique history from the late 19th and early 20th Centuries. She argued that it had contributed to an openness and receptiveness to dialogue with Courts of other countries. Justice Kiefel encouraged the participants at the Conference to recognise the importance of judicial dialogue and the importance of being part of a global community of Courts. She suggested that forums such as the IAWJ encouraged Judges to think of themselves in a similar way. She encouraged participants to have a productive conference. It certainly was.

A copy of Chief Justice Kiefel's paper is *attached*.

Following the keynote speech from Chief Justice Kiefel, delegates were warmly welcomed to the Conference by the Honourable Susana Medina de Rizzo from Argentina, President of the IAWJ and Ms Lisa Davis, Executive Director of the IAWJ. They emphasised the importance of dialogue between Judges in the Asia Pacific region that is culturally very diverse and encouraged all the delegates to contribute as fully as possible to the programme and debates.

The Conference programme began with a stimulating topic entitled **"The Impact of Judging on Gendered Violence"**.

The panel speakers from Australia (Diana Bryant CJ Family Court and Marcia Neave) New Zealand (Mary O'Dwyer) and Papua New Guinea (Regina Sagu).

The aim of this session was to explore how different countries within the region addressed the gendered aspect of violence; that is violence against a person because of their gender or that has a disproportionate impact because of gender. The question posed was "whether the countries represented on the panel recognised the gendered nature of family violence and what measures were being taken in the different Court systems". It was fascinating to hear the presentation of the Honourable Marcia Neave AO who chaired the Australian Royal Commission report on family violence. The substantial report with 227 recommendations strongly recommended the need for specialist integrated family violence Courts where criminal charges and family disputes could be resolved. A pilot Court has been established in Victoria which is operating integration of services, specialist Judges and addressing criminal and family disputes arising from family violence.

Chief Justice Diana Bryant AO highlighted the impact that family violence has had on child abduction. In a growing number of cases, a parent who is the victim of family violence, flee from the jurisdiction to escape family violence. This creates challenges when proceedings for return of children are taken under the Hague Convention on Civil Aspects of Child Abduction (the 1980 Convention).

We also heard from Principal Magistrate Regina Sagu from Papua New Guinea who spoke about customary law in the Village Courts in contrast to the state law operating outside the villages in the cities. This was a stimulating presentation. It illustrated the vulnerability of family violence victims in communities where corruption is rife.

Belinda Pidwell's report on this session is *attached* .

The session entitled "**Delivering Environmental Justice in the Asia Pacific Region in the Age of Climate Change**" was one of the most interesting sessions of the Conference. We were proud that Melanie Harland and Judge Caren Fox both spoke at this session. The session explored how Courts in our region determine disputes arising from climate change. The Asia Pacific region is highly vulnerable to the environmental and social impacts of climate

change and many of the countries in the region are vulnerable to what has been created in other parts of the world.

Melanie Harland spoke about the effects of climate change in New Zealand with New Zealanders living in flood prone areas, issues of drought, and the impact of agricultural emissions. She gave examples of how the law could be used to offer greater protection and put responsibility on Governments to address climate change. She urged women Judges to consider the environment, sustainability and the impact of decisions being made now on the next generation

Judge Caren Fox spoke about climate change from the perspective of human rights and described the important issues of indigenous people. She described the availability of the Waitangi Tribunal to resolve disputes in New Zealand, including potentially human rights in environmental breaches.

Carrie Wainwright's report on this session is *attached*.

On Day 2 discussing the topic "**Maintaining the Trauma : Imprisoning Indigenous People**". Professor Juanita Sherwood, Academic Director at the University of Sydney outlined the history of violence against Aboriginal nations of Australia. She began with the laws enacted in 1778 which led to dispossession of Aboriginal people from their land. She described the protectionism developed through law in the mid-19th century through to the late 20th century and law that created the "Stolen Generations" in Australia. The adverse impact of this history on Aboriginal nations in Australia has been severe. It has resulted in a significant disproportion of Aboriginal people in prison, and much higher rates of serious health issues, and high rates of state care/ custody of aboriginal children and young people. She concluded that the trauma cycle continues in Australia against the Aboriginal people.

Judge Dina Yehia, a Judge of the New South Wales District Court, provided a chilling statistic. The Aboriginal and Torres Straight Island people make up 3% of the Australia population but they constitute 27% of the prison population. She argued that legislation in Australia should be introduced to enable indigenous history to be taken into account in sentencing. She suggested that if that were the case, the Court could take into account the effect of dispossession, colonisation, and economic and social history.

Judge Elizabeth Gaynor spoke about her experience in the Koori Court in Victoria. The Koori nation emphasise family kinship and in the Koori Court different procedures are followed to recognise this. The Judge sits with two Elders of the Aboriginal Community and hears cases of criminal charges and in the Children's Court, care and protection issues. Judge Gaynor suggested that the Court is able to respond in a culturally appropriate manner and achieves better results with lower recidivism levels. In many respects the Koori Court appeared similar to our own Rangatahi Courts. It was a very interesting session.

In the session entitled "**The Impact of Judging on Women and Children**", Magistrate Beverley Schurr and Rosemary Caruna AC, Assistant Commission, Community Corrections explored the effects imprisonment on women. They suggested that women in prison suffer greater trauma because of the loss of contact with their children. They described the isolation of women in custody who have children; opportunities for parenting within prison are very limited and contact to children is restricted to basic visits. It is not uncommon to be sent to a prison far from home making visits for children impossible. We heard from Helen Wiseman, Chair of "Shine for Kids". She spoke about the stigma that children experience when they suffer the loss of a parent to prison. In Australia there are currently 18,000 children whose parents are in prison and statistics show that they are up to five times more likely go to prison in their adult life. This was a stimulating session which produced many questions and debate from the floor.

The final topic on the second day of the Conference was delivered by Supreme Court Justice Teresita De Castro from the Philippines. Her presentation was entitled " **Sextortion and the impact of judging in matters of sexual exploitation** ".

In her presentation Justice De Castro described the legislation in the Philippines that criminalises sextortion; that is the use of power for the purposes of sexual exploitation.

Justice De Castro described the many situations where a person in authority can use power to extract sexual favours from a vulnerable person who is in fear of losing their employment, failing in their studies or in other ways being exploited. She gave many examples of how offences have occurred and went on to describe sexual harassment laws in the Philippines.

Jenny Binns' report on this session is *attached*.

The topics in the Conference gave rise to lively debate, often continued during breaks and shared meals. The social calendar in the Conference was also interesting. A reception at Government House in New South Wales provided an opportunity to experience a unique part of Sydney architecture and enjoy a very special art collection. The Conference gala dinner at the New South Wales Parliament House was a lovely venue to celebrate the connection with Judges across our diverse region. A photograph of our delegation reflects our enjoyment of a very successful Conference.

Carolyn Henwood summed up the Conference for us:

> *"It is remarkable to see the growth of the International Association which was only an idea when I was first invited to the American Women Judges Association in the early 1990s. For me as the first woman sitting in Wellington, inexperienced and surrounded by male colleagues, it was empowering to be with 400 women Judges if only for a few days. I was able to see myself as part of a larger group and they made me very welcome. It is true that many issues remain the same but the potential is there for education and change in the future. The Association is valuable in its role of supporting Judges who may be isolated for political or geographical reasons. The sessions add richness, value and understanding when all countries have a voice.*

We are very grateful for the support of the Heads of Bench in assisting us to attend the Conference. We will continue to share our experiences and the insights we gained with our colleagues.

✦ ✦ ✦

"The Community of Courts in the Asia Pacific Region"

The Hon Susan Kiefel AC
Chief Justice of Australia

One of the objectives of the International Association of Women Judges (IAWJ) is to "develop a global network of women judges and create opportunities for judicial exchange"[1]. The IAWJ Asia Pacific Regional Conference promotes this goal by providing a forum for judicial officers from different legal systems to discuss challenges their courts face in delivering justice and how those challenges might be met. This 2017 Conference focuses upon topics such as how legal systems might better recognise the effects of gendered violence and deal with environmental issues in an age of climate change.

Collaboration between judges from different jurisdictions through conferences of this kind has been described as a feature of an emerging "global community of courts"[2]. Members of this community are said to recognise one another as participants in a common judicial enterprise, which transcends national borders. They recognise that they "face common substantive and institutional problems; they learn from one another's experience and reasoning"[3].

At a basic level, judicial exchanges foster an understanding between courts and through that understanding, trust and respect may develop. They may provide encouragement and support for judges in countries where the rule of law has come under assault[4].

At another level, a benefit of participation in conferences of this kind is exposure to possible legal solutions to emerging legal problems. One writer, speaking in the 1970s in defence of comparative law as an academic discipline, suggested that, at least in the Western world, legal borrowing was the "usual way

I acknowledge the assistance of the High Court's Legal Research Officer, Sarah Pitney, in the preparation of this paper.

of legal development"[5]. A moment's reflection on the history of the common law and equity would bear this out.

The courts of the Asia Pacific region could be regarded as amongst the most collaborative in the world. The region is said to have been the first to secure widespread adoption of a set of principles on judicial independence[6]. This event occurred in the 20th century and close collaborations between the courts of the region continue today. I will return to this later. At this point it is worthwhile, I think, to consider some earlier historical events.

Legal borrowing is not a novel experience for countries in the Asia Pacific region. The dialogue between judges of the Asia Pacific region may in part be attributable to the region's unique history of legal borrowing in the late 19th and early 20th centuries. This historical experience has left an imprint on the modern law of various Asia Pacific countries. It may also have contributed to a world view that is open and receptive to dialogues with the courts of other countries.

Perhaps the most prominent example of legal borrowing is Japan's transplantation of French and German law during the Meiji Restoration[7]. In the late 19th century Japanese scholars and officials were travelling to Europe, to survey and discuss the legal codes which had been established or were in the process of being drafted. In the early 1870s two French jurists[8] were engaged by the Japanese Ministry of Justice to advise on the drafting of new legal codes. The draft civil code based on the Napoleonic Code, the Code Civil of 1804, did not come into force in Japan but was nevertheless adopted by Japanese judges as "legal principle" until the new code, based on German law, was finalised in 1896.

Japan's attention shifted to German law in the 1880s, which was about the time that the first draft of what was to become the BGB, or German Civil Code, was being discussed. We can speak of legal borrowings here too, for the German Code was based upon Roman law. Three German jurists[9] prepared a Commercial Code, a Code of Civil Procedure and a Law of Organisation of Courts[10] for Japan. Japan's Civil Code of 1898 was largely modelled on the 1887 draft of the German

Civil Code. It is said, even today, that a "stable interest in German law persists" in Japan[11].

Japan's transplantation of European law attracted the interest of Korea and of China. In 1881, King Kojong of Korea ordered a group of senior officials to travel to Japan to observe its society and culture firsthand. The officials who were designated to visit Japan's Ministry of Justice returned with copies of Japan's criminal procedure and penal codes. Although they criticised Japan's reception of Western laws and civilisation as lacking critical evaluation[12], they proceeded to translate its codes. Korea subsequently employed a German diplomat as its first foreign legal adviser[13]. Laws governing the organisation of the courts and the Constitution of Korea, which were passed at the turn of the 20th century, reflected the growing influence of German and Japanese law in Korea.

China likewise took an interest in Japan's legal reforms. In the early 1900s, the newly established Law Codification Commission invited Japanese jurists to assist in drafting its new legal codes[14]. The first three chapters of the Commission's draft civil code (the "Qing Code") were drafted by a Judge of the Tokyo Court of Appeals and were modelled on German law as adopted in Japan. Although it did not take effect, on account of the fall of the Qing Dynasty in 1911, later codes were similarly heavily reliant on German and Japanese law[15].

Last year I was a member of a delegation comprised of members of the High Court of Australia, the Federal Court of Australia and the Law Council of Australia to China, at the invitation of the President of the Supreme People's Court of the Republic of China. During that visit we met law professors from universities in Beijing who, to our embarrassment, displayed a not inconsiderable knowledge of both civilian law and the common law. The influence of European law on China's current civil laws is well recognised. At the same time, the Supreme People's Court has expressed an interest in the common law's use of precedent. It will be interesting to observe if the Chinese courts are able to meld this aspect of the common law with their civilian-based codes.

There are other, lesser known, examples of legal borrowing in the Asia Pacific region. They include Nepal's use of French law as a model for reform in the mid-19th century and Thailand's borrowing of German and Japanese civil law in the early 20th century. In 1849 the founder of the Rana Dynasty of Nepal travelled to France and Britain. He was inspired by French law and on his return established a "Law Council" to draft a new legal code[16]. The "Country Code" was adopted in 1854 and remained the principal source of Nepalese law until 1963.

Thailand's King Rama V appointed a Commission in 1908 to draft civil and commercial codes with the assistance of French jurists. When disputes arose within the Commission as to how Thai and French law should be integrated, King Rama VI established a new Committee and instructed it to draft a code based on the German and Japanese civil codes[17].

The extent to which the history of legal borrowing has shaped the development of the relevant legal system varies. These examples however serve to confirm that the borrowing of legal solutions from other countries is not a new phenomenon in the Asia Pacific and that jurists and governments in the past have found ways to collaborate despite barriers such as language, culture and distance.

The major reforms in Japan, Korea and China were not simply passive transplantations of French and German law. That is almost impossible for any legal system which must adapt foreign legal codes to its own society with its unique history and culture. Despite the Korean official's criticism of the Japanese, Japan's reforms were in fact heavily debated. By way of example, the draft civil code based on French law was criticised for its failure to take account of Japanese customs such as the traditional extended-family system. The later Chinese Kuomintang Civil Code retained aspects of Chinese social customs and provided for the application of custom in the absence of specific provision in the Code.

The motivation for these reforms and the borrowing of European law by Japan was in large part as a precondition to renegotiation of the "unequal treaties" of the mid-19th century[18]. Similar treaties are said to have prompted reforms

undertaken by China and Thailand. And it is suggested that the Nepalese reforms were attempts to protect the nation from British imperialism[19].

It must also be acknowledged that the transplantation of the British and European legal systems in the region was not always the result of a choice exercised by countries in the region. Nevertheless it has allowed those courts to feel some affinity with other courts beyond their own borders and that has provided a basis for dialogue today. In the common law world the example of India comes to mind. The High Court of Australia and the Supreme Court of India meet every few years and, by reason of our shared heritage, are able to discuss legal problems common to our systems.

Modern judicial exchanges are not motivated by pressures of the kinds which had been felt by Japan and China. They are undertaken as a matter of choice because of the benefits perceived to flow from them, for example, exposure to other legal solutions and the strengthening of shared norms such as judicial independence and the rule of law.

Contemporary interaction between judges within the global community of courts is characterised by a far greater degree of dialogue than has historically been the case. Conferences such as this provide a forum for judicial officers across the region to collectively reflect on possible solutions to important transnational challenges confronting legal systems. The first session of the 2017 Conference – "The impact of judging on gendered violence" – will address an important issue that is the subject of the Family Violence Best Practice Principles published by the Family Court of Australia and Federal Circuit Court of Australia, the fourth edition of which was released in December 2016.

The success of IAWJ in the Asia Pacific region is perhaps no surprise in light of the growing collegiality between courts in the region. Six years prior to the establishment of IAWJ, the first LAWASIA Conference of Chief Justices of Asia and the Pacific was held in Malaysia in 1985. The goal of the Conference of Chief Justices is to provide an opportunity for "open exchange of views and information amongst Chief Justices"[20]. Justices of the High Court of Australia regularly attend

the Conference and in 2015 the Court co-hosted the 16th Conference which was attended by Chief Justices (or their representatives) from 38 countries.

A significant achievement of the LAWASIA Conference of Chief Justices was the adoption at the 6th Conference in 1995 of the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region. That Statement was adopted by the Chief Justices (or representatives thereof) of 20 nations and has subsequently garnered further support and been referred to in judgments by Justices of the High Court of Australia[21] and other courts throughout the region[22]. In 1997, Chief Justice Brennan of the High Court of Australia described the Statement as "remarkable" in its ability to express "ideals common to legal systems of very different kinds"[23]. Chief Justice Gleeson later described the Statement as reflecting "the significance of international co-operation among judges"[24].

The Statement was recently reaffirmed by the "Colombo Declaration" signed last August at a Roundtable Meeting of Chief Justices of the Asia Pacific Region in Sri Lanka. That Declaration was signed by the Chief Justices (or representatives thereof) of 15 nations, including by Justice Bell on behalf of the Chief Justice of Australia. The Declaration recommends consideration of "amplification" of the principles in the Statement in light of "social, economic, political and global developments and challenges which affect the maintenance and protection of independence of the judiciary" that have arisen in the past two decades.

There are many other important forums for interaction between judiciaries emerging in the Asia Pacific region. One is the Asia Pacific Judicial Reform Forum (APJRF), the Secretariat of which is currently chaired by Justice Bell of the High Court of Australia. An important contribution of the APJRF was the publication in 2009 of Searching for Success in Judicial Reform: Voices from the Asia Pacific Experience, a compilation of case studies discussing modern challenges in delivering justice such as delay and corruption. Contributors to the text include current and former judicial officers from Australia, Cambodia, Indonesia, Nepal and the Philippines.

The Asian Business Law Institute was launched in January 2016. Amongst other things, it aspires to provide a forum for members of the legal profession, including judges, to discuss and collaborate in developing business law in the region.[25]

The High Court of Australia regards dialogue with overseas judiciaries through these forums and other modes of exchange as a priority. The Court has recently established an International Committee to facilitate dialogue with other judiciaries with a particular focus on our region.[26] The Council of Chief Justices is also working to develop a more coordinated approach to interactions between the Australian judiciary and overseas judiciaries and has recently established a Working Group to that end.

There are some courts with whom the High Court will talk but which do not share the same values as other courts such as the rule of law. To courts of some countries in our region, judicial independence means freedom from the pressures of corruption rather than reflecting a separation of powers. Judges of these courts may nevertheless strive to do justice by the people who come before them, within the confines of their legal system. From our perspective, it is preferable to maintain a dialogue about changes which are possible.

I have mentioned the delegation, in 2016, led by the High Court to the Supreme People's Court of China. A Letter of Exchange was entered into between our courts by which it was agreed to explore opportunities for the development of mutual understanding, education and cooperation between our judiciaries.

This is not to say that an engagement with another court involves the acceptance or legitimisation of any inhumane or unequal treatment of persons coming before that court. These are matters which, if possible, should be discussed. In discussions I have had in recent times with courts in Malaysia and Brunei, it would appear that Sharia Law is to be applied in some courts. The recent adoption of classic Sharia evidentiary principles stipulating the number and gender

requirements of witnesses in the Sharia Evidence Order of the courts of Brunei Darussalam and its Sharia Penal Code[27] would appear to disqualify women as witnesses and make it harder to prove gender-based violence[28]. Given that a focus of this Conference is on violence of this kind, the operation of Sharia Courts in the region might warrant discussion.

The High Court and the Council of Chief Justices recognise the importance of being part of a global community of courts. Forums such as the IAWJ Asia Pacific Regional Conference encourage judges to think of themselves in a similar way. I am sure that its attendees will have a stimulating and productive Conference.

---

1 www.iawj.org.

2 Anne-Marie Slaughter, "A Global Community of Courts" (2003) 44(1) *Harvard International Law Journal* 191.

3 Anne-Marie Slaughter, "A Global Community of Courts" (2003) 44(1) *Harvard International Law Journal* 191 at 193.

4 Anne-Marie Slaughter, *A New World Order* (Princeton University Press, 2009)120.

5 Alan Watson, *Legal Transplants: An Approach to Comparative Law* (Scottish Academic Press, 1974) 7.

6 David Malcolm, "Judicial Reform in the 21st Century in the Asia Pacific Region" (2000-2001) *LAWASIA Journal* 72 at 74 referring to the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region.

7 (1868-1912).

8 Georges Bousquet and Gustave Boissonade. See Meryll Deane, *Japanese Legal system* (Cavendish Publishing, 2nd ed 2002) 62.

9 Carl Friedrich Hermann Roesler, Hermann Techow and Otto Rudorff.

10 Meryll Dean, *Japanese Legal System* (Cavendish Publishing, 2nd ed, 2002) 62-67; Professor John H Wigmore, "Legal Education in Modern Japan" (1893) 5 *Green Bag* 17 at 18.

11 Harald Baum, "Teaching and researching Japanese law: a German perspective" in Stacey Steele and Kathryn Taylor (eds), *Legal Education in Asia: Globalization, Change and Contexts* (Routledge, 2010) 89 at 91.

12 Chongko Choi, "On the Reception of Western Law in Korea" (1981) 9 *Korean Journal of Comparative Law* 141 at 146.

13 Chongko Choi, *Law and Justice in Korea: South and North* (Seoul National University Press, 2005) 17.

14 Philip C Huang, *Code, Custom, and Legal Practice in China: The Qing and the Republic Compared* (Stanford University Press, 2001) 16.

15 Huixing Liang, *The Draft Civil Code of the People's Republic of China* (Martinus Nijhoff Publishers, 2010) xiv.

16 Professor Kanak Bikram Thapa, "Religion and Law in Nepal" in J Martinez-Torron and W C Durham (eds), *Religion and the Secular State: National Reports* (Complutense Universidad de Madrid, 2014) 517 at 518.

[17] Alessandro Stasi, *General Principles of Thai Private Law* (Springer, 2016) 3-4.

[18] Harald Baum, "Comparison of law, transfer of legal concepts, and creation of a legal design: The case of Japan" in John O Haley and Toshiko Takenaka (eds), *Legal Innovations in Asia: Judicial Lawmaking and the Influence of Comparative Law* (Edward Elgar, 2014) 61 at 68.

[19] Andras Hofer, *The Caste Hierarchy and the State in Nepal: A Study of the Muluki Ain of 1854* (Universitatsverlag Wagner, 1979) 40.

[20] http://www.lawasia.asn.au/chief_justices_of_asia_and_pacific.html.

[21] See, e.g. *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at [3] per Gleeson CJ ("The fundamental importance of judicial independence and impartiality is not in question ... It was declared in Art 2.02 of the *Universal Declaration of the Independence of Justice* and in the *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region*").

[22] See, e.g. *Vishaka v State of Rajasthan* (1997) 6 SCC 241 (Supreme Court of India); *Supreme Court Advocates on Record Association v Union of India* (2016) 5 SCC 1 (Supreme Court of India); *Republic of the Marshall Islands v American Tobacco Company* [2001] MHSC 2 (Republic of the Marshall Islands Supreme Court).

[23] Chief Justice Brennan, "The Significance of the Beijing Statement of Principles of the Independence of the Judiciary" (Speech delivered at the 15th LAWASIA Conference, Manila, 30 August 1997).

[24] Chief Justice Gleeson, "Global Influences on the Australian Judiciary" (Speech delivered at the Australian Bar Association Conference, Paris, 8 July 2002).

[25] Chief Justice French, "Convergence of Commercial Laws – Fence Lines and Fields" (Paper presented at the Doing Business Across Asia – Legal Convergence in an Asian Century Conference, 22 January 2016, Singapore).

[26] *High Court of Australia Act* 1979 (Cth) s 17(5) provides for the establishment of committees.

[27] Ann Black, "Informed by ideology: A review of the court reforms in Brunei Darussalam" in Andrew Harding and Penelope Nicholson (eds), *New Courts in Asia* (Routledge, 2010) 337.

[28] Muswah Oral Statement: Brunei Darussalam (presented at the 59th Session of the CEDAW Committee, 27 October 2014), available at http://www.muswah.org/sites/default/files/MuswahOralStatement59CEDAWBrunei_1.pdf

Report from Judge Pidwell:

Asia Pacific Regional Conference of the International Association of Women Judges
Sydney 27-30 April 2017

Topic : The impact of judging on gendered violence
On the first day of the conference, our very own Judge Mary O'Dwyer joined a panel of 3 other presenters, chaired by Justice Margaret Beazley AO to address this subject which unfortunately is relevant to all the countries represented at the conference.

The Hon. Marcia Neave AO, the chair of the Australian Royal Commission's Report on Family Violence, spoke about the pervasiveness of family violence in Australia and the recidivist nature of the offending. The recommendations from the latest report included the need for both cultural and legislative change, for specialist courts, better information sharing, integration of services and specialist judges to deal with both criminal and civil aspects of family violence. The government has agreed to implement all of the 227 recommendations of the report.

Principal Magistrate Regina Sagu from PNG spoke about the challenge they have of the police and victims being reluctant to implement their laws on family violence. They have village courts which apply local custom when interpreting the law. The leaders of each community are the heads of those courts which work well at the local level. Uniformity is a problem as there are over 700 ethnic groups in PNG. The biggest FV problems appear in the cities where the village courts are least effective.
Judge Mary O'Dwyer spoke about our legislative foundation and Family Violence courts. She highlighted the fact that despite our strong legislation, our speedy processes and the therapeutic support that is available, our appalling family violence statistics still rise. She described the poignant examples from Dunedin of the deaths of Sophie Elliot, and Bradley and Ellen Livingstone from family violence. She spoke strongly and effectively, making all of the NZ delegation very proud.

The Hon Chief Justice Diana Bryant of the Family Court of Australia described the difficulties in the interface of state and federal laws in this area. Different courts have jurisdiction over different process, and there is little information sharing. For example, any private family matter (eg parenting issues between family members) is dealt with at federal level, and any state matter (eg protection orders) is at state level. The chart she used to show how the system was structured was mind boggling. She also discussed the fact that UNCROC post – dates the 1980 Hague Convention on Civil Aspects of Child Abduction. This creates a tension when the "grave risk" defence is used as the statistics show that the majority of parents who flee a jurisdiction with children are primary carers going to their former home country, to escape family violence. This provoked some good debate.

The session was interesting, thought provoking and extremely well presented. Of concern was the lingering message that whilst all our countries have strategies to combat family violence in varying ways, none are currently effective in reducing the level of family violence in our societies.

Report from Judge Wainwright

Notes from IAWJ Conference:

Session: Delivering environmental justice in the Asia Pacific Region in the Age of Climate Change

Rachel Pepper, judge and chair of the Land and Environment Court of NSW, introduced the session as an area where the courts are increasingly being called on to determine disputes arising from climate change. The irony is that the parts of the world worst affected tend to be places that have contributed least to the emission of carbon dioxide, which is the main cause of the problem.

The presenters were:

Christine Trenorden, Visiting Professor, University College London
The warmest temperatures ever were recorded in the first 6 months of this year, and much of the world recorded warmer than average temperatures. She discussed the world's various responses to dealing with the problem. She said that whatever is happening internationally (she described some developments in China, Indonesia, India and Australia in our region), countries need to do something about climate change nationally. Judges need to be mindful of the issues and relevant law, and facilitate public access to justice in this area. Environmental issues matter not only because of direct economic impacts, but because there will be social and health impacts that will adversely affect communities, and cost money. She emphasised the need for specialist courts and specialist judges, especially given the high scientific content, and the need for procedural flexibility and innovation to deal effectively with environmental issues. "Access is all-important, as is the need for good adjudication of complex cases."

Melanie Harland, judge of the Environment Court of NZ
An Aotearoa New Zealand perspective

Melanie talked about the effects of climate change in NZ, and the source of human contributions to it.

She listed the projected impacts 2040-2090 - effects such as 50-100cm sea level rise, temperatures up to 3 degrees higher, and increased storminess and more frequent heavy seas. Two thirds of New Zealanders live in flood prone areas, and the availability of fresh water is going to be an issue.

Agriculture is one of our biggest contributors to NZ greenhouse gas emissions - at 49%, a much higher percentage than other 'developed' countries. Transport (17%) and energy (14%) are the other main contributors.

Our government is trying to do something about emissions, and has set targets for reduction. They are to be achieved by domestic emission reductions, the removal of carbon dioxide by forests, and participation in international carbon markets. Our Emissions Trading Scheme is our main device - but agriculture is not included. How effective is this measure then likely to be? Local and regional government planning documents must also deal with global warming, but their focus is on effects - not

causes! We have no strategy for transport, but in the energy sector have a goal of 90 per cent renewable energy, which we're likely to meet. However, the main reason for that is the hydro-electrical capacity that was created long before climate change was an issue.

The courts have thus far had little role to play. However, sections 5 and 7 of the Resource Management Act 1991 provide scope - the law just needs to be used.

Judge Harland instanced a case concerning an open cast coal mine proposed in New Zealand, to extract coal destined for export to China and India. The Environment Court was asked to make a determination about whether the end uses of the coal could be taken into account in deciding whether the activity was sustainable. The answer was no.

Judge Harland lamented how little the Environment Court had influenced the management of the environment in New Zealand, but expressed the view that the court's ability to take into account indigenous matters would be the way that it could take a new direction.

She said that judging in environmental matters is very important, for women and for women judges. We care deeply about our communities, our countries, and our planet. She invited women judges to confront the way we live our lives, in light of sustainability. She asked women appeal court judges to read very widely about matters like indigenous law and the rights of children when making appeal decisions. A progressive approach and a different reasoned way of addressing complex problems is not judicial activism: it is necessary in this area. She emphasised the need for women's voices to be heard on environmental issues, which makes access to justice key. Women are too infrequently at the table.

Caren Fox, Deputy Chief Judge of the Maori Land Court and alternate judge of the Environment Court
How can law and policy mitigate impacts of climate change for the Pacific?

Judge Fox introduced herself as a non-expert in this field, given the complexity of the science, and other specialist aspects of the jurisdiction. However, she is qualified to put climate change in a human rights context. 25.4 million people a year are displaced by climate change, and massively larger numbers will be affected by 2050. Coastal erosion in our region is already a huge issue.

However, it is the small island states in the Pacific that are being disproportionately affected: most islands are experiencing significant adverse effects. Papua New Guinea and Solomon Islands were specifically mentioned.

The United Nations Framework Convention on Climate Change is the most important convention, which gave rise to the Kyoto Protocol. However, most of the globe's worst offenders did not sign up to the climate change protocols, and the Paris Agreement was intended to enhance the effectiveness of the global response to the threat of climate change. It will see finance flow from industrialised countries to developing countries, so most of them can take action at country level on climate change challenges.

What can small states do if countries like China or the US fail to meet their commitments under the Paris Agreement? States can either individually or as a group draw on international common law principles that assert the duty of all states not to harm other states, including environmental harm. They could therefore potentially bring an action in the International Court of Justice. Basic human rights norms, and the right to a healthy environment, could also be relied on: individuals' right to life, adequate standard of living, health and self-determination could form the basis for action. We're already at a point of crisis, given coastal inundation.

Pacific states meet regularly on climate change, and also on the immigration issues raised by human displacement.

There are specific issues for indigenous peoples. In NZ, claims to the Waitangi Tribunal would be available. Another issue for Australia and New Zealand legislation dealing with indigenous peoples, where legislation is silent on climate change obligations of governments, to what extent should they be inferred?

Report from Judge Binns

ASIA PACIFIC REGIONAL CONFERENCE OF
INTERNATIONAL ASSOCIATION OF WOMEN JUDGES
27 – 28 APRIL 2017

Late last month, I was fortunate enough to travel to Sydney, to attend the Asia Pacific Regional Conference of the International Association of Women Judges, which was hosted by the Australian Association of Women Judges.

The theme of the conference was:

"Impacts of Judging: An Asia Pacific Perspective"

The topics covered included, indigenous communities, sex slavery, people smuggling and refugees, regional business and foreign policy, domestic and family violence, prisoners and their families and dealing with the impacts of environmental change.

I was particularly interested in the session: *"Sextortion and the impact of judging in matters of sexual exploitation"* and agreed to report on that.

The presenter was Teresita De Castro who was appointed to the Supreme Court of the Philippines in 2007. The other scheduled speaker was unable to attend so no paper was provided from her.

Associate Justice De Castro referred to the definition of *"sextortion"* as:

> "The dynamics of power and control, the abuse of authority to extract sex from unwilling women. It is the abuse of power for purposes of sexual exploitation"

The *"perpetrator"*, is someone in a position of authority such as a government official, teacher, administrator or supervisor in a government or private institution, prosecutor, church official, jail warden, immigration officer, policeman, health officer and other persons in authority.

The "victim" is an employee or a subordinate in government or private office, a student, a job applicant, a prisoner, a court employee, a patient, a party litigant and other vulnerable persons who are under the protection, care, or supervision of one who has authority or power.

Examples were given of sites of the offence, e.g. school, workplace, chambers of a judge, police station, prosecutor's office, immigration, prison or government offices and other unlikely places.

The incidence of the offence was identified as usually being, repeated violation which may be against a single victim or multiple victims.

Her Honour noted that there are far reaching, permanent adverse consequences to victims, their families and society at large and she gave examples of where Judges had been perpetrators.

Associate Judge De Castro said that the term *"sextortion"* is a new term in the Philippines. The three elements of sextortion, as defined by IAWJ are:

1. Sexual conduct- which includes any form of sexual conduct, or a demand for a sexual favour.

2. Abuse of Authority- the person demanding sex, a sexual favour or displaying inappropriate sexual contact, has the authority to give the victim a favour/benefit.

3. Quid pro quo- the victim will get what they need when they comply/acquiesce with the sexual demand.

These elements are present in offences penalised by Philippine Laws.-

The available remedies include, criminal sanctions including imprisonment, civil remedies such as restitution, reparation, damages and indemnification for consequential damages and administrative action which includes removal from office, forfeiture of benefits (partial/full) and disqualification from re/appointment/ reinstatement to public office.

Associate Justice De Castro gave specific examples of anti sexual harassment laws, including those relating to

1. Acts of lasciviousness upon persons of either sex, in a number of circumstances, eg: using force and/or intimidation, where a woman is deprived of reason or otherwise unconscious, the woman is under 12 years.
2. Qualified seduction (seduction of a virgin over 12 and under 18) and seduction of a sister by her brother by descendant or ascendant.
3. Corruption of minors, white slave trade, forcible abduction, consented abduction which is the abduction of a virgin over 12 and under 18 carried out with her consent and with lewd designs.

Her Honour referred to the Anti-Trafficking in Persons Act, Anti Child Abuse law and the Anti-Graft and Corrupt Practices Act.

She also gave examples of the civil service laws and regulations as well as providing an overview of the process and jurisdiction in sextortion cases.

While at the conference, I attended some special conference events, including a welcome reception at the Supreme Court of New South Wales, a welcome reception at NSW Government House (which had a lovely ambience and the best king prawns ever tasted), as well as the conference gala dinner at NSW Parliament House.

It was special to sing waiata as a group, which appeared to have some influence on our hosts to have a group sing along to an aboriginal song and also to *"I am Woman"*.

In addition to the conference programme and the social events, my personal conference highlights were hearing the musical ensemble made up of lawyers, judges and others associated with the law, including the President of the Association of Women Judges, Judge Robyn Tupman, which performed at the conference dinner. Also, I was very humbled to be provided with a safe escort back to my hotel after the conference dinner by Justices Glazebrook and France.

I felt very proud to be a Judge from New Zealand and to have been in the company of so many capable and inspirational women throughout the conference.

J A Binns
District Court Judge

12 May 2017