Chapter Objectives

After reading this chapter students should be able to:

- appreciate the importance of learning law in context
- give a basic overview of the different areas of law
- understand the importance of ethical behaviour in resolving disputes.

1.1 THE CONCEPT OF LAW

The New Zealand legal system permeates every aspect of our society. To truly understand the nature of the system it is imperative to understand how the system affects wider society and how wider society affects the system. This is the reason for the title of this book: *Law Alive: The New Zealand Legal System in Context*. Budding lawyers need to know the content of legislation and the precedents of cases. They need to master the skills of legal writing, statutory interpretation and case analysis. Before any of this can happen, however, law students must understand the environment in which the law exists. Otherwise, ‘black-letter’ law and legal skills become abstract and divorced from the day-to-day realities of the legal system.

First and foremost, law is about people. The discipline of law belongs in the social sciences. It is not abstract in the way that mathematics, music, physics or even economics can be abstract. It is not a pure science but rather the practical application of rules and regulations to everyday problems. These problems include commercial dealings, family
disputes, criminal actions, land transfers and international agreements. There is nothing academically pure about the law relating to a divorce settlement or a military invasion, but the need for law that applies in these situations is indisputable. If humans could operate in a utopia of peace and harmony, a formal legal system would be redundant. Unfortunately, human nature necessitates the existence of a comprehensive regulatory system. Greed, passion, envy, pride and anger are constants in human history. Law is about people, and people are renowned for fighting with each other.

That said, much law actually facilitates cooperation. Mediation, for example, seeks to bring parties closer together rather than to find a winner and a loser. Contract law facilitates the smooth operation of business. Electoral law gives most New Zealanders over the age of 18 the opportunity to take an active part in our democracy. If we look at all of these legal examples we find that, ultimately, they are needed to provide protection against the negative side of human nature. Mediation exists only because people dispute in the first place. As mediation is usually voluntary, litigious parties often refuse to have anything to do with it. Contracts exist due to the danger that the ‘other side’ will not keep to their side of the agreement unless forced to by law, and so that people can remember their obligations. Electoral law provides democratic opportunity, but also protects democracy against possible executive tyranny. Law is both aspirational and a necessary evil.

1.2 COMPONENTS OF THIS BOOK

Key elements of New Zealand’s legal system form the basis for each chapter in this textbook. These elements are:

- historical background
- the Treaty of Waitangi
- our constitutional framework
- the ways in which New Zealanders resolve disputes
- theoretical perspectives on the law
- the relationship between New Zealand and foreign legal systems
- the changing role of demographic groups within the legal community.

There are, of course, other important elements that go to make up what we refer to as the New Zealand legal system. The elements listed above are those considered most important when gaining a basic understanding of the law’s role in New Zealand.

A contextual understanding of any topic must begin with history. Samuel Taylor Coleridge observed, ‘If men could learn from history, what lessons it might teach us! But passion and party blind our eyes, and the light which experience gives is a lantern on the stern, which shines only on the waves behind us!’1 The New Zealand legal system is a

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product of our nation’s history. It is also the product of thousands of years of European history and a thousand years of Māori history. Chapter 2 charts the course of English legal history and explains how the legal traditions of a nation 19,000 kilometres away form the basis of our current legal system.

While common law and constitutional traditions were evolving in England, Aotearoa was being settled by voyagers from the South Pacific. The Māori brought with them their own rules and regulations. Over centuries, Māori developed an intricate set of concepts to govern society. After the Treaty of Waitangi was signed between Māori and the British Crown in 1840, the British legal system began to be implemented around New Zealand. Its adaptation to the New Zealand context and the clash between this system of law and indigenous customary law provide the key themes in New Zealand’s legal history. Interesting comparisons can be made with our closest neighbour, Australia.

The Treaty of Waitangi provided the basis for English law in New Zealand. To understand the legal relationship between Māori and Pākehā in New Zealand, law students need to know the history of the treaty and the role that it plays in present New Zealand society. The treaty has had a controversial role to play since its signing in 1840. From its flawed drafting to the subsequent treaty breaches over successive decades, and finally to its recent legal and political recognition, the treaty is as much about law as about race relations and politics. Chapter 3 introduces students to the treaty document and the history of the treaty, and outlines the role that the treaty currently plays in the New Zealand legal system.

A general understanding of New Zealand’s constitutional framework is necessary for all beginning law students. Further on in the LLB, students study constitutional law in more depth, but political structures are at the heart of any legal system and therefore must be examined at the very start of any legal education. Chapter 4 discusses the different branches of the New Zealand government: the legislature, the executive and the judiciary. The unique role of constitutional conventions will be outlined. Key constitutional principles are explained, including the rule of law, the separation of powers, and parliamentary sovereignty. To illustrate the different aspects of New Zealand’s constitutional structure practical examples are provided, namely the unsuccessful attempt to introduce legislation raising the drinking age and the successful attempt to legalise same-sex marriage. These legislative case studies highlight many of the concepts and processes contained in Chapter 4.

Many law students will come to first-year study with the view that most legal disputes are settled in a courtroom. Chapter 5 challenges this notion. While litigation and adjudication are addressed, alternative forms of dispute resolution are also explored, including negotiation and mediation. The way in which lawyers resolve disputes has been changing for some time, and when new lawyers enter modern practice they soon realise that the ability to reach a compromise with an opposing party in a negotiation is as important a skill as arguing precedent in a courtroom.
Underpinning any wide-ranging discussion of law is jurisprudence, also referred to as legal philosophy. In short, jurisprudence addresses the basic but essential question of ‘What is law?’ This question has occupied some of the greatest minds for centuries. Law students need some appreciation of the idealism of natural law, the pragmatism of positivism and the challenges posed by critical legal studies and its associated movements, such as feminist legal theory and critical race theory. Jurisprudence pervades every topic in this text. Critical race theory can be applied to the Treaty of Waitangi, positivism to the legislative process, naturalism to international law, and feminist legal theory to the ‘Women in Law’ case study. Chapter 6 introduces students to the leading jurisprudential schools of thought and provides examples of situations where these can be used to aid our understanding of the legal system.

While this text is about the New Zealand legal system, it is important to consider how our system fits in with international law, in order to see the global context of law. Many recent international controversies are dominated by legal concerns. The Russian invasion of Crimea raised vital questions of international law: for example, should the United Nations have intervened to stop the takeover? The climate change debate is analysed as an example of how international law affects the New Zealand legal system. International law affects New Zealand in many ways. It controls how we trade with other nations. New Zealand has incorporated international agreements, such as the International Covenant of Civil and Political Rights and the Convention on the Elimination of All Forms of Discrimination against Women, into domestic legislation. Chapter 7 outlines the ways in which international law affects New Zealand and provides examples of incidents where New Zealand legal culture has featured on the world stage.

The final chapter in this text is a case study combining legal history, constitutional law, dispute resolution, jurisprudence and international law. This chapter looks at the changing role of women in the New Zealand legal system. As with all legal developments, the relationship between women and the law is a product of our history. Through legislative change, case precedent, international covenants, social protest and theoretical argument, the role of women in law is markedly different in the twenty-first century when compared with the nineteenth and even the twentieth centuries. This chapter highlights key themes that appear earlier on in this text.

Many parts of law are very practical. Tasks such as drafting a contract, drawing up a will, organising a property conveyance and defending accused people on possession of cannabis charges can form the day-to-day work of a lawyer in New Zealand. These tasks may seem divorced from discussions of constitutional and legal philosophy. This text argues that it is vital to understand the context of our system to appreciate the importance of legal tasks. Law is a human tool created to resolve human problems. It can be a powerful tool for change. It can reduce conflict and create conflict. It can inspire citizens and alienate them. But law is an inescapable part of being a citizen of a nation such as New Zealand.

conveyance: the legal term for transferring property from one party to another.
SO YOU WANT TO BE A LAW STUDENT?

When studying any legal system, there is a lot of information to learn and remember. At law schools this information is tested through exams, essays, tests, opinions and practical simulations. Law Alive: The New Zealand Legal System in Context provides exercises for students to complete as they work through the text. These exercises take the form of case studies, puzzles, problem situations, warm-up exercises, group activities, role-playing, short-answer questions and essay topics. Make sure you attempt these exercises. It is not enough just to read information over and over. To successfully engage with the information in this text, active learning is required. Different students learn in different ways. Most textbooks are just that: books filled with text. While the information in this book is primarily conveyed through text, there are also tables, timelines, flow charts and photographs to help students comprehend key issues.

1.3 CLASSIFICATIONS OF THE LAW

Before embarking on our journey through the different aspects of the New Zealand legal system, it is important to outline the various branches of law that form the basis of this system. These branches can be divided in several ways, including public and private, criminal and civil, domestic and international, procedural and substantive. Public law involves the government in some way, while private law deals with situations between private individuals or groups. In criminal law, the state prosecutes a defendant, while in civil law a private party, the plaintiff, takes an action against another private party. Domestic law covers the jurisdiction of New Zealand, while international law is made by global bodies and varies in its effect on different nations. Finally, substantive law is the actual content of law, whereas procedural law refers to the processes governing the treatment of legal content. This section examines the key components of public and private law and also some other classifications that do not fit neatly into these two categories.

1.3.1 PUBLIC LAW

Constitutional and administrative law: Public law deals with the actions of government and the relationship between the state and individual. Chapter 4 is concerned with constitutional law, which sets out the roles of the different branches of government and how they interact with each other and with citizens. The New Zealand Bill of Rights Act 1990 outlines the rights of individual citizens in relation to the state.
Another very important but less high-profile branch of public law is administrative law. This branch allows for the judicial review of state actions, whether at central or local level. It allows judges to review government decisions to ascertain whether or not they are *ultra vires*. Important natural law principles are woven into the fabric of administrative law. These principles include the presumption that the adjudicating official will be free from bias.

*Revenue law:* Revenue law, or taxation law, is also defined as public law, because it regulates individuals’ payment of taxes to the state.

*Criminal law:* Criminal law involves the enforcement of laws by the state. This is often the form of law we are exposed to through television and film, and that we read about in literature, in newspapers and on the internet. Criminal law is the most dramatic and controversial area of law. It involves gruesome crimes, dishonesty, betrayal, violence and mystery. It also places defence lawyers in the position of defending clients who could well be guilty. The difficult and misunderstood role that the criminal defence lawyer plays is partly responsible for the low opinion that many people have of lawyers. To an outsider it seems as though the defence lawyer is trying to help guilty people escape justice in return for money. The fact that everyone is entitled to be represented by a lawyer, whether innocent or guilty, is sometimes forgotten, as is the fact that everyone is innocent until proven guilty in a court of law.

Only a small minority of lawyers practise criminal law. Compared to some other practice areas it is not particularly lucrative. The fact that much of the work revolves around the courtroom differentiates this area from most others. The laws of evidence are vital in criminal procedure, and the disciplines of criminology and psychology are often relevant. The criminal trials that make headlines are usually only the most violent or bizarre. Most
criminal work is not high-profile, as it deals with issues such as possession of cannabis, drink driving and minor assault charges. Criminal law is largely codified in New Zealand. That means it can be found in a few comprehensive statutes such as the Crimes Act 1961 and the Summary Offences Act 1981. There are a few Acts that deal with specific criminal offences, such as the Misuse of Drugs Act 1975.

1.3.2 PRIVATE LAW

Commercial law: Commercial law can involve contractual issues, questions surrounding the formation and management of corporations, competition (antimonopoly) law and securities law. Contracts form the basis of commerce and have to follow a set pattern, with the essential elements of an offer, acceptance and consideration. The limited liability company is a legal construct and these entities dominate the New Zealand economic landscape. The power of the largest companies is restrained by competition law, which breaks up monopolies. A very common form of commercial law is consumer law. In New Zealand this includes the Fair Trading Act 1986 and the Consumer Guarantees Act 1993. These statutes are often relied on by individuals who have been allegedly ‘ripped off’ in the process of buying goods and services.

**FIGURE 1.2** Classification of the law—private
SO YOU WANT TO BE A LAWYER?

Commercial law may not be as glamorous as many other areas of law, but it is both the most common area of practice and the most lucrative. Lawyers are expensive and many individuals and not-for-profit organisations have difficulty affording legal fees. Businesses are the wealthiest entities in New Zealand, and supply lawyers with much of their work. The only institution that rivals business in its spending on legal fees is the government.

Property law: New Zealand’s greatest obsession (besides rugby) is the buying, renovating and selling of residential property. Most of the wealth of New Zealand citizens is tied up in real estate. Farming the land has traditionally been our most important export industry. Therefore the law that governs land ownership and use is of great importance. The majority of New Zealanders will see a lawyer only a few times during their lives. One of these times will be when buying a home and obtaining a mortgage. New Zealand’s land ownership system is based on the Torrens registration system, which began in South Australia. Details are held in a central registry that anyone can check. Once title has been obtained over a property it is effectively indefeasible; that is, no one can challenge it. A very common form of ownership is fee simple, a form of freehold ownership. The fee simple owner has very few restrictions on the way in which he or she can use the land, relative to other forms of ownership. Another common form is leasehold, where a tenant uses a landlord’s property in return for rent payment.

Real estate is only one form of property. Personal property includes all other forms of property such as vehicles, jewellery and shares. Not all property is tangible. A growing area of property law is that of intellectual property. Copyright, trademarks and patents protect people’s ideas from those who would steal and exploit them for financial gain. In the information society that we now live in, ideas are easily as valuable as tangible objects.

Tort law: While criminal law deals with wrongs that are prosecuted by the state, tort law covers wrongs that relate to an action brought by one private individual against another—that is, civil wrongs. Tort law is made up of a number of different branches, including negligence, nuisance and defamation. Negligence involves situations where a party owes a duty of care to another party and breaches this duty, causing loss. Personal injury cases are often based in negligence. These cases are popular topics in American legal dramas, as the ability to sue for personal injury in the United States is relatively unrestricted. In New Zealand the Accident Compensation Corporation (ACC), established in 1972, effectively took away the ability to sue for personal injury, compensating injured parties from a communal fund instead.

Nuisance is property interference, committed by another party. An example of nuisance is pollution from a factory drifting over a residential area and causing respiratory problems.
Defamation is concerned with unjust damage to a person’s reputation. It includes written damage (libel) and spoken damage (slander). There are a number of defences to defamation, the strongest being the defendant’s proof that the statement is in fact true.

**Family law:** Along with criminal law, the most emotionally charged legal arena to work in is family law. While certain areas of family law deal with positive aspects of domestic life, much of family law is designed to sort out the situations when things go wrong. Whether it is divorce, the division of relationship property, child custody, adoption or domestic violence, law has to intervene in the private family sphere when the non-legal cultural bonds that hold families together break down. The concept of family is changing in New Zealand, and, recently, de facto relationships, civil unions and same-sex marriages have been included in the same legislative regimes as heterosexual marriage. Examples from family law can be found later in this textbook.

**Environmental law:** Environmental law is a relatively new area that deals not only with the prevention of environmental disasters but also with planning ahead to make sure the environment is used in a productive and sustainable way. The massive Resource Management Act 1991 has revolutionised this area of law in New Zealand by creating new legal obligations to ensure the environment is protected. It remains one of our most controversial statutes. Chapter 7 has a case study that explores the issue of climate change and its relationship to law.

**Equity (trusts and succession):** Equity was developed as an alternative to the common law in England, starting in the thirteenth century. This historical development is outlined in Chapter 2. An understanding of equity’s history is necessary to appreciate how it fits into the New Zealand legal system. Equity ameliorates the harshness of the common law. When a common law precedent would create an unfair result, equity can be used instead.

Today equity is applied in the same courts as the common law and sometimes it is difficult to tell the two apart. Equity has traditionally dominated certain specialist areas such as trusts and succession law and breach of confidence. Equity has its own remedies (such as the injunction), but few plaintiffs seeking these remedies would identify them as being different from the ‘common law’. If a celebrity provides confidential information to a friend only to find that the friend is about to leak the information to the media, the celebrity can apply for an **injunction** to stop the information from going to print. This would constitute a ‘breach of confidence’ action which is based in equity.

### 1.3.3 OTHER AREAS

**Māori issues:** The relationship between Māori and the law is a vital aspect of our legal system. Chapter 3 looks at the Treaty of Waitangi and its place in New Zealand’s constitutional structure. Other vital legal issues specifically relating to Māori include native title and Māori land law. As outlined in Chapter 3, special provisions in statutes dealing with health, education and resource management recognise the unique role that Māori play in our society.
International law: Chapter 7 of this book provides information on this pivotal area of law. International law is separate from domestic law. International law governs the relations between nations, whereas domestic law governs the actions of entities and individuals within those nations. Domestic legislation is always enforceable, whereas international law relies to a large extent on the goodwill of nations to be enforced. The major international legal bodies, such as the United Nations, the International Court of Justice, and the International Criminal Court, attempt to regulate world affairs, with some success and some failures.

Procedure: Legal procedure is not a substantive area of law but rather makes up the processes that regulate the substantive areas. Criminal procedure and civil procedure are different in many ways. For example, the specific procedures governing a criminal trial differ from those governing a Māori Land Court hearing. It is often in navigating the maze of procedure that lawyers really earn their money. Most laypeople would have little idea where to start in filing a claim for an injunction to prevent the publication of defamatory information. They may understand the concept of defamation and the defences available to justify it, but that would not be enough to mount a successful case if they had no idea how to file a statement of claim or an affidavit.

Not surprisingly, the different areas of law overlap. Property law appears in family law in the area of relationship property, and in Māori law in the special classifications of Māori land. Many criminal offences deal with property damage, while the tort of nuisance specifically focuses on property. Assets such as shares, which play an important role in commercial law, are a type of property. Law should be seen as a web of intersecting rules, rather than fenced-off areas isolated from each other.

Law is everywhere. Imagine you are sitting in a bar having a pint of beer. While this situation may seem far removed from the drama of a courtroom, it has many legal features. If you are 18 years old or over, you can enter the bar and consume the alcohol. If you are 17, then you would not be able to enter the bar or purchase alcohol (though some exceptions exist). This area of law is controlled by the Sale and Supply of Alcohol Act 2012 passed by the elected legislature in accordance with constitutional processes. The drinking age has been the subject of nationwide debate in 1999, 2006 and 2012. Interested organisations and concerned private citizens made submissions to select committees as to what the drinking age should be. This particular issue is discussed in Chapter 4.

The Sale and Supply of Alcohol Act 2012 also stipulates when and how the bar can sell alcohol. The person who just sold you the beer is an employee and his or her presence in the bar is regulated by employment law, in particular, the Employment Relations Act 2000. The bar staff will be on contracts that set out rates of pay, working conditions, holiday entitlements and dispute resolution procedures in the event of a grievance. Health and safety legislation is in place to make sure staff and